Here, There, and Everywhere: Defining the Boundaries of the "Schoolhouse Gate" in the Era of Virtual Learning

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I. INTRODUCTION

It's 3:00 PM on a Thursday. The last school bell of the day rings at XYZ High School, signaling the end of the school day. A group of friends leave their algebra class and walk to Starbucks. On their walk, the friends discuss a classmate of theirs whom they dislike, another ninth grader—Student A. During the conversation, the girls refer to Student A as "fat," "ugly," and "stupid." One of the students in the group, Student B, creates a meme in which she superimposes Student A's Facebook profile picture on an image of Fiona, the ogre from the movie *Shrek*, with the caption "Weird Fat Fugly Ogre." Student B posts the meme on Twitter and shares it with her friends. Her friends retweet the meme and send it to additional students who are still at school waiting for soccer practice to begin. In only a few hours, the meme is circulated to much of the student body of XYZ High School. By midnight, it has been retweeted 350 times, has 1,500 likes, and has 200 comments.

Too afraid to face her peers, Student A refuses to go to school the following day. Enraged, her mother drives to the school with printed copies of the offending tweet and demands a meeting with the principal. Following the meeting, the principal identifies Student B as the meme's creator. He calls Student B to his office and suspends her from school for ten days for bullying Student A.

Weeks go by, and Student A remains distraught. Recognizing signs that her daughter, Student A, has started excessively exercising and restricting her calorie intake, Student A's mother enrolls her in an eating disorder program for teenagers affiliated with a local hospital. Around the same time, Student B, who realizes that her suspension will reflect poorly upon her as she applies to college, sues the school district and the principal, arguing that her suspension was an unconstitutional infringement of her First Amendment right to free speech.

While this might seem farfetched to some, this anecdote is based upon an amalgamation of lower court cases,[1] court documents,[2] and recent news stories.[3] Since the first social media website was introduced to the public in

1. *See* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010); *see also* A.S. *ex rel.* Schaefer v. Lincoln Cnty. R-III Sch. Dist., 429 F. Supp. 3d 659, 664 (E.D. Mo. 2019).

2. *See* Reply Brief for Petitioner at *2-3, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 20-255), 2021 WL 1549729; *see also Mahanoy*, 141 S. Ct. at 2062-63 (Thomas, J., dissenting).

3. *See, e.g.*, Monica Anderson et al., *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RES. CTR. 2-3 (Sept. 27, 2018), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2018/09/PI_2018.09.27_teens-and-cyberbullying_FINAL.pdf [https://perma.cc/Y5LS-QGGV]; *see also* Georgia Wells et al., *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:59 AM), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739 [https://perma.cc/TUD7-M3CA].

1997,[4] at least fifty federal court cases have been brought by students challenging the constitutionality of disciplinary measures taken against them by their schools for their off-campus speech.[5] Between the continued prominence of computer-based learning in many schools due to COVID-19[6] and the ever-increasing amount of time students spend on the Internet and social media,[7] the line of what constitutes activities within the spatial-temporal confines of school is blurry at best. This lack of clarity has created confusion among school officials concerning their ability to discipline students for harmful speech that originates off-campus.[8] Among students, it has led to concerns about when, if ever, they can express themselves freely without fear of punishment from school officials.[9] In the lower courts, this confusion has also led to the emergence of many different approaches governing the discipline of students for their speech—creating a patchwork of fragmented policies across jurisdictions.[10]

The Supreme Court addressed this issue of whether the First Amendment prohibits school officials from regulating speech created by students off-campus for the first time in June 2021 when it decided *Mahanoy Area School District v. B.L.*[11] The decision was announced amidst a time when student Internet usage reached all-time highs, as schools across the

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4. *See* Alexandra Samur, *The History of Social Media: 29+ Key Moments*, HOOTSUITE (Nov. 22, 2018), https://blog.hootsuite.com/history-social-media/ [https://perma.cc/CY7H-KPNC].

5. *See, e.g.*, Brief for Huntsville, Alabama City Board of Education et al. as Amici Curiae Supporting Petitioner, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 20-255), 2021 WL 859700, at *10 (listing forty off-campus student speech cases with reported decisions in federal court); *see also* Hewlette-Bullard *ex rel.* J.H-B. v. Pocono Mountain Sch. Dist., 522 F. Supp 3d. 78, 99 (M.D. Pa. 2021); McLaughlin v. Bd. of Regents of Univ. of Okla., 566 F. Supp. 3d 1204, 1213-14 (W.D. Okla. 2021), *appeal docketed*, No. 21-6142 (10th Cir. Oct. 28, 2021); Cheadle *ex rel.* N.C. v. N. Platte R-1 Sch. Dist., 555 F. Supp. 3d 726, 733 (W.D. Mo. 2021), *appeal dismissed*, No. 21-2963, 2021 WL 7186863 (8th Cir. Nov. 2, 2021); McClelland v. Katy Indep. Sch. Dist., No. 4:21-CV-00520, 2021 WL 5055053, at *8-9 (S.D. Tex. Nov. 1, 2021), *appeal docketed*, No. 21-20625 (5th Cir. Nov. 30, 2021; Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 264 (5th Cir. 2019); Yeasin v. Durham, 719 F. App'x 844, 849 (10th Cir. 2018).

6. *See* Perry Stein, *Enrollment in Virtual Schools Is Exploding. Will Students Stay Long Term?*, WASH. POST (Feb. 19, 2022, 12:00 PM), https://www.washingtonpost.com/education/2022/02/19/virtual-school-enrollment-increase/ [https://perma.cc/4Z6E-ABJX].

7. *See, e.g.*, Monica Anderson & Jingjing Jiang, *Teens, Social Media and Technology 2018*, PEW RSCH. CTR. 8 (May 31, 2018), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2018/05/PI_2018.05.31_TeensTech_FINAL.pdf [https://perma.cc/HUJ7-8FZ9].

8 *See, e.g.,* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy*,* 141 S. Ct. 2038, 2063 (2021) (Thomas, J., dissenting).

9. *See* Maureen Downey, *Opinion: Public Schools Can Still Wrongly Punish Off-Campus Student Speech*, ATLANTA J.-CONST.: GET SCHOOLED BLOG (June 28, 2021), https://www.ajc.com/education/get-schooled-blog/opinion-public-schools-can-still-wrongly-punish-off-campus-student-speech/YDJLPRHZPJD4PAXPCJPGOJHCWE/ [https://perma.cc/C6XS-Z6FX].

10. *See, e.g.*, CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 224-25 (2015) (explaining the approaches taken by each of the circuit courts).

11. 141 S. Ct. at 2045.

country were forced to switch from in-person to online learning to stop the spread of COVID-19.[12] This period was further marked by growing concerns about the adverse effects of social media on youth mental health, as researchers and academics reported connections between increased social media usage among teenagers and elevated rates of anxiety, depression, and body image issues.[13] Due to these circumstances, many had high hopes that the Supreme Court would end this uncertainty surrounding schools' authority to discipline students for their off-campus speech and provide clear guidance for schools and lower courts to rely upon.[14] However, in *Mahanoy*, the Court did anything but—merely providing a highly particularized decision that left for "future cases to decide where, when, and how" schools' regulation of off-campus student speech may violate the First Amendment.[15]

In light of the Internet dramatically expanding the reach of students' speech, the *Mahanoy* opinion's vague description of schools having a "somewhat less[er]" authority to regulate off-campus speech must be clarified to provide school administrators and lower courts with a workable standard for determining what actions are appropriate in the future.[16] Moreover, because of the latitude given to the lower courts to define what these vague standards mean*, Mahanoy* essentially empowers district court judges to give effect to their policy preferences on this issue, creating varied understandings of the scope of students' free speech rights across the country.[17] Because of these problems, this Note proposes that the Supreme Court abandon its current approach of considering the location from which student speech originates. Instead, it argues that the Court should adopt a multi-step sequential evaluation process, modeled mainly after the five-step sequential evaluation process used by the Social Security Administration for disability determinations.[18] This proposed test would provide for greater efficiency, fairness, and predictability among the lower courts.[19] Under this test, students

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12. *See* Colleen McClain et al., *The Internet and the Pandemic*, PEW RSCH. CTR. 4 (Sept. 1, 2021), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2021/09/PI_2021.09.01_COVID-19-and-Tech_FINAL.pdf [https://perma.cc/HEA4-9GWW].

13. *See, e.g.*, Deepa Seetharaman, *Senators Seek Answers from Facebook After WSJ Report on Instagram's Impact on Young Users*, WALL ST. J. (Sept. 14, 2021, 8:11 PM), https://www.wsj.com/articles/senators-seek-answers-from-facebook-after-wsj-report-on-instagrams-impact-on-young-users-11631664695 [https://perma.cc/9BZG-RQXN].

14. *See, e.g.*, Frank D. Lomonte, *The Future of Student Free Speech Comes Down to a Foul-Mouthed Cheerleader*, SLATE (Mar. 29, 2021), https://slate.com/technology/2021/03/mahanoy-area-school-district-supreme-court-snapchat-cheerleader.html [https://perma.cc/HP95-5LJX]; *see also* Josh Blackman, *The Incomprehensibility of* Mahanoy Area School District v. B.L., REASON: VOLOKH CONSPIRACY (June 25, 2021, 9:00 AM), https://reason.com/volokh/2021/06/25/the-incomprehensibility-of-mahanoy-area-school-district-v-b-l/ [https://perma.cc/Y8J6-DRXP].

15. 141 S. Ct. at 2046.

16. *Id.* at 2059 (Thomas, J., dissenting).

17. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 992 (Scalia, J., concurring in part and dissenting in part) (discussing how a lack of concrete guidance on abortion has created a fractured legal regime based upon jurists' individual policy preferences).

18. *See* 20 C.F.R. § 404.1520 (2020).

19. *See* ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 697 (3d ed. 2020).

bear the burden of demonstrating that the speech for which they were disciplined did not have a "sufficient nexus" to the school;[20] or, if there was a nexus, that it did not fall within the categories of speech the Court has deemed to be within the purview of schools to regulate. If the student successfully meets this burden, the burden of proof shifts to the school to show that the challenged speech posed a "reasonably foreseeable risk" of "material disruption" to the school's pedagogical interests.[21]

Before delving into the proposed test, this Note will first provide a brief overview of the First Amendment, Supreme Court precedent governing student speech, the emergence of the Internet and social media, the state of student social media usage, and the lower courts' approaches to regulating off-campus student speech in the Internet era. Next, it will elaborate upon why the Supreme Court's current approach for adjudicating student speech cases is inadequate in terms of providing guidance to students about the scope of their speech rights. This will demonstrate the need for a clarified test to guide school administrators and the lower courts' decision-making processes. This section will further outline the proposed test for evaluating the breadth of schools' authority to regulate off-campus student speech. Finally, this Note will conclude with closing thoughts on the need for the Court to replace the indeterminate guidelines it provided in *Mahanoy* with a more workable test to govern schools' disciplinary authority over off-campus student speech.

II. BACKGROUND

A. The First Amendment and the Right to Free Speech

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . ." [22] As the First Amendment contains no definition of what constitutes "the freedom of speech," our understanding of the scope of this freedom comes from Supreme Court opinions.[23] In this regard, while the language of the First Amendment only explicitly bans *Congress* from taking actions that may chill citizens' speech, the Court has interpreted the free speech rights it confers to be "fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from infringement by the States."[24] Stemming from this recognition of the freedom of speech as a "fundamental right," the Court has understood the right broadly, placing an express prohibition on the government's ability to place constraints on speech because of "its message[,] . . . ideas[,] . . . subject matter, or . . . content."[25] More specifically, it has interpreted the freedom to encompass the freedoms of

20. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 577 (4th Cir. 2011).

21. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38-39 (2d Cir. 2007) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

22. U.S. CONST. amend. I.

23. *See* GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 1000 (5th ed. 2021).

24. Gitlow v. New York, 268 U.S. 652, 666 (1925).

25. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

inquiry and thought,[26] including the "right to speak freely and . . . to refrain from speaking;"[27] the rights to utter, print, and read;[28] the right to distribute and receive literature;[29] and the "right to attempt to persuade others to change their views," even when the speaker's message may offend their audience.[30]

However, despite its robust protections of the freedom of speech, the Supreme Court has not interpreted the First Amendment to confer an absolute right,[31] instead identifying "narrowly limited" classes of unprotected speech.[32] As of April 2022, the Supreme Court has recognized eight categories of speech unprotected by the First Amendment—(1) obscenity, (2) defamation, (3) fraud, (4) incitement, (5) fighting words, (6) true threats, (7) speech integral to criminal conduct, and (8) child pornography.[33] While the Court has acknowledged that there may be additional categories of unprotected speech,[34] it has indicated a "reluctan[ce] to mark off new categories of speech for diminished constitutional protection."[35] Notwithstanding this reluctance, the Court has qualified the breadth of free speech rights as it pertains to children and minors due to their being subject to the control of their parents and guardians until reaching the age of majority.[36]

B. Tracing the Extension of Constitutional Rights to Children and Students

For much of early American history, the law failed to recognize children as having rights apart from their parents or the state, embracing the notion that children were entitled only to be heard through their parents or elders.[37] It was not until the 1960s that the Supreme Court began to explicitly reference children as being holders of their own constitutional rights—declaring that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[38] In the decades that followed, this understanding continued to prevail, with Justice Blackmun further proclaiming that "[c]onstitutional rights do not mature and magically come into being only when one attains the

26. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).
27. Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018) (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).
28. *Griswold*, 381 U.S. at 482.
29. *See* Martin v. City of Struthers, 319 U.S. 141, 143 (1943).
30. Hill v. Colorado, 530 U.S. 703, 716 (2000).
31. *See Gitlow*, 269 U.S. at 666.
32. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
33. *See* VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2019).
34. *See* United States v. Stevens, 559 U.S. 460, 472 (2010).
35. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-72 (2018).
36. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654-55 (1995).
37. *See* DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW IN A NUTSHELL 9-17 (7th ed. 2021).
38. Laurence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. L. 77 (1999) (quoting *In re* Gault, 387 U.S. 1, 13 (1967)).

state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[39]

Despite this recognition of children as possessors of constitutional rights, the Court has clarified that their enjoyment of such rights is not the same as adults.[40] Observing that children are not capable of taking care of themselves[41] due to their "peculiar vulnerabilit[ies]" and inability to make mature and informed decisions, the Court has reasoned it would be inappropriate to recognize constitutional protections afforded to adults as robustly for children.[42]

In the context of school, the Court has similarly applied this understanding of children possessing rights of a "lesser magnitude" than adults[43] to justify school officials' tutelary control over their students.[44] Based on its view of schools having the duty to instill "habits and manners of civility"[45] and teach cultural values necessary for students' development into adults,[46] the Court has long utilized the English common law doctrine of *in loco parentis*[47] to provide school officials with the authority to maintain order within their schools.[48] In applying this doctrine, the Court has acknowledged that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school."[49] Through this understanding of schools' standing *in loco parentis* over their students, the Court has further justified granting school officials "First Amendment leeway" to discipline behaviors that occur under their supervision—deeming deviations from traditional First Amendment doctrine to be permissible when necessary to protect the "special characteristics of the school environment."[50] Using this reasoning, it has permitted school officials to prohibit the use of "vulgar and offensive terms in public discourse,"[51] and speech that is "reasonably viewed as promoting illegal drug use" in school or at school events.[52] In addition, it has further justified school officials to "censor school-sponsored publications . . .

39. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976).

40. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 168 (1944); *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1358 (1980) [hereinafter *Developments*].

41. *See* Schall v. Martin, 467 U.S. 253, 265 (1984).

42. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

43. *Developments*, *supra* note 40, at 1358.

44. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

45. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

46. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

47. *See In Loco Parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019). Translated from Latin, "*in loco parentis*" means "in the place of a parent." *Id.*

48. *See e.g.*, *Acton*, 515 U.S. at 655-56; *see also* Morse v. Frederick, 551 U.S. 393, 413 (2007) (Thomas, J., concurring).

49. *Acton*, 515 U.S. at 655-56 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 516 (1969)).

50. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2044-46 (2021) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

51. *Fraser*, 478 U.S. at 676.

52. *Morse,* 551 U.S. at 403.

reasonably related to legitimate pedagogical concerns"[53] or "other expressive activities . . . members of the public might reasonably perceive to bear the imprimatur of the school" as within the scope of schools' disciplinary authority.[54]

Concerning this additional latitude afforded to schools to maintain discipline and order, the Court has repeatedly justified this greater degree of control over student expression as necessary to protect the "special characteristics of the school environment."[55] Scholars and commentators have interpreted these characteristics to include: the age and maturity of schoolchildren; the fact that, for many students, school attendance is made compulsory by law; how schools serve the sometimes-competing interests of the parents, children, and the state; the heightened safety considerations required of school administrators; the expectation of public accountability; and the need to promote educational goals.[56]

In *Tinker v. Des Moines Independent Community School District,* commonly regarded as the foundational case for students' rights, the Supreme Court famously declared, "It can hardly be argued that either students or teachers shed their constitutional freedom of speech or expression at the schoolhouse gate."[57] In *Tinker*, students suspended for wearing black armbands to school to protest the Vietnam War sued their school district, arguing that the suspension violated their First Amendment free speech rights.[58] Addressing the school's authority to regulate the students' speech, the Court held that the First Amendment barred school officials from censoring student speech on or off campus unless such speech "might reasonably have led school authorities to forecast substantial disruption of or material interference, with school activities" or a showing that a disturbance on school premises actually occurred.[59] The Court in *Tinker* further explained that these protections were not limited to the classroom, but extended to all school facilities and established that schools could not discipline students for simply expressing opposing viewpoints that create discomfort.[60]

While *Tinker* is lauded by many as a decision protective of student speech rights—due to its enumeration of them in the first place—many fail to recognize the limitations on student speech it also created.[61] Specifically, in its phrasing of the oft-cited substantial disruption test, the Court constrained the speech rights of students.[62] By stating that "conduct by the student in class or out of it" was not subject to First Amendment protection, the Court significantly expanded the realm of behaviors within schools' disciplinary

53. *Acton,* 515 U.S. at 655-56 (citing *Kuhlmeier*, 484 U.S. at 273).
54. *Kuhlmeier*, 484 U.S. at 271.
55. *Mahanoy*, 141 S. Ct. at 2044-46 (citing *Kuhlmeier*, 484 U.S. at 266).
56. *See* Bryan R. Warnick, *Student Speech Rights and the Special Characteristics of the School Environment*, 38 EDUC. RESEARCHER 200, 201 (2009).
57. 393 U.S. 503, 506 (1969).
58. *See id.* at 504.
59. *Id.* at 514.
60. *See id.* at 509, 513.
61. *See* Mary-Rose Papandrea, *The Great Unfulfilled Promise of* Tinker, 105 VA. L. REV. 159, 159-60 (2019).
62. *See id*.

authority.[63] In addition, by permitting school officials to act when they "might reasonably . . . forecast substantial disruption of . . . school activities," the Court left much discretion to schools to determine what expressive activities created a sufficient level of foreseeable disruption, as opposed to only authorizing discipline for harm that had occurred.[64] These limitations have become even more pronounced in the last few decades, as students' Internet and social media usage has facilitated more opportunities for off-campus student speech than ever before.[65]

C. The Internet and Contemporary Forms of Student Speech

1. The Emergence of the Internet and Social Media

Historians and academics alike regard October 29, 1969, the day the first message was delivered through an interconnected computer network, as the day the modern Internet was born.[66] The Internet has developed and grown immensely in the five decades since, revolutionizing how we live and communicate.[67] Today's Internet can hardly be cabined to being merely an "electronic communications network" that connects people around the world, as defined in Merriam-Webster's online dictionary;[68] rather, today almost anything from watching movies to banking to even ordering groceries can be done online.[69]

With the emergence of the Internet, so too emerged many new forms of media, including e-mail, instant messaging, and social media.[70] These new media forms have further contributed to the revolution spawned by the Internet by providing more accessible and faster ways to communicate and share information.[71] Through social media—defined as "websites and other

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63. *Tinker*, 393 U.S. at 513*; see also* Papandrea, *supra* note 61, at 159-60.

64. *See* Ben Lee, *What* Tinker *Got Wrong,* FOUND. FOR INDIVIDUAL RTS. EDUC. (Sept. 28, 2018), https://www.thefire.org/what-tinker-got-wrong/ [https://perma.cc/62CE-26HU]; *see also* Papandrea, *supra* note 61, at 170-71.

65. *See* Beth A. Narrow & Sommer Ingram Dean, *The Law of Students' Rights to Online Speech: The Impact of Students' Ability to Openly Discuss Public Issues*, HUM. RTS. MAG., Jan. 2022, at 17.

66. *See* Matt Blitz, *What Will the Future of the Internet Look Like?*, POPULAR MECHS. (Sept. 30, 2021), https://www.popularmechanics.com/technology/infrastructure/a29666802/future-of-the-internet/ [https://perma.cc/4YFR-FCG2].

67. *See id.*

68. *Internet*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/Internet [https://perma.cc/KZ4X-S5HN] (last visited Nov. 12, 2021).

69. *See* Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html [https://perma.cc/9CT2-VCCX].

70. *See* Michael Aaron Dennis et al., *Internet*, ENCYC. BRITANNICA, https://www.britannica.com/technology/Internet [https://perma.cc/3EZH-TMNG] (last visited Jan. 25, 2022).

71. *See* Sol Rogers, *The Role of Technology in the Evolution of Communication*, FORBES (Oct. 15, 2019, 8:57 AM), https://www.forbes.com/sites/solrogers/2019/10/15/the-role-of-technology-in-the-evolution-of-communication/ [https://perma.cc/U8GD-UALW].

online means of communication that large groups of people use to share information and develop social and professional contacts"—users can share photos and videos and communicate with their friends and family from wherever they have cellphone service or Internet connection.[72]

In the last few years, the Supreme Court has begun to acknowledge these increasingly prominent forms of media, even formally recognizing sentiments communicated on the Internet and social media as free speech activities protected by the First Amendment.[73] In *Packingham v. North Carolina*, Justice Kennedy remarked about how social media enables anyone with working Internet "to become a town crier with a voice that resonates farther than it could from any soapbox."[74] With recent surveys indicating that over 72% of Americans report using at least one social media platform—the impact and reach of citizen's speech is only likely to continue growing.[75]

2. Student Social Media Use Today

Reflective of the trends in Internet use among the population at large, the Internet and social media play even more significant roles in the lives of American youth.[76] Among teenagers, YouTube,[77] Instagram,[78] Snapchat,[79] Facebook,[80] and Twitter[81] are the most popular online platforms.[82] Most popular social media companies, including YouTube, Instagram, Facebook,

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72. *Social Media,* DICTIONARY.COM, https://www.dictionary.com/browse/social-media [https://perma.cc/44RR-XWAV] (last visited Jan. 25, 2022).

73. *See, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1731 (2017).

74. *Id.*

75. *See Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/ [https://perma.cc/X7DU-CM7J]; *Packingham*, 137 S. Ct. at 1731.

76. *See* Anderson & Jiang, *supra* note 7; VICTORIA RIDEOUT & MICHAEL B. ROBB, THE COMMON SENSE CENSUS: MEDIA USE BY TWEENS AND TEENS, 3 (Jenny Pritchett ed., 2019), https://www.commonsensemedia.org/sites/default/files/research/report/2019-census-8-to-18-full-report-updated.pdf [https://perma.cc/UXL7-7J8U].

77. YouTube is a website where users can watch or share videos. *YouTube*, DICTIONARY.COM, https://www.dictionary.com/browse/youtube [https://perma.cc/YDV5-GE7K] (last visited Oct. 7, 2022).

78. Instagram is an application on which users can share photos and videos with their friends. Elise Moreau, *What Is Instagram and Why Should You Be Using It?*, LIFEWIRE (Sept. 12, 2021), https://www.lifewire.com/what-is-instagram-3486316 [https://perma.cc/C6E6-2EBK].

79. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy*,* 141 S. Ct. 2038, 2040 (2021) (describing Snapchat as "a social media application for smartphones that allows users to share temporary images with selected friends").

80. Facebook is a website where users can connect with friends, post comments, share photographs, news clips, linked to other websites, and other content either to either select people, groups of friends, or the public at large. Daniel Nations, *What Is Facebook? Learn Why So Many People Can't Stay Away from Facebook*, LIFEWIRE (Sept. 19, 2021), https://www.lifewire.com/what-is-facebook-3486391 [https://perma.cc/TET9-RY3S].

81. Twitter is an online news and social networking application where people communicate in messages limited to 280 characters. Paul Gil, *What Is Twitter & How Does It Work?*, LIFEWIRE (Aug. 30, 2021), https://www.lifewire.com/what-exactly-is-twitter-2483331 [https://perma.cc/B5N3-LVMM].

82. *See* Anderson & Jiang, *supra* note 7, at 2.

and Twitter, require users to be thirteen or older to make an account because of the Children's Online Privacy Protection Act's prohibition of website operators from collecting information from children under thirteen.[83] However, children ages eight to twelve have been easily able to get around these age restrictions—with reports indicating 76% of children in this age group use YouTube[84] and as much as 50% of children ages eleven and twelve have social media profiles.[85]

Looking at social media usage patterns of school-aged children more broadly, surveys of American adolescents aged eight to eighteen years old indicate that exclusive of time spent on digital devices for school and homework, children aged eight to twelve spend approximately four hours and forty-four minutes on screen media, and teenagers aged thirteen to eighteen spend about seven hours and twenty-two minutes on screen media.[86] Further, 95% of American teenagers report having access to a smartphone, and 89% of teenagers claim to use the Internet at least "several times a day." [87] With students' almost constant use of their phones, the Internet, and social media, most students "are engaging in enormous amounts of off-campus speech."[88]

Because of the far greater reach and speed at which Internet-generated speech can be received, speech that a student posts or sends while off campus is regularly received by fellow students on-campus.[89] Given the frequency with which students have brought challenges against their schools for discipline related to their Internet speech, the lower courts have had to grapple with the limited guidance provided by the Court to determine how to best adjudicate these issues in their jurisdictions.[90]

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83. Children's Online Privacy Protection Act, 15 U.S.C. § 6502 (2012).

84. RIDEOUT & ROBB, *supra* note 76, at 34.

85. *See, e.g.*, *Under-Age Social Media Use 'On the Rise', Says Ofcom*, BBC NEWS (Nov. 29, 2017), https://www.bbc.com/news/technology-42153694 [https://perma.cc/M5QJ-LDCJ]; Eleanor Harding, *Six in Ten Parents Say They Would Let Their Children Lie About Their Age Online to Access Social Media Sites*, DAILY MAIL (Jan. 24, 2017, 2:48 AM), https://www.dailymail.co.uk/news/article-4150204/Many-parents-let-children-lie-age-online.html [https://perma.cc/TVC7-5ZE9].

86. RIDEOUT & ROBB, *supra* note 76, at 3. Included in its term "screen media," the article references several activities including watching tv and videos, playing video games, using social media, listening to music, reading, writing, video chatting, browsing, and creating content. *See id*. at 6.

87. Anderson & Jiang, *supra* note 7, at 2, 8.

88. Brief for Independent Women's Law Center as Amicus Curiae Supporting Respondents, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 20-255), 2021 WL 1255349, at *16-17.

89. *Mahanoy*, 141 S. Ct. at 2062-63 (Thomas, J., dissenting).

90. *See* Brief of Huntsville, Alabama City Board of Education et al., *supra* note 5, at *11.

D. Student Speech in the Internet World: Approaches to Regulating Off-Campus Speech

1. Pre-Mahanoy Circuit Court Approaches

As the Internet transformed modern methods of communication, greatly expanding the reach of students' expressive activity,[91] the lower courts had nothing more than the broad statement from *Tinker* that "conduct by the student in class or out of it" could be punished by school officials if it created or threatened a sufficient risk of substantial disruption to the school to guide them.[92] With such indeterminate instructions, the lower courts were left to their own devices to determine what constituted on- versus off-campus speech, and what behaviors were sufficient to satisfy this "substantial disruption" standard.[93] From this uncertainty, three predominant approaches emerged among the circuit courts—the reasonable foreseeability test, the sufficient nexus test, and an approach entirely rejecting the applicability of *Tinker* to off-campus speech.[94]

a. The Reasonable Foreseeability Test

The reasonable foreseeability test has been the most popular standard for applying *Tinker* to off-campus speech among the circuit courts, with the Second, Eighth, and Eleventh Circuits applying it to guide their determinations.[95] Under this test, schools may regulate students' off-campus speech when it is "reasonably foreseeable" that the student's communication will "substantially disrupt the work and discipline of the school" environment.[96]

In *Wisniewski v. Board of Education of the Weedsport Central School District*, the case credited with creating this test, the Second Circuit was faced with determining whether a student's instant messages sent from his home computer were within the school's authority to regulate.[97] The messages at issue included a picture of a pistol firing a bullet at a person's head with the caption "Kill Mr. VanderMolen."[98] The Second Circuit dismissed the

91. *See* Rogers, *supra* note 71.

92. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

93. Daniel Marcus-Toll, Note, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV 3395, 3409 (2014); Lee, *supra* note 64.

94. *See, e.g.*, ROSS, *supra* note 10, at 224-25; Nicolas Burnosky, Comment, *2-4-6-8 Who Do We Appreciate? The Third Circuit Scores a Touchdown for Student-Athlete Free Speech Rights*, 28 JEFFREY S. MOORAD SPORTS L.J. 369, 380 (2021). While the concepts guiding these three tests are recognized as the predominant circuit court tests, they are not uniformly titled as they are in this Note.

95. *See* Meghan K. Lawrence, Note, Tinker *Stays Home: Student Freedom of Expression in Virtual Learning Platforms*, 101 B.U. L. REV. 2249, 2265-66 (2022).

96. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38-39 (2d Cir. 2007) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

97. *See id.*

98. *Id.* at 36.

student's First Amendment claim against his school officials, finding the messages to be unprotected based on the substantial disruption framework provided in *Tinker*.[99] It opined that no reasonable jury could conclude that it was unforeseeable that the student's messages would come to the attention of school officials and create a substantial disruption to the work and discipline of the school.[100]

b. The Sufficient Nexus Test

Under the sufficient nexus test, which was introduced by the Fourth Circuit, schools may discipline students for off-campus speech when there is a close connection between the speech and the school's pedagogical interests.[101] In *Kowalski v. Berkeley County Schools*, the case to which this test is attributed, the Fourth Circuit applied this substantial nexus test to determine whether a student's suspension for her off-campus social media activity that targeted and referred to one of her classmates as being a "slut" and having herpes violated her First Amendment rights.[102] Finding that the student's free speech rights were not violated, the Fourth Circuit invoked *Tinker* and reasoned that even though the ability of schools to regulate students' off-campus speech is not unlimited, here, the nexus of the student's social media activity to the school and the subsequent interference it caused within the school were sufficient to justify its disciplinary action.[103] The Fourth Circuit concluded the opinion with a declaration 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."[104]

The Ninth Circuit has also applied the sufficient nexus test, but under its understanding of the test, a totality of the circumstances inquiry is required to determine if the student's speech is closely connected to the school.[105]

c. The "Tinker is Inapplicable to Off-Campus Speech" Approach

Under this approach, used primarily by the Third Circuit, judges reject the idea that *Tinker* authorized schools to regulate off-campus speech.[106] This reading of *Tinker* and ultimate refusal to recognize schools' authority to discipline students for off-campus speech stems from a fear that doing so would allow "the state, in the guise of school authorities to reach into a child's

99. *See id.* at 35.

100. *See id.* at 39-40.

101. *See* Marcus-Toll, *supra* note 93, at 3420; THOMAS A. YOUNG, LEGAL RIGHTS OF CHILDREN § 17:3 (3d ed. 2021).

102. 652 F.3d 565, 567-69 (4th Cir. 2011).

103. *See id.* at 572-73.

104. *Id.* at 577.

105. *See* McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 707-08, 712 (9th Cir. 2019) (internal citations omitted).

106. *See* ROSS, *supra* note 10, at 225.

home and control" their actions.[107] Judges advocating for this approach have also argued that students' off-campus speech should receive the same protections as adults, reasoning that the "special characteristics of the school environment" justifying lesser protection for student speech in schools are absent outside the "schoolhouse gate."[108]

In *B.L. v. Mahanoy Area School District*, the appellate level case that preceded *Mahanoy*, the Third Circuit held that *Tinker* does not apply to off-campus speech—defining off-campus speech to include any speech made outside of school-owned, -operated, or -supervised channels.[109] It reasoned that doing so would offer greater clarity to students, as it would be much easier for them to determine whether their speech occurred in a school-operated setting than if the speech had some indeterminate "nexus" to the school.[110] However, this approach was explicitly rejected by the majority in *Mahanoy*, who reasoned that certain speech that originates off-campus may still constitute important regulatory interests for the school, such as severe bullying or harassment.[111]

2. Mahanoy Area School District v. B.L.

In *Mahanoy Area School District v. B.L.*, the Supreme Court addressed the question of whether a school could punish a student for speech made while off-campus for the first time.[112] The case centered around a high school student's claim that her school district violated her free speech rights by suspending her from the junior varsity cheerleading team following her sending two Snapchat messages while off-campus one weekend.[113] The messages at issue had been posted to the student's Snapchat story after she learned she was not selected for either her school's varsity cheerleading team or her desired position on her school's softball team.[114] One of the messages contained text indicating the student's anger about not making the varsity cheerleading team, while the other had an image of her and a friend accompanied by the caption "f**k school f**k softball f**k cheer f**k everything."[115] After the images spread, the coaches of the junior varsity cheerleading team, in consultation with the school, suspended the student from the team for the upcoming school year.[116] She and her parents subsequently filed suit in the district court.[117]

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107. *Id.* (quoting Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011)).

108. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 936 (3d Cir. 2011) (Smith, J., concurring).

109. *See* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020), *aff'd on other grounds*, 141 S. Ct. 2038 (2021).

110. *Id.* at 189-90.

111. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

112. *See id.* at 2044.

113. *See id.* at 2043.

114. *See id.*

115. *Id.*

116. *See id.*

117. *Mahanoy*, 141 S. Ct. at 2043.

Writing for an 8-1 majority, Justice Breyer held that the suspension violated the student's First Amendment free speech rights, reasoning that the school was unable to demonstrate that there was either a reasonable threat or occurrence of a "substantial disruption" because of the offending Snapchat messages.[118] He further rejected the school's purported interest in teaching civility and good manners, deeming it an insufficient interest to overcome the student's right to free speech.[119]

Aside from reaffirming the applicability of the *Tinker* "substantial disruption" test to off-campus speech, the majority opinion provided little additional guidance as to what kind of off-campus speech would constitute a sufficient disruption. The opinion merely mentioned three features of off-campus speech that "diminish the unique educational characteristics that might call for special First Amendment leeway."[120] Specifically, Breyer referenced three attributes: (1) the fact that the doctrine *in loco parentis* is generally inapplicable to off-campus student speech; (2) the concern that imposing restrictions on students' off-campus speech would subject students to speech restrictions twenty-four hours a day, having a serious chilling effect; and (3) the observation that schools have an important duty to protect students who espouse unpopular ideas as a means to promote the continued preservation of a well-informed, democratic society.[121] Yet, like with the rest of the considerations he mentions in the opinion, Justice Breyer declined to assign determinative values to these characteristics or even to define off-campus speech; leaving the matter for future cases to decide.[122] Thus, in place of formal guidance, he offered a list of off-campus student conduct illustrative of what might be permissible for schools to regulate—including severe bullying, threats to fellow students or teachers, and breaches of school security devices.[123] Because *Mahanoy* provides little more than these broad declarations of principles, lower courts are left with no clear standards to guide future cases.[124]

3. Confusion in the Lower Courts Post-Mahanoy

Stemming from the indeterminate guidance provided by *Mahanoy*, lower courts addressing similar issues in its wake continue to be inconsistent in determining when schools' regulation of off-campus student speech is constitutional.[125] At least one district court in the Tenth Circuit has read *Mahanoy*'s protection of students' off-campus speech broadly, interpreting

118. *See id.* at 2047-48.
119. *See id.*
120. *Id.* at 2045-46.
121. *See id.*
122. *See id.*
123. *Mahanoy*, 141 S. Ct. at 2045-46
124. *Id.* at 2046; Downey, *supra* note 9.
125. *See, e.g.*, McLaughlin v. Bd. of Regents of Univ. of Okla., 566 F. Supp. 3d 1204, 1213-14 (W.D. Okla. 2021), *appeal docketed*, No. 21-6142 (10th Cir. Oct. 28, 2021); Cheadle on behalf of N.C. v. N. Platte R-1 Sch. Dist., 555 F. Supp. 3d 726, 733 (W.D. Mo. 2021), *appeal dismissed*, No. 21-2963, 2021 WL 7186863 (8th Cir. Nov. 2, 2021).

the case to mean that nearly all student posts on social media that originate off-campus are protected speech.[126] In contrast, another district court in the Fourth Circuit has construed *Mahanoy* more narrowly—finding the school's strong interest in deterring alcohol abuse among its students as a sufficient interest to overcome the "substantial disruption" test.[127] Thus, the court enabled the school to discipline a student for Snapchat videos she had sent of herself drinking in her bedroom, reasoning it was one such regulatory interest Justice Breyer had indicated as remaining "significant" off-campus in *Mahanoy*.[128]

Other courts, such as one district court in the Fifth Circuit, have affirmatively called attention to the lack of clarity provided by *Mahanoy.*[129] In a case decided nearly five months after *Mahanoy*, the district court judge refused to even address the merits of a student's First Amendment claims, reasoning that school officials were shielded by qualified immunity for their actions, as there was no "rule that could have put [them] on notice that it would be unconstitutional" to discipline a student for his sending an offensive Snapchat video to another student off-campus after a football game.[130] The judge harped upon *Mahanoy's* failure to establish a clear rule governing school officials' ability to discipline off-campus speech, making reference to the *Mahanoy* majority's reference to circumstances that "may implicate a school's regulatory interests" without giving any specific criteria.[131]

Because of the variability in outcomes in the lower courts, students are left in limbo about when and where they can express themselves freely without fear of repercussion from school officials.[132] This uncertainty, aside from having a chilling effect on student speech, keeps the door wide open for the continued use of the qualified immunity defense by school officials whenever they face challenges for disciplinary actions concerning speech—even those that violate students' constitutional rights.[133] This reality illustrates the pressing need for the Court to issue a clarified test.[134] The forthcoming

126. *See McLaughlin*, 566 F. Supp. 3d at 1213-14 (referencing *Mahanoy* and stating that "[i]f a student's posting via social media of a direct vulgar attack on her school and its coaches is protected speech . . . , it is difficult to see how posting a somewhat ambiguous emoji on a third-party website . . . could be otherwise.").

127. *See Cheadle*, 555 F. Supp. 3d at 732 (finding no free speech violation when a school suspended a student for sending Snapchat videos of herself drinking alcohol from her bedroom to her classmates because the school's interest in deterring middle schoolers from underage drinking was one of the permissible "significant . . . off-campus circumstances" Justice Breyer authorized in *Mahanoy*).

128. *See id.*

129. *See* McClelland v. Katy Indep. Sch. Dist., No. 4:21-CV-00520, 2021 WL 5055053, at *8-9 (S.D. Tex. Nov. 1, 2021), *appeal docketed*, No. 21-20625 (5th Cir. Nov. 30, 2021).

130. *Id.* at *9.

131. *Id.* at *8 (quoting *Mahanoy*, 141 S. Ct. at 2046).

132. *See* Downey, *supra* note 9.

133. *See* David L. Hudson Jr., *Qualified Immunity*, FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/1560/qualified-immunity [https://perma.cc/TY67-Q4B3] (last visited Oct. 7, 2022).

134. *See* Downey, *supra* note 9.

section provides a proposed alternative test for the Court to adopt when it is faced with the next off-campus student speech case.

III. ANALYSIS

A. *The Modified Test: A Systematic Inquiry Assessing the Scope of Schools' Authority to Regulate Student Speech*

To mend the troubling reality that students receive differing protection for their speech based on their circuit's interpretation of the *Tinker* substantial disruption test,[135] the Court should fill the gaps left by *Tinker* and *Mahanoy* by articulating a multi-step sequential evaluation process. While this proposal advocates for the Court to abandon consideration of geographic origin in its evaluation of whether actions taken by school officials are permissible, this new approach is not novel. Instead, it is mainly based upon Supreme Court precedent and dicta indicating behaviors explicitly or implicitly regarded as within or outside the regulatory authority of schools.[136]

The proposed test, a four-step inquiry modeled to function like the Social Security Administration's (the "SSA") five-step sequential evaluation procedure for disability determinations, [137] similarly involves following a series of steps in a set order that functions formulaically for all courts. As was the purpose of the SSA's evaluation process, this test aims to promote efficiency, fairness, and uniformity among courts.[138] For example, suppose a court finds that the challenged speech is among the types of speech recognized by the Supreme Court as within the scope of schools' disciplinary authority in Table B's Step 3, *infra*. In that case, the court would end its inquiry and issue an opinion in favor of the school. In contrast, if at Step 3 the court fails to make a definitive determination based upon the grids in Tables A-C, *infra*, it would proceed to the next and final step in the evaluation process to conclude its inquiry.

Embedded in each of the test's steps are behaviors explicitly or implicitly regarded by the Court as being within or outside the regulatory authority of school officials. In addition, the proposed test consolidates elements of the prevailing circuit court tests for regulating off-campus speech to create one all-encompassing inquiry. A more in-depth explanation of how a court would proceed through each step of the proposed test is provided below.

135. *See* Marcus-Toll, *supra* note 93, at 3436-37.
136. *See infra* Tables B-C.
137. 20 C.F.R. § 404.1520 (2020).
138. *See* GLICKSMAN & LEVY, *supra* note 19, at 697.

1. Step 1: Did the Speech Have a "Sufficient Nexus" to the School?

As a threshold question, a court must first ask whether there is a "sufficient nexus"[139] or close connection between the challenged speech and the school's pedagogical interests. To assess if such a nexus exists, it should look at the totality of the circumstances surrounding the student's speech, engaging in an in-depth fact-specific inquiry into the case at hand.[140] Relevant considerations for this analysis should include whether the speech: (1) bears the "imprimatur" of the school or is proffered through some platform with the school's name or logo;[141] (2) was made during a time when the school was responsible for the student;[142] (3) was made while the students were on their way to or from the school;[143] (4) took place on school grounds, property or digital platforms (such as the school's Zoom account);[144] (5) occurred during in-person or remote instruction;[145] (6) occurred during extracurricular activities sponsored or offered by the school;[146] (7) identified the school or targeted a member of the school community with vulgar or abusive language;[147] or (8) involved a failure to follow rules concerning school assignments.[148] While not an exhaustive list, this suggested inquiry consolidates considerations advanced by the Supreme Court, and expanded upon by lower courts, in deciding what constitutes a connection to the school significant enough to warrant punishment.

For a student's speech to have a sufficient nexus to the school, it need not meet all the above-listed considerations. Instead, each of the factors present should be considered cumulatively to assess its relative connection to the school—with a "sufficient nexus" being found where the balance of the scale is titled toward connection to the school. If, after this totality of the circumstances analysis, a court determines the speech has a sufficient connection to the school, it should move on to the next step of the evaluation process. If, however, the speech does not have a sufficient nexus to the school, a court must dismiss the case in favor of the student, as the school cannot regulate speech that is "in no way connected with or affecting the school," for the discipline of such conduct falls within the zone of parental authority.[149]

This step incorporates the "sufficient nexus" test applied by the Fourth and Ninth Circuits.[150] While this test has been subject to criticism for

139. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 577 (4th Cir. 2011).

140. McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 707 (9th Cir. 2019).

141. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

142. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2054 (2021) (Alito, J., concurring).

143. *Id.*

144. *Id*. at 2045 (majority opinion).

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

146. *Id.*

147. *Id.* at 2045 (majority opinion).

148. *Manahoy*, 141 S. Ct. at 2045.

149. *Id.* at 2060 (Thomas, J., dissenting) (quoting Lander v. Seaver, 32 Vt. 114, 120 (1859)).

150. *Kowalski*, 652 F. 3d at 577; *see also McNeil*, 918 F.3d at 707-08, 712.

affording little clarity to students on what speech could subject them to punishment,[151] the addition of the eight suggested factors to guide a court's determination offers students greater guidance of what speech may subject them to punishment.[152] In addition, by requiring such an in-depth case-by-case inquiry, this step seeks to add a layer of protection for students, ensuring they can only be disciplined for speech that is within the school's regulatory purview.

2. Step 2: Did the Speech Implicate a Matter of Public Concern?

Once a court has determined the speech has a sufficient connection to the school, it must assess if the speech is political, religious, or implicates some other matter of public concern. Currently, no precise test exists for determining if the challenged speech can be classified as such. In this inquiry, a court should assess whether the speech: (a) "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public;"[153] (b) "involves a matter of interest to the community;"[154] or (c) addresses "matters concerning government policies."[155] If the challenged speech implicates any one of these factors, it should be regarded as involving a matter of public concern.

Because of the greater burden of justification surrounding speech that implicates such matters, student speech that receives this classification may only fall within the school's regulatory authority if it is among the behaviors the Court has previously deemed outside the scope of First Amendment protection or if it falls into the narrow categories of speech the Court has expressly indicated are within the scope of school's power to regulate.[156] Accordingly, if the speech implicates a matter of public concern, a court should proceed to cross-reference the contested speech against the categories of speech the Supreme Court has recognized as unprotected speech in Table A, *infra*, and the few categories of speech the Court has recognized as unprotected for students in schools in Table B, *infra*. If the speech does not fall within one of the categories in Tables A or B, a court must dismiss the case in favor of the student because allowing schools to regulate such expression would be antithetical to the First Amendment's objective of affording citizens freedoms of inquiry and thought without governmental interference.[157]

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151. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 188-89 (3d Cir. 2020), *aff'd on other grounds*, 141 S. Ct. 2038 (2021).

152. *Kowalski*, 652 F.3d at 577.

153. Snyder v. Phelps, 562 U.S. 443, 453 (2011) (quoting City of San Diego v. Roe, 543 U.S. 77, 83-84 (2004)).

154. Nixon v. City & Cnty. of Denver, 784 F.3d 1364, 1367 (10th Cir. 2015).

155. *San Diego*, 543 U.S. at 80.

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

157. *See* Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

If a court determines the speech does not implicate a matter of public concern, it should move on to Step 3 of the evaluation process.

3. Step 3: Did the Speech Overlap with the Categories of Speech the Court has Already Addressed Concerning the Scope of the School's Regulatory Authority?

At this step, a court will go through the student speech regulatory guidelines in Tables A through C, *infra.* The guidelines consist of a composite list of all the behaviors explicitly or implicitly regarded by the Court as within or outside the regulatory authority of the school. This step is akin to Step 3 of the SSA's five-step sequential evaluation process, at which a final determination of disability can be made if the claimant's impairment appears among the listings.[158]

In the guidelines included in Tables A through C, *infra*, courts will be presented with several categories of speech to cross-reference the challenged speech against. These categories are: (1) Recognized Categories of Unprotected Speech;[159] (2) Types of Speech Recognized by the Supreme Court as Within the Scope of Schools' Disciplinary Authority;[160] and (3) Types of Speech Suggested by the Supreme Court as Within the Scope of Schools' Disciplinary Authority.[161] If a court determines the speech matches one of the categories of speech listed in either Table A: Recognized Categories of Unprotected Speech or Table B: Types of Speech Recognized by the Supreme Court as Within the Scope of Schools' Disciplinary Authority, the inquiry is over, and the student's speech is not protected. Accordingly, a court should dismiss the case finding that the student's punishment did not violate their First Amendment free speech rights.

If a court determines the speech matches one of the categories of speech listed in Table C: Types of Speech Suggested by the Supreme Court as Within the Scope of Schools' Disciplinary Authority, a rebuttable presumption is formed that the student's speech is not protected. However, because such speech has only been suggested as being within the bounds of schools' disciplinary authority, a court should still proceed to Step 4 and allow the student a chance to rebut the presumption that their speech is unprotected from punishment by the school. If a court determines the speech does not fall within any of the categories of speech included in Tables A through C, *infra*, it should also move onto Step 4 of the evaluation process.

158. Barnhart v. Thomas, 540 U.S. 20, 24-25 (2003).
159. *See infra* Table A.
160. *See infra* Table B.
161. *See infra* Table C.

4. Step 4: Did the Speech Pose a "Reasonably Foreseeable" Risk of, or has it Already Produced, a Substantial Disruption to the Pedagogical Interests of the School?

At this final step of the evaluation, a court should consider whether a jury would conclude that the speech had a "reasonably foreseeable"[162] risk of reaching the school,[163] whether the speech was specifically targeted at members of the school community,[164] whether the speaker encouraged other students' participation,[165] whether a disruption actually occurred,[166] and if it did, whether it produced a substantial disruption.[167] If the speech satisfies any one of these criteria, it would render the speech within the school's zone of regulatory authority—making the student's discipline permissible. If, however, a court determines the speech did not pose a reasonably foreseeable risk of substantial disruption to the school, a court must dismiss the case in favor of the student.

This step encapsulates the hallmark *Tinker* "substantial disruption" test, as well as the "reasonable foreseeability" test the Second Circuit articulated in *Wisniewski.*[168] As the reasonable foreseeability and substantial disruption tests have been subject to much of the same scrutiny for vagueness and inconsistent outcomes, this step includes pointed questions based on cases from the lower courts.[169] This step further serves as a final catch-all for speech that has a significant impact on the school that may have slipped through the cracks in Steps 1 through 3, or that has not been previously expressed by the Court as a category of speech that the school may regulate due to the unique "characteristics of the school environment."[170]

B. Getting Rid of Unnecessary Red Tape: Eliminating the Consideration of the Geographic Origin of Student Speech

As indicated above, the Supreme Court's decision in *Mahanoy* leaves many open questions concerning the parameters of on- versus off-campus speech for students, school administrators, and courts.[171] By placing emphasis on the location student speech originates from when evaluating schools' disciplinary authority, the Court in *Mahanoy* created a significant risk of

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162. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38-39 (2d Cir. 2007) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

163. *Id.*

164. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

165. *See* Doninger v. Niehoff, 527 F.3d 41, 50 (2d. Cir. 2008).

166. *See Tinker*, 393 U.S. at 514.

167. *See id.*

168. *Wisniewski*, 494 F.3d at 38-39 (quoting *Tinker*, 393 U.S. at 513).

169. Shannon M. Raley, Note, *Tweaking* Tinker*: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 776, 796-97 (2011); Larissa M. Lozano, Note, *A 'Substantial and Material' Refinement of* Tinker, 46 N.M. L. REV. 171, 172, 179-83 (2016).

170. Morse v. Frederick, 551 U.S. 393, 408 (2007).

171. *See supra* Section II.D.3

future cases yielding inconsistent results for nearly identical forms of expression—as the spatial-temporal confines of modern schools are so hard to identify.[172] Justice Breyer even noted in the majority opinion that "given the advent of computer-based learning," distilling a meaningful standard for what constitutes off-campus speech would be extremely challenging due to the numerous exceptions and carveouts needed to accompany such a rule.[173] Yet, if the justices at the highest court in the country cannot distill such a distinction, how can lower courts reasonably be expected to do so in any reasonable or predictable manner?

In the absence of a clear-cut rule, the Court in *Mahanoy* noted circumstances that "may" call for a school's authority to address off-campus speech—referencing "severe bullying," "harassment targeting particular individuals," and "threats aimed at teachers or other students."[174] However, by using the permissive "may" as opposed to the imperative "shall" or "must," the Court provides for the possibility that even in these more extreme circumstances, schools *still* might not be authorized to regulate a student's speech merely based on its geographic origin.[175] Thus, under this standard, a school may rightfully punish a student for tweeting offensive images of a classmate every day from homeroom, but not the student who posts similarly inflammatory images from their house after school each day at 5:00 PM.[176] The differing outcomes for such similar behaviors beg the question of how this framework promotes the teaching of manners and civility, often viewed as an imperative of American public schools.[177]

The continued reliance on an on/off-campus distinction further creates a logistical challenge for educators and school officials to determine when discipline of students is permissible. Amidst what seems to be a never-ending pandemic and a mounting youth mental health crisis, public schools face an incredible number of challenges in educating and protecting the well-being of students.[178] Yet, instead of being able to respond quickly to what would ordinarily be routine disciplinary decisions, school officials instead are expected to sift through "multiple First Amendment standards and assay the bounds of the 'school environment'" to determine if a student can be suspended from after school activities for a week after a weekend of online activity mocking another student.[179] These challenges, accompanying the use of an on/off-campus speech distinction, highlight the need for the abandonment of this approach. Thus, instead of arbitrarily using a speech's geographic origin as a threshold requirement for whether student speech can

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

173. *Id.* at 2045.

174. *Id.*

175. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 112 (2012); *Mahanoy*, 141 S. Ct. at 2045.

176. Reply Brief for Petitioner, *supra* note 2, at *2-3.

177. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).

178. U.S. DEP'T OF EDUC., SUPPORTING CHILD AND STUDENT SOCIAL, EMOTIONAL, BEHAVIORAL, AND MENTAL HEALTH NEEDS 1, 3, 7 (2021), https://www2.ed.gov/documents/students/supporting-child-student-social-emotional-behavioral-mental-health.pdf [https://perma.cc/9ACW-7SCF].

179. Reply Brief for Petitioner, *supra* note 2, at *2-3.

be regulated, the Court should instead adopt an approach focusing on the effects of the speech at issue with a proximate cause test like those historically used to govern students' out-of-school conduct.[180] The following section provides an example of the application of this proposed test and how it better incorporates the impact of the contested speech into its consideration of whether discipline is permissible.

C. Applying the Proposed Test

This Note began with a fictional anecdote in which Student B is suspended from school for ten days for her creation of a meme of one of her classmates, Student A, in which she superimposed Student A's picture on a cartoon ogre, with the caption "Weird Fat Fugly Ogre." Because the test proposed by this Note has never been applied by a court, this section seeks to illustrate how the test would function as applied to the facts provided in this fictional anecdote.

1. Step 1: Did the Speech Have a "Sufficient Nexus" to the School?

First, engaging with the threshold question of whether the ogre meme had a "sufficient nexus"[181] with the school's pedagogical interests, a court would likely determine the meme did have a sufficient nexus to the school. Here, as the Fourth Circuit determined in *Kowalski*, a lower court would likely find that the meme's inclusion of Student A's picture and its rapid circulation among the student body constituted a "targeted attack on a classmate . . . in a manner sufficiently connected to the school environment" to create a substantial disruption with the school's ability to discipline and protect the rights of its' students.[182] In addition, the meme was created loosely while Student B was heading home from school,[183] if going to Starbucks with her friends after school is to be viewed as a quick detour on her way home. While not corresponding to all the considerations included within Step 1, the meme's use of Student A's face and subsequent circulation to nearly the entire student body in less than 24 hours makes it highly probable that a jury would find a sufficient nexus to the school based on a totality of the circumstances.

180. *Mahanoy,* 141 S. Ct. at 2059-60 (Thomas, J., dissenting) (discussing how courts in the late 19th century used a "'direct and immediate tendency' to harm" standard for governing students' off-campus conduct (quoting Lander v. Seaver, 32 Vt. 114, 120 (1859))).

181. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 577 (4th Cir. 2011).

182. *Id.* at 567.

183. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2054 (2021) (Alito, J., concurring).

2. Step 2: Did the Speech Implicate a Matter of Public Concern?

Based upon the lower court's determination that the meme was sufficiently connected to the school, the court would then assess if the speech was political, religious, or implicated some other matter of public concern. Here, there appear to be no such interests addressed by the challenged speech. The meme contains neither an illustration of attitudes toward contemporary or historical events nor expresses a point of view or commentary on a social or political policy.[184] It simply appears to be born out of juvenile sniping and cliquishness—not a commentary on a matter of public concern.

3. Step 3: Did the Speech Overlap with the Categories of Speech the Court has Already Addressed Concerning the Scope of the School's Regulatory Authority?

At this step, the court would first go through the table titled "Recognized Categories of Unprotected Speech" in Table A, *infra*. Defamation appears to be the only category of unprotected speech the meme might fall under. However, while the meme identifies Student B by reasonable implication through its incorporation of her picture, the accompanying caption "Weird Fat Fugly Ogre" clearly indicates an opinion, not a fact, and thus fails to meet the standard for defamation.[185]

Turning to the table entitled "Types of Speech Recognized by the Supreme Court as Within the Scope of School Disciplinary Authority" in Table B, *infra*, the court would next consider the similarity of the meme to the types of speech provided in the table. Here, the meme did not use "lewd, indecent, or vulgar speech;"[186] "promote illegal drug use;"[187] or "bear the imprimatur of the school"[188]—thus, it would not seem to fall within the categories of speech explicitly declared within the scope of school's regulatory power by the Court in *Bethel*, *Morse*, and *Hazelwood* respectively.[189]

Next, the court would turn to the final table, "Types of Speech Suggested by the Supreme Court as Within the Scope of School Disciplinary Authority," in Table C, *infra*, to see if the meme matched any of the types of

184. *The Cartoon Analysis Checklist*, TEACHINGHISTORY.ORG, https://teachinghistory.org/sites/default/files/2018-08/Cartoon_Analysis_0.pdf [https://perma.cc/7G35-RDPD] (last visited Oct. 7, 2022).

185. HARVEY A. SILVERGATE ET AL., FOUND. FOR INDIVIDUAL RTS. IN EDUC., FIRE'S GUIDE TO FREE SPEECH ON CAMPUS 137-38 (Greg Lukianoff & William Creeley eds., 2d ed. 2012), https://dfkpq46c1l9o7.cloudfront.net/wp-content/uploads/2014/02/FIRE-Guide-to-Free-Speech-on-Campus-2nd-ed.pdf [https://perma.cc/RQ5W-L67R].

186. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986).

187. Morse v. Frederick, 551 U.S. 393, 408 (2007).

188. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

189. 478 U.S. at 676; 551 U.S. at 408; 484 U.S. at 273.

speech provided therein. Here, as indicated above, the offending meme clearly targeted Student A. Therefore, the court would need to explore whether this targeting amounted to the sort of "severe bullying or harassment" Justice Breyer indicated as within the regulatory interests of the school in *Mahanoy*.[190] As no definition is provided for what constitutes "severe," the meme would seem to require something "beyond typical name-calling or teasing" and constitute more relentless or consistent attacks directed toward the victim.[191] Here, the meme alone, while offensive, would almost certainly not meet this high threshold. Thus, unless more information existed about previous attacks launched by Student B at Student A, the court would likely move on to Step 4 to make a final determination about whether Student B's suspension for creating the meme violated her free speech rights.

4. Step 4: Did the Speech Pose a "Reasonably Foreseeable" Risk of, or has it Already Produced, a Substantial Disruption to the Pedagogical Interests of the School?"

Assuming the court concluded the meme did not constitute severe bullying or harassment at Step 3, here, the court would engage in final considerations of whether the speech posed a "reasonably foreseeable" risk to the pedagogical interests of the school.[192] Specifically, the court should evaluate whether a reasonable jury would conclude that the speech would reach the school,[193] whether the speech was specifically targeted at members of the school community,[194] whether the speaker encouraged other students' participation,[195] whether the disruption occurred,[196] and if it did, whether it had a substantial impact.[197]

In this case, the offending meme seemingly meets all the criteria to constitute a "reasonably foreseeable" risk of disruption; the question is whether such disruption is "substantial."[198] As indicated above, the meme was specifically targeted at Student A—it superimposes Student A's Facebook profile picture onto the meme. Further, Student B clearly encouraged other students' participation in the attack on Student A by posting the meme to Twitter and sharing it with her classmates—both those with her in Starbucks and those still at school. The meme's viral dissemination would make it highly probable that a reasonable jury would conclude that the speech would reach the school.

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190. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

191. Rachel Simmons, *Extreme Bullying*, TEEN VOGUE (Sept. 21, 2010), https://www.teenvogue.com/story/extreme-bullying [https://perma.cc/A54B-DENC].

192. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38-39 (2d Cir. 2007) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

193. *See id.*

194. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

195. *See* Doninger v. Niehoff, 527 F.3d 41, 50 (2d. Cir. 2008).

196. *See Tinker*, 393 U.S. at 514.

197. *See id.*

198. *Wisniewski*, 494 F.3d at 38-39 (quoting *Tinker*, 393 U.S. at 513).

However, as indicated above, the record does not seem to indicate that this incident was more than an isolated attack against Student A. Further, while the spread of the meme affected Student A deeply and led to her ultimately developing an eating disorder, more information would be needed to conclude whether her reaction was due to her "unreasonabl[e] fragil[ity]," as "otherwise protected speech [does] not become punishable" simply by offending the "hypersensitive."[199]

Considering recent news stories concerning the adverse impacts of social media on youth mental health[200] and all the facts provided,[201] it seems more likely than not that a court would conclude that Student B's meme, while created from an off-campus location, fell within the school's zone of regulatory authority based upon its significant impact on Student A. Thus, it seems highly probable that the court would find that Student B's suspension did not violate her First Amendment free speech rights.

D. Justifying the Proposed Test

As illustrated in the sample application above, the systematic nature of the proposed test provides for a streamlined approach to evaluate the merits of student speech cases. Through its clearly articulated, sequential inquiry and accompanying guidelines, this test would both help students to better understand the bounds of their speech rights and provide lower courts with more clarity on how to adjudicate cases. While there was some ambiguity at the final step as to the likely outcome of the case, this simply illustrates the high bar to which judges would be held to ensure no more speech than necessary is deemed beyond the scope of First Amendment protection for students. It is also important to note that many cases like *Mahanoy* would likely be dismissed following Step 1 due to the challenged speech's insufficient connection to the school. Thus, the number of cases for which such a time and resource-intensive analysis would be required is almost certainly slim.

Notwithstanding the appeal of such a systematic approach, some courts, like the Third Circuit, still contend that schools' disciplinary authority must not extend to off-campus speech, as to do so would constitute an intrusion into the lives of students and infringe upon parental autonomy.[202] However, the clear distinction insisted upon by the Third Circuit is quite illusory considering the explosion of computer-based learning brought on by COVID-19 lockdowns and the near-constant use of digital technology by school-aged children.[203] Thus, the Third Circuit's approach invites cutting off the ability of schools to discipline students almost entirely, denying schools the ability

199. Brewington v. State, 7 N.E.3d 946, 969 (Ind. 2014).

200. *See, e.g.*, Monica Anderson et al., *supra* note 3; Georgia Wells et al., *supra* note 3.

201. *See supra* Section I.

202. ROSS, *supra* note 10, at 225.

203. *See* Benjamin Herold, *The Decline of Hybrid Learning for This School Year in 4 Charts*, EDUC. WEEK (Sept. 27, 2021), https://www.edweek.org/technology/the-decline-of-hybrid-learning-for-this-school-year-in-four-charts/2021/09 [https://perma.cc/WN4V-TFP4]; *see also* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045-46 (2021).

to serve their core function of instilling the nation's children with the skills and values necessary for them to develop into adults.[204] In contrast, if the Court were to adopt this proposed test, which fully takes into account the hyper-connected world of 2022, the disparate treatment experienced by students resulting from courts varied interpretations of the current standard would be significantly lessened.[205]

This country has more than 130,000 public elementary and secondary school principals, approximately 30,000 state court judges, and 1,700 federal court judges.[206] With so many potential players involved in a student's challenge to a disciplinary action, the likelihood of variability in interpretations of the scope of schools' authority to discipline students for their speech is exceptionally high.[207]

IV. CONCLUSION

For the reasons stated above, the Supreme Court's decision in *Mahanoy* provides school officials and lower courts with an insufficient standard for the regulation of off-campus student speech. With the continued reliance on virtual schooling to varying degrees as the pandemic continues, the need for clear guidance on this subject is more critical than ever. Thus, the Court should adopt the test proposed in this Note, as it provides a more comprehensive standard of review that requires lower courts to engage in a standardized, systematic inquiry to determine whether a student's First Amendment free speech rights have been violated. Such a standard is necessary to ensure students receive uniform enjoyment and protection of their First Amendment rights.

204. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

205. *See supra* Section II.D.3.

206. *Table 105.50. Number of Educational Institutions, by Level and Control of Institution: Selected Years, 1980-81 Through 2017-18*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d19/tables/dt19_105.50.asp?current=yes [https://perma.cc/8LKP-NUP3] (last visited Nov. 20, 2021); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FAQS JUDGES IN THE UNITED STATES 3 (2014), https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf [https://perma.cc/A8VP-2757].

207. *See The Uniform College Athlete Name, Image, or Likeness Act (2021): A Summary*, UNIF. L. COMM'N, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7fa9099b-eab8-3033-f4cf-69b4f09aae65&forceDialog=0 [https://perma.cc/SCT5-PCTW] (last visited Oct. 7, 2022).

V. APPENDIX

A. Table A: Recognized Categories of Unprotected Speech

Type of Speech	Standard	Next Steps?
1. Obscenity	In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court articulated the following three-part test to define obscenity: a) "The average person, applying contemporary community standards [to] find that the work, taken as a whole, appeals to the prurient interest;" b) The work to "describe in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and c) "The work, taken as a whole" to "lac[k] serious literary, artistic, political, or scientific value." If each of these prongs is met, the expression is unprotected by the First Amendment.[208] **Sufficient Examples:** • Depictions or descriptions of "sexual acts," "masturbation, excretory functions, [or] lewd exhibition[s] of the genitals;"[209] • Erotic expression that would "conjure up psychic stimulation."[210] **Insufficient Examples:** • Depictions of nudity absent a showing of the genitals of the persons portrayed.[211]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 2 for the "Defamation" inquiry.
2. Defamation	In a concurring opinion in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1996), Justice Stewart explained that defamation suits provide a means of redress and "the protection of [one's] own reputation from unjustified invasion and wrongful hurt."[212]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school.

208. Miller v. California, 413 U.S. 15, 24 (1973).
209. *Id.* at 25.
210. Cohen v. California, 403 U.S. 15, 20 (1971).
211. Jenkins v. Georgia, 418 U.S. 153, 161 (1974).
212. Rosenblatt v. Baer, 383 U.S. 75, 92 (1996) (Stewart, J., concurring).

	Sufficient Examples: • Statements that assert facts (not opinions), that identify their victims either by name or reasonable implication and that are capable of being proven false.[213] **Insufficient Examples:** • "Public officials, political candidates or [other] public figures may not recover" for defamatory statements made about them concerning their official conduct "unless the statement was both false and made with 'actual malice.'"[214] • Private figures seeking to recover for defamatory statements made against them concerning matters of public concern, "unless the statement was both false and made knowingly or at least negligently."[215] • Mere possession of obscene materials in one's own home.[216]	-If the standard is not met, proceed to Row 3 for the "Fraud" inquiry.
3. Fraud	In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the Supreme Court established the standard that commercial speech which is fraudulent, or misleading will not receive free speech protections.[217] **Sufficient Examples:** • Speech that may lead to consumer deception.[218] **Insufficient Examples:** • This category of protected speech is not inclusive of all false statements. The Court has reasoned that "some false statements are inevitable if there is to be an open and vigorous	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 4 for the "Incitement" inquiry.

213. SILVERGATE ET AL., *supra* note 185, at 137-38.

214. MAGGS & SMITH, *supra* note 23, at 1076 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 287-88 (1964)).

215. *See id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974)).

216. SILVERGATE ET AL., *supra* note 185, at 44.

217. MAGGS & SMITH, *supra* note 23, at 1133 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)).

218. KILLION, *supra* note 33 (citing Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003)).

	expression of views in public and private conversation" and thus protected by the First Amendment.[219]	
4. Incitement	In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court reasoned that while the First Amendment protects speech that advocates breaking the rules or law, it does not protect speech that is aimed at "inciting or producing imminent lawless action and is likely to. . . produce such action."[220] **Sufficient Examples:** • Speech that instills fear that "serious evil will result" if the speech is not inhibited and that poses a reasonably imminent fear of danger.[221] **Insufficient Examples:** • Speech that creates "fear of serious injury cannot alone justify suppression of free speech and assembly."[222] • Speech that is merely morally reprehensible but presents no imminent threat of harm.[223]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 5 for the "Fighting Words" inquiry.
5. Fighting Words	In *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), the Supreme Court defined fighting words as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" and deemed such speech as outside the scope of the First Amendment's free speech protections.[224] **Sufficient Examples:** • "Personally abusive epithets, which when addressed to the ordinary citizen are … inherently likely to provoke a violent reaction."[225]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 6 for the "True Threats" inquiry.

219. *Id.* (citing United States v. Alvarez, 567 U.S. 709, 718-19 (2012)).
220. Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).
221. Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).
222. *Id.*
223. *Id.*
224. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
225. Cohen v. California, 403 U.S. 15, 20 (1971).

	Insufficient Examples: • Speech that is merely "upsetting or arouses contempt."[226]	
6. True Threats	In *Virginia v. Black*, 538 U.S. 343 (2002), the Supreme Court re-affirmed its recognition of true threats as unprotected speech.[227] It interpreted "true threats [to] encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group."[228] **Sufficient Example:** • "Forms of intimidation that are most likely to inspire fear of bodily harm."[229] **Insufficient Example:** • Political Hyperbole[230]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 7 for the "Speech Integral to Criminal Conduct" inquiry.
7. Speech Integral to Criminal Conduct	In *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490 (1949), the Court declared that the freedom of speech rarely extends its protections to speech "used as an integral part of conduct in violation of a valid criminal statute."[231] **Sufficient Examples:** • Speech that constitutes the solicitation of criminal activity;[232] • "Offers or requests to obtain illegal material;"[233] • Impersonation of government officials.[234] **Insufficient Examples:** • Overly broad prohibitions of speech, banning not only speech that promotes unlawful conduct but also "all truthful publications of	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 8 for the "Child Pornography" inquiry.

226. KILLION, *supra* note 33 (citing Snyder v. Phelps, 562 U.S. 443, 458 (2011)).
227. Virginia v. Black, 538 U.S. 343, 359 (2003).
228. *Id.*
229. *Id.* at 363.
230. *Id.* at 359.
231. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498-99 (1949).
232. KILLION, *supra* note 33 (citing United States v. Williams, 553 U.S. 285, 297-98 (2008) & *Alvarez*, 567 U.S. at 721).
233. *Id.*
234. *Id.*

	facts" about a matter of public concern.[235]	
8. Child Pornography	In *New York v. Ferber*, 458 U.S. 747 (1982), the Court recognized child pornography as an additional category of unprotected speech that is subject to content-based regulation.[236] **Sufficient Examples:** • "Works that visually depict sexual conduct by children below" the age specified by statute.[237] **Insufficient Examples:** • Depictions of sexual conduct which are not obscene and "do not involve live performance or photographic or other visual reproduction of live performances."[238]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to the next table in Appendix B.

B. Table B: Types of Speech Recognized by the Supreme Court as Within the Scope of Schools' Disciplinary Authority

Type of Speech	Illustration	Next Steps?
1. "Sexually Explicit," "Indecent," "Lewd," or "Vulgar" Speech	In *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 685 (1986), the Supreme Court held that the First Amendment did not bar schools from disciplining students for using "offensively lewd" and indecent speech" in an assembly, stating "it is a highly appropriate function of public school education to prohibit the use of vulgar language."[239]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 2.

235. *Giboney*, 336 U.S. at 498-99.

236. MAGGS & SMITH, *supra* note 23, at 1130 (citing New York v. Ferber, 458 U.S. 747, 765 n.18 (1982)).

237. *Ferber*, 458 U.S. at 764.

238. *Id.* at 765.

239. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986).

2. Speech Promoting Illegal Drug Use	In *Morse v. Frederick*, 551 U.S. 393 (2007), the Supreme Court held that the "'special characteristics of the school environment,' . . . and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use," and therefore deemed a principal's suspension of students for unfurling a banner that read "BONG HiTS 4 Jesus" during an approved out-of-school event as constitutional. [240]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 3.
3. Speech Bearing the Imprimatur of the School	In *Hazelwood School District v. Kuhlmeier*, 480 U.S. 260 (1988), the Court held that the school officials' decision to withhold publication of student-written newspaper articles did not violate the student's First Amendment rights.[241] It further held that "other expressive activities . . . members of the public might reasonably perceive to bear the imprimatur of the school" were within the permissible scope of schools' disciplinary authority. [242]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to the next table in Appendix C.

C. Table C: Types of Speech Suggested by the Supreme Court as Within the Scope of Schools' Disciplinary Authority

Type of Speech	Next Steps?
1. All speech made during times when the school is responsible for the student[243]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 2.
2. All speech taking place over school laptops, on the school's website, or through school email accounts or phones[244]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 3.

240. Morse v. Frederick, 551 U.S. 393, 408 (2007).
241. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
242. *Id.*
243. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).
244. *See id.*

3. All speech that takes place during extracurricular activities, including team sports and activities taken for school credit[245]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. - If the standard is not met, proceed to Row 4.
4. All "speech taking place during remote learning"[246]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 5.
5. Speech published by the school that is "poorly written, inadequately researched, biased, or prejudiced"[247]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 6.
6. Speech that is deemed "unsuitable for mature audiences"[248]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 7.
7. "Severe bullying or harassment" targeting others in the school community[249]	-If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, proceed to Row 8.
8. "Threats aimed at teachers or other students" [250]	- If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. - If the standard is not met, proceed to Row 9.
9. Failure to adhere to school codes of conduct or "following rules concerning lessons" or the participation in school activities[251]	- If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. - If the standard is not met, proceed to Row 10.

245. *See id.*
246. *Id.*
247. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).
248. *Id.*
249. *Mahanoy*, 141 S. Ct. at 2045.
250. *Id.*
251. *Id.*

10. "Breaches of School Security Devices" [252]	- If the standard is met, the speech is not protected. The court should issue a summary judgment decision in favor of the school. -If the standard is not met, the speech is protected. The court should issue a decision in favor of the student.

252. *Id.*