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Mahanoy Area School District v. B.L.: The Right to Free Speech. In the Age of Social Media, Where Do We Go With a Lack of Direction from the Court (2023)

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MAHANOY AREA SCHOOL DISTRICT V. B.L.: THE RIGHT TO FREE SPEECH. IN THE AGE OF SOCIAL MEDIA, WHERE DO WE GO WITH A LACK OF DIRECTION FROM THE COURT?

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I. INTRODUCTION

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] But does the line still fall at the schoolhouse gate when student speech is transmitted on social media from the comfort of one's home? First Amendment rights in the public-school context have consistently been an issue, but *Tinker v. Des Moines Independent Community School District* established that student speech is protected within the school.[2] However, the issue of student speech has substantially evolved with the influence of social media applications like Facebook, Twitter, Instagram, and Snapchat.[3] Currently,

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

2. *Id.*

3. Patricia Smith, *The Limits of Student Speech*, N.Y. TIMES UPFRONT (Dec. 30, 2022, 7:56 PM), upfront.scholastic.com/pages/promotion/navigationlps/030821/the-limits-of-student-speech.html [perma.cc/KU79-93SM].

the Supreme Court has not expressly set forth any specific guidelines for school districts facing student speech that is transmitted through social media.[4] Lower courts currently apply *Tinker* to off-campus speech, but this leads to inconsistent enforcement of First Amendment protection.[5]

Students utilize social media platforms to stay up-to-date on the most recent trends, communicate with peers, and to express their opinions. In *Mahanoy Area School District v. B.L.*, B.L., a high school student, did just that.[6] She was unhappy that she did not make the varsity cheerleading team and took to social media to express her opinion.[7] She was later punished by the school for doing so.[8] This Case Note will analyze how the Supreme Court attempted to address the issue of online student speech in *Mahanoy* and how the Court fell short in creating a clear standard for future courts to use in addressing online student speech.

In Part II, prior Supreme Court cases will be used to analyze the relevant precedent related to the First Amendment's protection of free speech in schools.[9] This will provide a better understanding of how courts have applied student speech standards such as the *Tinker* test to different student speech issues and the current landscape leading to the Court's decision in *Mahanoy Area School District v. B.L.*[10]

Part III considers the *Mahanoy* case and includes a discussion of the Court's reasoning in reaching its holding, along with consideration of the concurring and dissenting opinions. Finally, Part IV will critique the Court's reasoning in *Mahanoy*, and how its failure to fully address online student speech creates an unclear standard for future courts that will address online student speech issues. Part IV proposes that SCOTUS carve out an exception to the *Tinker* test for student speech that is transmitted on social media, and online speech in general.

II. BACKGROUND

First Amendment rights in the context of public schools have been a long-standing issue before the courts. To better understand how the courts have historically approached this issue, this section discusses cases that have addressed student's' First Amendment rights and that have carved out exceptions for the protection of these rights. This section also discusses precedent that specifically addresses online student speech. These cases provide insight into how the court has dealt with

4. Katherine A. Ferry, *Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech*, 49 LOY. U. CHI. L.J. 717, 719 (2018).

5. *Id*.

6. Mahanoy Area Sch. Dist. v. B.L. (Mahanoy II), 141 S. Ct. 2038, 2042 (2021).

7. *Id.*

8. *Id.*

9. *Tinker*, 393 U.S. at 503; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1998); Morse v. Frederick, 551 U.S. 393 (2007).

10. *See* discussion *infra* Section II (discussing various interpretations of student speech standards).

student speech leading up to *Mahanoy.*

A. Supreme Court Precedent on Student Speech in Schools

1. Lander v. Seaver: Supreme Court of Vermont and Limits in the Schoolroom

The issue pertaining to what authority a school has over student speech and actions dates back to 1859 and is addressed in *Lander v. Seaver*.[11] In *Lander*, the plaintiff-student sued his public school teacher, alleging that the teacher had no right to punish the student for acts committed after the school day was over and the student had returned home.[12] The question before the Supreme Court of Vermont was whether the schoolmaster has a right to punish his student for acts of misbehavior that were committed after the school day had been dismissed, the student had returned home, and the student was under the supervision of his parents.[13] While in the presence of other students from the same school, the student used "contemptuous language . . . to insult" the schoolmaster.[14] The court found that the student's language had a direct and immediate tendency to demean the school master's authority.[15] Ultimately, the Court held the right to punish children's behavior lies with the parents and the schoolmaster did not have the authority to punish the student the next day at school.[16]

In *Lander*, the Vermont Court discussed the doctrine of *in loco parentis*.[17] "The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's parents cannot protect, guide, or discipline them."[18] This doctrine does not limit the ability of schools to set rules and control their classrooms, it merely limits the use of "excessive physical punishment."[19] Off campus speech typically falls within the zone of parental responsibility, rather than under the school's responsibility.[20] Students have never had an absolute right to free speech in the classrooms, as the doctrine of *in loco parentis* gives schools the ability to regulate student speech.[21]

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11. Lander v. Seaver, 32 Vt. 114, 119 (1859).

12. *Id.*

13. *Id.*

14. *Id.* While driving his father's cows' home after school, the pupil passed the teacher's property and called the teacher a name. *Id.* at 115. The next day at school, the teacher reprimanded the student for the language and whipped him with a rawhide. *Id.*

15. *Id.* at 119.

16. *Id*.

17. *Id*.

18. *Mahanoy II*, 141 S. Ct. at 2046.

19. *Morse*, 551 U.S. at 416.

20. *Mahanoy II*, 141 S. Ct. at 2046.

21. Joyce Dindo, *The Various Interpretations of Morse v. Frederick: Just a Drug Exception or a Restriction of Student Free Speech Rights?*, 37 CAP. U.L. REV. 201, 217

2. Tinker v. Des Moines Independent County School District

Over 100 years after Vermont considered *Lander*, the U.S. Supreme Court addressed the issue of First Amendment rights in public schools in *Tinker v. Des Moines Independent County School District*.[22] In *Tinker*, the Court established the "substantial disruption" test, also known as the "*Tinker* test."[23] *Tinker* was one of the first cases decided in a series of student speech cases.[24] In *Tinker*, the Supreme Court held that the First Amendment Rights of three public school students were violated when school officials suspended them for wearing black armbands in protest of the war in Vietnam.[25] The *Tinker* test establishes that to punish a student's expression of opinion, the prohibited conduct must "materially and substantially interfere with the requirements of appropriate discipline in the operation of a school."[26] Conduct by a student, in class or out of it, "which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the constitutional guarantee of freedom of speech."[27] The Supreme Court held that "the wearing of armbands in the circumstances of the case was entirely divorced from actually or potentially disruptive conduct by those participating in it, and as such was closely akin to 'pure speech' which is entitled to comprehensive protection under the First Amendment."[28] *Tinker* has served as the blueprint for future decisions in the new era of students' speech rights.[29] In the decades to follow, courts would utilize the *Tinker* test and apply different exceptions in its application.[30]

Following *Tinker*, the Courts in *Bethel School District v. Fraser*, *Hazelwood School District v. Kuhlmeier* and *Morse v. Frederick* also addressed the issue of First Amendment Rights in schools.[31] These cases

(2008) (outlining the history of public education, pointing out that students have never had a right to free speech in the classrooms).

22. *Tinker*, 393 U.S. at 503.

23. *Id*.

24. *Id.*

25. *Id.*

26. Walter Araujo, *Punishing Cyberbullies: Using Supreme Court Guidance Beyond Tinker to Protect Students and School Officials*, 34 T. JEFFERSON L. REV. 325, 339 (2012) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

27. *Tinker*, 393 U.S. at 513.

28. *Id*. at 504.

29. Araujo, *supra* note 26, at 339.

30. *See Morse*, 551 U.S. at 409-10 (holding that schools may restrict student speech reasonably regarded as promoting illegal drug use); *Hazelwood*, 484 U.S. at 273 (holding that schools may exercise editorial control over the style and content of student speech in school-sponsored activities as long as their reasons are reasonably related to a legitimate concern); *Fraser*, 478 U.S. at 686 (holding that the First Amendment does not prevent school officials from punishing speech that is vulgar or lewd); T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 781 (N.D. Ind. 2011) (assuming *Tinker* applied to students punished for posting provocative photos of themselves with lollipops on social media).

31. *Fraser*, 478 U.S. at 675; *Hazelwood*, 484 U.S. at 273; *Morse*, 551 U.S. at 409-10.

demonstrate the evolution of Supreme Court precedent concerning the extent of student speech rights in the public-school context and how this precedent applies to students' off-campus speech as well.[32] Then, the Court in *J.S. ex rel. Snyder v. Blue Mountain School District* and *T.V. v. Smith-Green Community High School Corporation* addressed off-campus speech that deals with social media applications and speech posted on the internet.[33] An analysis of each case in turn provides an illustration of the precedent the Court would ultimately consider and apply in *Mahanoy Area School District v. B.L*.

3. Bethel School District v. Fraser

In 1986, the Court addressed student speech in *Bethel School District v. Fraser*.[34] Matthew Fraser, a student, was suspended for delivering a speech before a high school assembly in which he used an "elaborate, graphic and explicit sexual metaphor."[35] During the speech, students reacted by shouting and yelling and even making sexually suggestive gestures.[36] The District Court held that the sanctions violated the student's rights under the First and Fourteenth Amendments, awarded him damages, and enjoined the school district from preventing him from speaking at graduation.[37] On appeal, the Ninth Circuit affirmed the judgment of the District Court, rejecting the argument that the school district had an interest in protecting students from lewd and indecent language in a school-sponsored setting.[38]

The *Fraser* Court was concerned with allotting significant deference to school administrators that were tasked with the responsibility of educating students of the "fundamental values necessary to the maintenance of a democratic political system."[39] In his opinion, Justice Brennan explained that if the student had delivered the same speech

32. Araujo, *supra* note 26, at 339.

33. *Blue Mountain*, 650 F.3d at 915; *Smith-Green*, 804 F. Supp. 2d at 871.

34. *Fraser*, 478 U.S. at 675.

35. *Id.* at 677 (holding that Fraser's speech was not protected when he nominated a fellow student for student government office and referred to the candidate in terms of sexual metaphors, employing such phrases as "he's firm in his pants, he's firm in his shirt, his character is firm – but most of all, his belief in you, the students of Bethel is firm . . . a man who takes his point and pounds it in . . . Jeff is a man who will go to the very end –even the climax, for each and every one of you . . .", and concluding with, "[s]o vote for Jeff for ASB vice-president – he'll never come between you and the best our high school can be.").

36. *Id*. at 678 (noting that the next day, Fraser was suspended for violating the school's disruptive conduct rule). The school rule provided, "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id*. at 678. The school rule's language follows the language of *Tinker's* substantial disruption test. *Id.*

37. *Id.* at 679.

38. *Id.* at 679-80.

39. John T. Ceglia, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939, 949-50 (2012) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

outside of school, he could not be penalized just because government officials considered his language inappropriate.[40] *Fraser* reinforces the idea introduced in *Tinker* that although students retain their constitutional rights to freedom of speech upon entering the schoolhouse gate, those rights are not automatically coextensive with the rights of adults in other settings.[41] The Supreme Court's reversal of the lower courts signaled a "renewed deference to school administrators in restricting student speech."[42] *Fraser* also establishes that not all speech is entitled to the same protection that was granted in *Tinker.*[43]

4. Hazelwood School District v. Kuhlmeier

In 1988 in *Hazelwood School District v. Kuhlmeier*, student members of a school-sponsored newspaper sued their school after their principal removed two pages from the newspaper prior to publication.[44] The pages the principal censored contained an article describing the experiences of three pregnant Hazelwood students and an article about the effects of divorce on students at the school.[45] The school removed the pages fearing that the pregnant students' identities would not remain a secret and because references to sexual activity and birth control were viewed as inappropriate for students.[46] Because the newspaper was a part of the curriculum, the educators were permitted greater deference in determining content.[47] The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[48] The Court reasoned that schools must be permitted to refuse

40. *Fraser*, 478 U.S. at 688.

41. *See Morse*, 551 U.S. at 404-05 (quoting *Fraser*, 478 U.S. at 682) (explaining that students' First Amendment Rights exist, however, they are restricted in the context of public schools).

42. Ceglia, *supra* note 39, at 950. While expanding deference granted to school administrators, *Fraser* does not apply to off-campus student speech. *See*, *e.g.*, J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 317 (3d Cir. 2010) (Chagares, J., concurring in part and dissenting in part)).

43. *See Fraser*, 478 U.S. at 680 ("The marked distinction between the political message of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals.").

44. *Hazelwood*, 484 U.S. at 264 (holding that the school is permitted to refuse sponsorship of student speech that is reasonably perceived as incompatible with the values of civilized order shared by the nation and that undermines a school's critical function).

45. *Id*. at 263.

46. *Id.* (clarifying that the pages were also removed to afford the identifiable divorced parents a chance to respond to the article before it was published).

47. *Hazelwood*, 484 U.S. at 271 (referencing the Court stating that a school must be able to consider the intended audience's emotional maturity when determining whether or not it is appropriate to disseminate student speech on potentially sensitive topics).

48. *Id. at* 273 (holding that schools are allowed to exercise editorial control over the style and content of student speech in school-sponsored activities if their reasons

sponsorship of student speech reasonably perceived to be incompatible with the values of civilized social order.[49] This holding strays from the *Tinker* test and allows schools to control speech that undermines its critical function as an institution.[50] *Hazelwood* gives school administrators broad discretion to regulate student speech that can be considered part of a school-sponsored activity.[51]

5. Morse v. Frederick

Next, in *Morse v. Frederick*, a student was suspended after refusing to take down a banner that read "BONG HiTS 4 JESUS" while at an off-campus school sponsored event.[52] Here, the Court acknowledged that the *Tinker* analysis is not absolute.[53] The Court held that school officials may prohibit student expression reasonably regarded as promoting illegal drug use.[54] Due to the impact that peer pressure has on teenagers, the Court recognized the school's interest in not promoting or tolerating drug use.[55] Although this speech technically occurred off-campus, the Court held that because it happened during school hours, at a school-sanctioned event, it fell within the school's scope of authority.[56]

Morse illustrated the Court's willingness to expand the Tinker test and extend the reach of public authority beyond the "schoolhouse gate."[57] This was one of the first times the Court addressed student speech that

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are reasonably related to a legitimate concern).

49. *Id.* at 272 (noting that "[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized order'" (quoting *Fraser*, 478 U.S. at 683)).

50. *Id.* at 270-72.

51. Ceglia, *supra* note 39, at 951 (referencing *Hazelwood*, 484 U.S. at 260). The Court indicated that the power to restrict student speech under *Hazelwood* would not be limited by *Tinker*, and instead created a broad exception to *Tinker* that permits school administration to restrict any speech that is "inconsistent with its basic educational mission." *Fraser*, 478 U.S. at 685.

52. *Morse*, 551 U.S. at 396-98. The court believed that although the banner was "cryptic," it was reasonable that the high school principal regarded it to be promoting illegal drug use which directly conflicted with the established school policy prohibiting such messages at school events. *Id*. at 401-02.

53. *Id.* at 405.

54. *Id.* at 410. *See also id.* at 408-09 (reasoning that the danger in this case was far more severe than the desire to avoid discomfort that accompanies an unpopular viewpoint set forth in *Tinker*).

55. *See id.* at 408 (noting "[s]chool boards know that peer pressure is perhaps 'the single most important factor leading schoolchildren to take drugs,' and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. . ." (quoting Bd. of Educ. v. Earls, 536 U.S. 822, 840 (2002)).

56. *Morse*, 551 U.S. at 400. *See also* Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 370-80 (2007) (analyzing the facts, holding, reasoning, and impact of *Morse*).

57. *Morse*, 551 U.S. at 400-01 (determining that school speech precedent of *Tinker* applied to speech that took place across the street from the school and technically off-campus).

took place off campus.[58] *Morse* represented the notion that students have free speech rights on school property and under school authority, but the school's authority to discipline out of school statements is not prohibited.[59] *Morse* expanded school authority to regulate speech that promoted illegal activity when it occurred off-campus, but at a school-sponsored event.[60]

The cases that followed *Tinker* emphasized the idea that students' First Amendment rights in school are not equivalent with the rights of adults in other settings.[61] The context of a school environment allows school officials to limit students' First Amendment rights as demonstrated above.[62] The standard set forth after all the above-mentioned cases is as follows:

> Students retain free speech rights in public schools as long as their speech does not amount to a 'true threat,' does not create a material and substantial disruption of school activities, or that school officials can reasonably forecast as creating a substantial disruption, unless the student's speech was vulgar, lewd, or undermined the school's basic educational mission, or unless the speech is offensively sexual suggestive nature, or unless the speech is school sponsored and school officials' actions are reasonably related to legitimate pedagogical concerns, or unless the speech might reasonably be understood as bearing the imprimatur of the school itself, or unless the speech advocates illegal drug use.63

This "standard" is extremely unclear and difficult to follow.[64]

B. Precedent Addressing Online Student Speech

The "schoolhouse gate" described in *Tinker* has always acted as a clear line between on-campus speech that is subject to in-school punishment and off-campus speech that is outside of the authority of a school administrators' regulation.[65] The emergence of the Internet and social media applications has complicated what once was a simple

58. *Id.* at 393 (holding that schools have the authority to restrict student speech reasonably regarded as promoting illegal drug use).

59. Araujo, *supra* note 26, at 346 (citing *Morse*, 551 U.S. at 401) (permitting a school to punish a student for a banner displayed across the street from the school).

60. *Morse*, 551 U.S at 405-06 (stating that the First Amendment does not require schools to tolerate or promote student speech that contributes to the dangers of illegal drug use).

61. *See Fraser*, 478 U.S. at 682 (holding that "[t]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

62. *Tinker*, 393 U.S. at 503; *Fraser*, 478 U.S. at 675; *Hazelwood*, 484 U.S. at 260; *Morse*, 551 U.S. at 393.

63. Allison E. Hayes, *From Armbands to Douchebags: How Doninger v. Niehoff shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 255 (2010).

64. *Id*.

65. Rory Allen Weeks, *The First Amendment, Public School Students, and the Need for Clear Limits on School Official's Authority over Off-Campus Student Speech*, 46 GA. L. REV. 1157, 1166-67 (2012).

delineation, as off-campus speech can now travel to and easily be received on campus.[66] As school administrators face this increasing entanglement of social media and its effects in schools, they have struggled in applying *Tinker*.[67] The pervasive use of social media applications further challenges a school's authority over student speech that technically occurs off campus and throws another element into the already unclear standard followed by the courts.[68] Without any clear Supreme Court guidance, lower courts have been left to "craft a patchwork of precedent, yielding inconsistent and unpredictable results."[69]

1. J.S. ex. rel. Snyder v. Blue Mountain School District

In *J.S. ex rel. Snyder v. Blue Mountain School District*, the Third Circuit addressed the issue of a social media application and student speech.[70] Here, an eighth-grade student was suspended after she created a fake Myspace social media account that ridiculed the school's principal.[71] The court applied the *Tinker* test and held that the Myspace profile did not create even a reasonably foreseeable risk of substantial disruption.[72] Here, the Court was willing to extend *Tinker* to non-political speech but was unwilling to apply *Fraser's* lewd speech test to off-campus speech.[73]

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66. *Id.* "On its own, social networking that takes place at off-campus locations cannot be regulated under existing Supreme Court precedent." Ceglia, *supra* note 39, at 955. Schools and courts "have struggled with defining whether, and if so, when, speech conducted in an off-campus online venue can be considered to be on-campus speech." *Id.* at 956.

67. Weeks, *supra* note 65, at 1166-67. "[T]he line between on-campus and off-campus speech is blurred with the increased use of the internet and the ability of students to access the internet at school, on personal computers, school computers and even cellphones." Ceglia, *supra* note 39, at 956 n.86 (quoting J.S. v. Blue Mountain Sch. Dist., No. 07cv585, 2008 WL 4279517, at *18-20 n.5 (M.D. Pa. Sep. 11, 2008)). Since "technology allows such access, it requires school administrators to be more concerned about the speech that is created off campus" than it ever has before due to its likelihood to be received on campus. *Id.*

68. *Smith-Green*, 807 F. Supp. 2d at 781 (discussing the lack of precedent concerning expressive conduct taking place off school grounds and not during a school activity when confronted with students posting provocative photos on the Internet).

69. Ceglia, *supra* note 39, at 941.

70. *Blue Mountain*, 650 F.3d at 915 (holding that the Myspace profile did not create even a reasonably foreseeable risk of substantial disruption). J.S. created the profile on her family's home computer and used a photo of the principal from the district's website, although the profile did not have other identifying information. *Id.* at 920.

71. Ferry, *supra* note 4, at 733 (reviewing the impact of social media on court's analysis regarding off-campus student speech).

72. *Blue Mountain*, 650 F.3d at 920 (holding that the Myspace profile did not create even a reasonably foreseeable risk of substantial disruption). The Court also noted "the profile was so outrageous that no one could have taken it seriously, and no one did," and that without subsequent action taken by the principal to punish the students, there would have been little to no disruption on school grounds. *Id.* at 930-31.

73. *Id*. at 929-30 ("If *Tinker's* black armbands – an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war – could not 'reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,' neither can J.S.'s profile, despite the unfortunate

The Court reasoned that adopting the *Fraser's* lewd speech test would in effect "adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or school official, is brought to the attention of a school official, and is deemed 'offensive' by the prevailing authority."[74]

2. T.V. v. Smith-Green Community High School Corporation

Next, in *T.V. v. Smith-Green Community High School Corporation*, an Indiana court addressed the issue of student speech via a social media application.[75] Here, two students were suspended from extracurricular activities after a parent complained about inappropriate pictures the students posted on their Myspace and Facebook accounts.[76] The pictures contained images of the two students sucking on phallic-shaped lollipops and were shared among their Myspace and Facebook friends as a joke.[77] The court held that the speech was protected by the First Amendment because it "had a particularized message of crude humor likely to be understood by those they expected to view the photos."[78] The Court stated that speech created for entertainment undoubtedly enjoys First Amendment protection.[79] The Court in *Smith-Green* applied the *Tinker* test because nearly all other federal courts had done so, and *Tinker* was the only applicable Supreme Court precedent addressing this type of student speech.[80] In applying the *Tinker* standard, the Court held that there was no substantial disruption, and that suspending the students violated their First Amendment rights.[81]

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humiliation it caused for [the principal]." (quoting *Tinker*, 393 U.S. at 514.)).

74. *Id.* at 933 (internal alterations omitted). In his dissenting opinion, Justice Fisher summarized the concern that narrowly applying the *Tinker* test leaves schools defenseless in protecting its "teachers and school officials against [students'] attacks" and it also leaves schools "powerless to discipline students for the consequences of their actions." Joshua Rieger, *Digitizing the Schoolhouse Gate: Protecting Students' Off-Campus Cyberspeech by Switching the Safety on Tinker's Trigger*, 70 FLA. L. REV. 695, 726 (2018) (quoting *Blue Mountain*, 650 F.3d at 941 (Fisher, J., dissenting)).

75. *Smith-Green*, 807 F. Supp. 2d at 767.

76. *Id*. at 773-74. The images, while posted online, did not identify the individuals as students at the high school. *Id.* The parent brought printouts of the images to the Superintendent because the photographs were causing "divisiveness" on the volleyball team of those in support of the crude humor and those against. *Id.* Notably, the complaining parent was not connected to the team. *Id.* A second concerned parent also contacted the school principal, but this parent worked as a secretary at the school. *Id.*

77. Araujo, *supra* note 26, at 350 (citing *Smith-Green*, 807 F. Supp. 2d at 772).

78. *Smith-Green*, 807 F. Supp. 2d at 776.

79. *Id.* at 775 (reasoning that "[t]here is no doubt that entertainment, as well as news, enjoys First Amendment protection." (quoting Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977)).

80. *Id.* at 781 (remarking that "[n]early all federal courts have treated such circumstances as governed by the *Tinker* standard." (citing Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008); Pinard v. Clatskanie Sch. Dist. 467 F.3d 755, 767 (9th Cir. 2006); Boucher v. Sch. Bd., 134 F.3d 821, 827-28 (7th Cir. 1998); Shanley v. Nebraska Indep. Sch. Dist., 462 F.2d 960, 970 (5th Cir. 1972)).

81. Araujo, *supra* note 26, at 351 (citing *Smith-Green*, 807 F. Supp. 2d at 784).

The Supreme Court has yet to rule on the issue of off-campus online speech, such as speech posted on social media platforms, but the Court has provided guidance on the extent of students' First Amendment rights in the public school context.[82] However, the *Tinker* test, or the "substantial disruption" test, is not suited for universal application.[83] Specifically, the *Tinker* test does not adequately assess student speech issues when the speech is published or broadcasted on social media sites and on the Internet.[84] Because the *Tinker* test has been distorted by federal appellate courts applying their own analysis to fit the facts of each case, First Amendment analysis of student speech is very inconsistent.[85] This is evident in *Mahanoy Area School District v. B.L.*[86]

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

B.L. was a student at Mahanoy Area High School, a public school in Mahanoy City, Pennsylvania.[87] At the end of her freshman year, B.L. tried out for a position on the school's varsity cheerleading team and on a private softball team.[88] She was not offered a position on either team, but did place for a spot on the school's junior varsity cheerleading team.[89] B.L. declined the coach's offer to join the junior varsity team and was upset because the coaches chose an entering freshman for the varsity squad.[90] While at a local convenience store that weekend, "B.L. used her smartphone to post two pictures on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time."[91] The posts were on her "Snapchat 'story,' a feature on the application that allows any person in the user's 'friend' group to view the images for a 24-hour period."[92] One image showed B.L. and a friend with

82. *See Smith-Green*, 807 F. Supp. 2d at 781 (acknowledging that the Supreme Court has yet to rule on the issue of off-campus online speech and that there is uncertainty as to how far the existing precedent can apply). Making distinctions between what students say on campus and off campus was easier in 1969 when *Tinker* was decided, before the rise of social media. Adam Liptak, *A Cheerleader's Vulgar Message Prompts First Amendment Showdown*, N.Y. TIMES (June 23, 2021), www.nytimes.com/2020/12/28/us/supreme-court-schools-free-speech.html [perma.cc/78XP-GZFK].

83. *See Morse*, 551 U.S. at 405 (stating that *Fraser* established that the method set forth in *Tinker* is not absolute); *Fraser*, 478 U.S.at 680 (explaining the error in treating lewd and offensive speech the same as political speech as seen in *Tinker*).

84. *Tinker*, 393 U.S. at 503.

85. Ferry, *supra* note 4, at 733.

86. *Mahanoy II*, 141 S. Ct. at 2038.

87. *Id*. at 2043. B.L.'s name is kept private as she was a minor at the start of litigation and her parents brought the suit on her behalf. *Id.*

88. *Id.*

89. Thomas M. Fisher, *Civil Cases in the Supreme Court's October Term 2020*, 57 CT. REV. J. AM. JUDGES ASS'N 132, 146 (2021).

90. *Id.*

91. *Mahanoy II*, 141 S. Ct. at 2043.

92. *Id.* (noting that B.L. had about 250 "friends" on her Snapchat who could view her story). Snapchat is a "popular messaging app that lets users exchange pictures and videos, called 'snaps', that are meant to disappear after they are viewed." Christine

raised middle fingers with the caption: "Fuck school fuck softball fuck everything."[93] The second image was of a blank screen with just a caption that read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" with an upside-down smiley face emoji.[94]

B.L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom were members of the cheerleading team.[95] At least one of them used a separate cellphone to take pictures of B.L.'s posts and shared them with the other members of the cheerleading squad.[96] The photos spread and eventually reached one of the cheerleading coaches.[97] The following week, "several cheerleaders and other students approached the cheerleading coaches while 'visibly upset' about B.L.'s posts."[98] During that same week, questions about B.L.'s posts carried over into an "Algebra class taught by one of the two [cheerleading] coaches."[99]

The coaches discussed the matter with the principal and "decided that because the posts used profanity in connection with a school extracurricular activity, they violated the team and school rules."[100] As a result, B.L. was suspended from the cheerleading squad for the school year.[101] The decision was upheld by the school's athletic director, principal, superintendent and school board.[102] In response to her suspension, B.L. filed this suit in Federal District Court.[103]

Elgersma, *Parents' Ultimate Guide to Snapchat*, COMMON SENSE MEDIA (Jan. 6, 2023), www.commonsensemedia.org/articles/parents-ultimate-guide-to-snapchat [perma.cc/X2TC-CAMA]. A Snapchat story can be created for friends to view for a 24-hour period. *Id.*

93. Fisher, *supra* note 89, at 146 (citing *Mahanoy II*, 141 S. Ct. at 2038) (highlighting that the long arm of school discipline does not always reach social media platforms).

94. *Mahanoy II*, 141 S. Ct. at 2043. B.L. took to Snapchat in frustration and posed in street clothes with her friend at the Cocoa Hut, a local store and student stomping ground. *Id.* B.L. posted the photos to her story where many of her friends on Snapchat were students at District schools, and some were fellow cheerleaders. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* (noting that one of the cheerleaders came across the Snaps, took screenshots of them (as they were not publicly viewable) and brought them to the coach's attention).

98. *Id.*

99. *Id.*

100. *Id.*

101. *See* Liptak, *supra* note 82 (stating the suspension was needed to "avoid chaos" and maintain a "team like environment.").

102. *See* B.L. v. Mahanoy Area Sch. Dist. (Mahanoy I), 964 F.3d 170, 176, 193 (3d. Cir. 2020) (noting that B.L. was specifically punished for violating the Respect Provision and the Negative Information Rule located within the Cheerleading Rules that B.L. had signed before trying out for the team).

103. *Id.* B.L.'s father appealed to the School Board, but they declined to get involved; therefore, B.L., through her parents, filed suit against the District for declaratory and injunctive relief.

III. ANALYSIS

A. Procedural History

B.L., along with her parents, sued the Mahanoy Area School District in the United States District Court for the Middle District of Pennsylvania.[104] She advanced three claims under 42 U.S.C. § 1983 which were: "that her suspension from the team violated the First Amendment; that the school and team rules she was said to have broken are overbroad and viewpoint discriminatory; and that those rules are unconstitutionally vague."[105] Summary judgment was granted in B.L.'s favor at this stage.[106] It ruled that B.L. did "not waive[] her free speech rights by agreeing to the team's rules and that her suspension from the team implicated the First Amendment even though extracurricular participation is merely a privilege."[107] The court ruled that B.L.'s Snaps were "off-campus speech and thus not subject to regulation" under *Fraser*.[108] The court also found that B.L.'s snaps "had not caused any actual or foreseeable substantial disruption of the school environment"; therefore, they were "not subject to discipline under *Tinker*."[109] The court "concluded that the School District violated B.L.'s First Amendment rights, rendering unnecessary any consideration" of the additional claims advanced.[110] The court "entered judgment in B.L.'s favor and awarded nominal damages and requir[ed] the school to expunge her disciplinary record."[111] An appeal then followed.[112]

The Third Circuit Court of Appeals determined that B.L.'s speech occurred off-campus.[113] B.L. "created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school."[114] The court also held that *Tinker* does not apply to off-campus speech such as B.L.'s.[115] As *Tinker* does not apply to off-campus speech, the court reasoned that the decision

104. *Id.* at 176.

105. *Id*. (noting that a 42 U.S.C. § 1983 claim allows people to sue the government for civil rights violations). This applies when someone acting under color of state-level or local law has deprived a person of rights created by the U.S. Constitution or federal statutes. *See* 42 U.S.C. § 1983 (2022) (detailing this civil action right).

106. *Mahanoy I*, 964 F.3d at 176.

107. *Id*.

108. *Id.*; *Fraser*, 478 U.S. at 675.

109. *Mahanoy I*, 964 F.3d at 176 (citing *Tinker*, 393 U.S. 503 (1969)).

110. *Id.* (noting B.L. also advanced claims for viewpoint discrimination, vagueness, and overbreadth).

111. *Id.*

112. *Id.*

113. *Id*. at 177.

114. *Id.* at 180.

115. *Id.* at 191. *See also id.* at 194 (Ambro, J., concurring in the judgment) (noting that "the holding in *Tinker* . . . – that schools may regulate student speech only if it 'substantially disrupt[s] the work and discipline of the school' – does not apply to 'off-campus' speech." (quoting *Tinker*, 393 U.S. at 513)).

to punish B.L. cannot be justified.[116] The school district argued "that by agreeing to certain school and team rules, B.L. waived her First Amendment right to post" the Snapchat photos.[117] The court held that B.L.'s Snaps were not covered by any of the rules the school district argued and relied upon and ultimately rejected its claim that B.L. waived her First Amendment rights.[118] The district court's judgment was affirmed.[119]

The school district then filed a petition for writ of certiorari in the Supreme Court and asked the Court to decide "whether *Tinker*, which holds that public-school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus."[120]

B. Majority Opinion

In assessing this question, the Supreme Court reiterated that precedent has "made clear that students do not 'shed their constitutional rights to freedom of speech of expression,' even 'at the schoolhouse gate.'"[121] The Court's precedent has also made clear, however, "that courts must apply the First Amendment 'in light of the special characteristics of the school environment.'"[122] One of these characteristics is the fact that schools often stand *in loco parentis*, i.e., in the place of parents.[123] The Court looked to "three categories of student speech that schools may regulate in certain circumstances" that have been previously outlined as precedent.[124] The first specific category is "'indecent,' 'lewd,' or 'vulgar' speech uttered during a school assembly on school grounds."[125] The second is "speech, uttered during a class trip, that promotes 'illegal drug use.'"[126] Third is "speech that others may reasonably perceive as 'bear[ing] the imprimatur of the school,' such as that appearing in a school-sponsored newspaper."[127] The Court recognized a school's "interest in regulating speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'"[128] The Supreme Court further recognized that "[t]hese special characteristics

116. *Mahanoy I*, 964 F.3d at 181 (referencing the School District's argument to "defend[] its actions based on its power 'to enforce socially acceptable behavior' by banning 'vulgar, lewd, obscene or plainly offensive' speech by students.").

117. *Id*. at 192.

118. *Id*.

119. *Id*. at 194.

120. *Mahanoy II*, 141 S. Ct. at 2044.

121. *Id*. (quoting *Tinker*, 383 U.S. at 506)*; see also* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794 (2011) (noting that "[m]inors are entitled to a significant measure of First Amendment protection.").

122. *Mahanoy II*, 141 S. Ct. at 2044 (quoting *Hazelwood*, 484 U.S. at 266).

123. *Id.* at 2046.

124. *Id.* at 2045.

125. *Id.* (quoting *Fraser*, 478 U.S. at 685).

126. *Id.* (citing *Morse*, 551 U.S. 393 at 409).

127. *Id.* (quoting *Hazelwood*, 484 U.S. at 271).

128. *Id.* (quoting *Tinker*, 393 U.S. at 513).

call for 'special leeway' when schools regulate speech that occurs under its supervision."[129]

The Supreme Court disagreed with the Third Circuit as the majority did not believe these special characteristics "that give schools additional license to regulate speech always disappear when a school regulates speech that is off campus."[130] A "school's regulatory interest remains significant in certain off campus circumstances" such as "bullying or harassment" that targets specific individuals, "threats aimed at teachers or other students, . . . participation in other online school activities; and breaches of school security devices."[131] B.L. asserts the definition of on-campus speech includes only specific scenarios, like when the school is responsible for travel to or from the school grounds or a school sponsored event.[132] The definition would reach into the virtual space to include communications via e-mails, on school websites or laptops, or during remote learning activities.[133] It would also encompass activities eligible for school credit.[134] B.L. also advanced the argument "that speech related to extracurricular activities," such as the cheerleading team, "would also receive special treatment."[135] The Supreme Court was skeptical of any such list of "appropriate exceptions or carveouts to the Third Circuit's majority's rule."[136] The majority opined that B.L.'s proposed rule "would deny off-campus applicability of *Tinker's* highly general statement about the nature of a school's special interests."[137] The Court reasoned that with the advance "of computer-based learning," It was hesitant "to determine precisely" what off-campus school activities belong on a list of when First Amendment protection does and does not apply.[138] The different factors, such as "a student's age, the nature of the school's off-campus activity, and the impact upon the school itself," make it difficult to create a rule that will apply in every situation.[139] For these reasons, the Supreme Court did not set forth a First Amendment rule stating "what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent substantial disruption of learning related activities or the protection of those who make up a school community."[140]

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129. *Id.*

130. *Id.* (asserting that there are three features of speech that can also apply to speech considered to be off-campus).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id*.

136. *Id*. (referencing B.L.'s argument "that speech related to extracurricular activities, such as team sports, would . . . receive special treatment.").

137. *Id*.

138. *Id*. (noting the Court's concern with creating a clear rule due to the advances of technology and social media and how they are also used for educational purposes, the Court struggles to create a rule that would apply in every situation as technology presents a unique challenge).

139. *Id.*

140. *Id.*

Although the Supreme Court does not set forth a generalized rule of what constitutes off-campus speech, it outlined "three features of off-campus speech that often, if not always, distinguish school's efforts to regulate that speech from their efforts to regulate on-campus speech."[141]

First, the Supreme Court pointed out that "in relation to off-campus speech, [a school] will rarely stand *in loco parentis*."[142] The Supreme Court reasoned that off-campus speech will normally fall within the zone of parental responsibility, not school-related responsibility.[143]

The second feature is that "regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day."[144] Courts must be cautious and skeptical of school's off-campus speech regulation because regulating off-campus speech infringes upon a student's ability to engage in any speech at all.[145] The Court further reasoned that schools would face a heavy burden to justify interferences with political or religious speech occurring outside the school grounds or a school-connected setting.[146]

The third feature the Supreme Court highlighted is the school's "interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[147] The Court noted the importance of freedom of speech in America's public schools as they are the "nurseries of democracy."[148] Schools facilitate the marketplace of ideas and this exchange of ideas must be protected.[149] Unpopular ideas must also be protected, "for popular ideas have less need for protection."[150] The Opinion noted the strong interest for "future generations [to] understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"[151]

The Supreme Court construed "these three features of much off-campus speech [to] mean that the leeway the First Amendment grants to

141. *Id.* at 2046.

142. *Id.* (referencing the doctrine of *in loco parentis* which treats school administrators as standing in the place of students' parents under circumstances where the children's parents cannot protect, guide, or discipline them).

143. *Id.*

144. *Id.* (noting that regulating off-campus speech can heavily infringe upon a student's free speech rights and ultimately leave no place where a student has freedom of speech).

145. *Id*. (referencing that "[w]hen it comes to political or religious speech that occurs outside" of the school, "the school will have a heavy burden" to prove that the intervention was justified).

146. *Id.*

147. *Id.* (noting that unpopular speech must be given the same expression as popular speech).

148. *Id*. ("Our representative democracy only works if we protect the 'marketplace of ideas.'").

149. *Id*. (highlighting that the "free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will.").

150. *Id.*

151. *Id*. (explaining that while "this quote is often attributed to Voltaire, it was likely coined by an English Writer, Evelyn Beatrice Hall.").

schools in light of their special characteristics is diminished."[152] However, the Court left unanswered "where, when, and how these features" of off-campus speech "will make a critical difference" and stated that B.L.'s case provided just one example.[153]

In applying these features to the situation at bar, the Supreme Court first considered the content and location of B.L.'s speech.[154] B.L.'s speech was critical of her team, her coaches and the school; however, the Court stated that this speech did not involve features that would place it outside the First Amendment's ordinary protection.[155] Although B.L. used vulgar language, her speech was not obscene.[156] The Court reasoned that B.L.'s speech was pure speech and if she were an adult, her speech would be protected under the First Amendment.[157] B.L.'s speech occurred outside of school hours and away from the school itself and did not target any student or the school itself within her speech.[158] The majority stated that the features of B.L.'s speech "diminish[ed] the school's interest in punishing" that speech.[159]

The majority broke down the school's interests in punishing B.L.'s speech into three parts.[160] First, the school advanced its "interest in teaching good manners and consequently in punishing the use of vulgar language that is aimed at part of the school community."[161] The Court stated that this interest was weakened because B.L.'s speech took place "outside the school and on her own time."[162] The school did not present

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152. *Id*.

153. *Id.*

154. *Id*. at 2046-47.

155. *Id*. at 2046. *See* Chaplinksy v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that the freedom of speech "is not absolute" and punishment of categories of speech include "lewd and obscene," "profane" and "libelous" speech, as well as "insulting" speech or "'fighting words' – those that, "by their very utterance inflict injury or tend to incite an immediate breach of the peace . . .").

156. *See* Cohen v. California, 403 U.S. 15, 26 (1971) (establishing that the government generally cannot criminalize the displays of profane words in public places).

157. *Mahanoy II*, 141 S. Ct. at 2046-47. *See also Cohen*, 403 U.S. at 24-26 (explaining that the government generally cannot regulate the form or content of speech and reversing defendant's conviction for wearing a jacket donning the words "Fuck the Draft" in a California courthouse); *cf.* Snyder v. Phelps, 562 U.S. 443, 461 (2011) (noting that the First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate."); Rankin v. McPherson, 483 U.S. 378, 387 (1987) ("The inappropriate character of a statement is irrelevant to the question whether it deals with a matter of public concern.").

158. *Mahanoy II*, 141 S. Ct. at 2047.

159. *Id*.

160. *Id*.

161. *Id*.

162. *Id. See Morse*, 551 U.S. at 405 (clarifying that although a school can regulate a student's use of sexual innuendo in a speech given within the school, if the student "delivered the same speech in a public forum outside of the school context, it would have been protected."); *see also Fraser*, 478 U.S. at 688 (Brennan, J., concurring) (noting that if the student in *Fraser* "had given the same speech outside the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.").

any "evidence of any effort to prevent students from using vulgarity outside of the classroom."[163] Therefore, the school's interest in teaching good manners was not sufficient to overcome B.L.'s freedom of expression.[164] Second, the school argued "it was trying to prevent disruption . . . within the bounds of a school-sponsored extracurricular activity."[165] However, there was no evidence of any "sort of 'substantial disruption' of a school activity" in this case that would "justify the school's action."[166] B.L.'s speech did not create a "disturbance" that met "*Tinker's* demanding standard."[167] Third, the school "expresse[d] a concern for team morale."[168] However, there was no evidence that suggested a serious decline in team morale because of B.L.'s speech that would rise to the level of "substantial" interference or disruption.[169] The majority reiterated that "undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression."[170] The school's interests in punishing B.L.'s speech were not enough to overcome B.L.'s First Amendment rights.[171] The Supreme Court disagreed with the Third Circuit's reasoning, but did agree that the school violated B.L.'s First Amendment Rights and affirmed the judgment.[172]

C. Concurring Opinion

In concurrence, Justice Alito, joined by Justice Gorsuch, began by noting that B.L.'s case was the first to ask the Court whether school officials can constitutionally regulate off-campus speech.[173] Justice Alito agreed with the Majority that public schools should be able to regulate

163. *Mahanoy II*, 141 S. Ct. at 2047.

164. *Id*.

165. *Id*.

166. *Id.* (quoting *Tinker*, 393 U.S. at 514).

167. *Id.* at 2048.

168. *Id. See also id.* at 2047-48 (explaining that the record here "shows that discussion of B.L.'s Snap took, at most, 5-10 minutes of an Algebra class 'for just a couple of days' and that some members of the cheerleading team were 'upset' about the content of B.L.'s snapchats . . .").

169. *Id*. at 2048 (noting that B.L.'s speech upset fellow cheerleaders but did not cause any sort of substantial disruption).

170. *Id.* (quoting *Tinker*, 393 U.S. at 508) (internal quotations omitted).

171. *Id*. (quoting *Tinker*, 393 U.S. at 509) (noting the burden school officials must meet to regulate speech, the Court invoked *Tinker* to explain that, "for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

172. *Id*. (stating that "[i]t might be tempting to dismiss B.L.'s words as unworthy of the First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary." (citing Tyson & Brother v. Banton, 273 U.S. 418, 447 (1927))). "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." *Cohen*, 403 U.S. at 25.

173. *Mahanoy II*, 141 S. Ct. at 2048 (Alito, J., concurring).

on-campus speech and recognized that teachers' and administrators' jobs would be extremely difficult if they could not control speech that occurred in schools.[174] He emphasized the doctrine of *in loco parentis* and that although parents delegate some rights for school officials to restrict off-campus speech, it is not a "complete transfer of parental authority."[175]

Applying the doctrine of *in loco parentis* to modern day public schools, Justice Alito "explained that public schools are delegated the amount of parental authority equivalent to the amount necessary for them to 'carry out their state-mandated educational mission.'"[176] Examples of this delegated parental authority to schools include homework, online instruction, and traveling to and from school.[177] He also pointed out categories of speech that fall between speech that occurs in a school-related fashion and speech that does not involve the school but involves some matter of public concern.[178] Examples of this "in-between" speech includes threats to a school official or student, speech that criticizes school administrators or teachers, and speech involving derogatory remarks towards other students.[179] Justice Alito admitted that these 'in-between' categories complicate the matter in terms of delineating when and how to regulate off-campus speech.[180] Finally, Justice Alito concluded that B.L.'s speech did not fall into any of these "in-between" categories.[181] He reasoned that because B.L.'s off-campus speech was merely criticism about a school extracurricular, and it "did not target a particular individual or cause a significant disruption[,] it did not fall into any categories where the Court has allowed school['s] [] to regulate off-campus speech."[182] Justice Alito concurred with the Majority that B.L's speech was protected and the school violated her First Amendment rights.[183]

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174. *Id*. at 2050. Justice Alito noted that broader authority was delegated for more extensive undertakings like boarding schools in comparison to at-home tutoring. *Id*. at 2051-52.

175. *Id*. at 2053.

176. *First Amendment –Free Speech – Public Schools -- Mahanoy Area School District v. B.L.*, 135 HARV. L. REV. 353, 357 (2021) (quoting *Mahanoy II*, 141 S. Ct. at 2052 (Alito, J., concurring) [hereinafter *First Amendment*].

177. *Id*. (citing *Mahanoy II*, 141 S. Ct. at 2054)

178. Daniel W. Gudorf, *Mahanoy Area Sch. Dist. v. B.L. 141 S. Ct. 2042 (2021)*, 48 OHIO N. UNIV. L. REV. 169, 179 (2021) (citing *Mahanoy*, 141 S. Ct. at 2056).

179. *Id*. (citing *Mahanoy II*, 141 S. Ct. at 2057).

180. *Id*. (citing *Mahanoy II*, 141 S. Ct. at 2056).

181. *Id*. (citing *Mahanoy II*, 141 S. Ct. at 2057).

182. *First Amendment*, *supra* note 176, at 357. Justice Alito reasoned that B.L.'s posts were not speech that criticized particular individuals. Gudorf, *supra* note 178, at 179 (citing *Mahanoy II*, 141 S. Ct. at 2058). He further reasoned that "the posts were meant to stay private" and that "they would not have reached the school officials if one of the recipients of the original posts had not informed the school." *Id*. (citing *Mahanoy II*, 141 S. Ct. at 2058).

183. *First Amendment*, *supra* note 176, at 357. "Justice Alito stressed that, because of the weighty First Amendment issues, school officials should 'proceed cautiously' when looking to regulate off-campus speech." Gudorf, *supra* note 178, at 180 (quoting *Mahanoy*, 141 S. Ct. at 2059).

D. Dissenting Opinion

In dissent, Justice Thomas disagreed with the majority's opinion that B.L.'s speech was protected by the First Amendment. However, Justice Thomas chastised the Court for overriding the school's decision "without even mentioning the 150 years of history supporting the coach."[184] According to Justice Thomas, the Court left out an important detail of what authority a school has when it operates *in loco parentis.*[185] He also argued that the majority did not attempt to explain why the historical rule is not applicable in this case and failed to attempt to "tether its approach to anything stable."[186]

Justice Thomas first asserted that assessing free-speech rights should begin by looking to the rights of citizens during "'the time of [the Fourteenth Amendment's] ratification.'"[187] The cases from that time period show "that public schools retained substantial authority to discipline students[,]" especially at school.[188] State authority from this era, *Lander v. Seavers*, "also extended to when students were traveling to or from school."[189] Justice Thomas argued that it is "well settled that [schools] c[an] discipline students for off-campus speech or conduct" if it "had a proximate tendency to harm the school environment."[190] He viewed *Lander* as a "widespread" rule that serves as the basis not only "for schools to discipline disrespectful speech but also to regulate truancy."[191] Schools can justify regulating truancy because of "its proximate tendency to harm schools."[192] Justice Thomas believed that the *Lander* rule – that "[a] school can regulate speech when it occurs off campus, so long as it has a proximate tendency to harm the school, its faculty," students or programs – should be followed.[193]

Justice Thomas further argued that the majority failed to identify a reason to depart from the historical rule in *Lander*.[194] He reasoned that the purpose "of B.L.'s speech was 'to degrade the [program and cheerleading staff]' in front of 'other pupils'" and therefore had 'a direct and immediate tendency to . . . subvert the [cheerleading coach's]

184. *Mahanoy II*, 141 S. Ct. at 2059 (Thomas, J., dissenting).

185. *Id*.

186. *Id*.

187. *Id*. (quoting McDonald v. Chicago, 561 U.S. 742, 813 (2010)). In *McDonald*, Justice Alito explained that precedent holds that, under substantive due process, most Bill of Rights guarantees apply to the states if the right is fundamental to the nation's scheme of ordered liberty or deeply rooted in the nation's history and tradition. *McDonald*, 561 U.S. at 759-67.

188. *Mahanoy II*, 141 S. Ct. at 2059. *See Morse*, 551 U.S. at 419 (holding that schools may restrict student speech reasonably regarded as promoting illegal drug use).

189. *Id.* (citing *Lander*, 32 Vt. at 120). *See also* discussion *supra* Section II.A.1.

190. *Mahanoy II*, 141 S. Ct. at 2059.

191. *Id.* (citing *Lander*, 32 Vt. at 120). The *Lander's* court described speech as "acts of misbehavior." *Lander*, 32 Vt. at 120.

192. *Mahanoy II*, 141 S. Ct. at 2060.

193. *Id.* at 2061 (citing *Lander*, 32 Vt. at 120-21). The *Lander* test focuses on the effect of speech, not its location. *Lander*, 32 Vt. at 124-25.

194. *Mahanoy II*, 141 S. Ct. at 2061.

authority.'"[195] He argued that the coach had the authority to discipline B.L. and that the modern doctrine supported this as well.[196] He also pointed out that "'[t]he penalties imposed . . . were unrelated to any political viewpoint' or religious viewpoint."[197] Schools have "well settled" authority to regulate and punish "vulgar" speech.[198]

Next, Justice Thomas argued that "student-speech cases are untethered from any textual or historical foundation" and that the court chose "intuition over history" in regard to student speech.[199] He argued that the Court abandoned the doctrine of *in loco parentis* "without even mentioning it."[200] The Court here declared that "it ha[d] been the unmistakable holding of this Court for almost 50 years' that students have free-speech rights in[] schools."[201] Yet, the cases cited by the majority do not support that.[202] Justice Thomas explained that the cases which *Tinker* relies on "concerned the right of parents and private schools, not students."[203] The majority opinion "acknowledge[d] that schools act *in loco parentis* when students speak on campus[,]" yet "fail[ed] to address the historical contours of that doctrine, whether the doctrine applies to off-campus speech, or why the Court has abandoned it."[204]

Justice Thomas also contended that the majority ignored relevant analysis.[205] He argued that "[t]he *Lander* test focuses on the effect of speech, not its location[,]" and that this test should be applied to B.L.'s speech.[206] The majority also "fail[ed] to consider whether schools will have *more* authority" to address student speech through social media

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195. *Id*. (quoting *Lander*, 32 Vt. at 115, 120).

196. *Id.*

197. *Id*. (quoting *Fraser*, 478 U.S. at 685).

198. *Id.* (citing *Fraser*, 478 U.S. at 683-684). "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Fraser*, 478 U.S. at 683. "The determination of what manner of speech in the classroom or school assembly is appropriate properly rests with the school board." *Id.*

199. *Mahanoy II*, 141 S. Ct. at 2061.

200. *Id.* at 2062. *See Tinker*, 393 U.S. 503 (holding that schools must justify punishing expressions of opinion by demonstrating that the prohibited conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of a school).

201. *Mahanoy II*, 141 S. Ct. at 2062 (quoting *Tinker*, 393 U.S. at 507).

202. *Morse*, 551 U.S. at 420 n.8 (Thomas, J., concurring) (explaining that the cases cited by the *Tinker* Court do not support the notion that students have free speech rights in schools; distinguishing *Meyer* – which involved a student free speech challenge against a private school and that the *Tinker* majority relied upon – as providing "absolutely no support for the proposition that free-speech rights apply within schools operated by the State . . ."). *See also Meyer*, 262 U.S. 390 (1923) (declaring unconstitutional a law that prohibited the teaching of the German language).

203. *Mahanoy II*, 141 S. Ct. at 2062 (citing *Morse*, 551 U.S. at 420 n.8) (Thomas, J., concurring)).

204. *Id.*

205. *Id*.

206. *Id. See Lander*, 32 Vt. at 120 (holding that the right to punish lies with the parents and the school master did not have the authority to punish the child for an act that occurred away from school).

because of how that speech "can be received on campus."[207] Lastly, he argued that the majority "uncritically adopts the assumption that B.L.'s speech, in fact was off-campus."[208] The majority failed to acknowledge the fact that when "it is foreseeable and likely that speech will travel onto campus, the school has a stronger claim of treating it as on-campus speech."[209]

Justice Thomas concluded that the Court took a common-law approach to *Mahanoy* and "states just one rule: Schools can regulate speech less often when that speech occurs off campus."[210] Yet, it left "this case as an 'example' and 'leav[es] for future cases' the job of developing this new common-law doctrine."[211] The majority's opinion lacked foundation from "anything stable, and courts (and schools) will almost certainly be at a loss as to what exactly the Court's opinion today means."[212] As the Court provided insufficient constitutional justification to depart from the doctrine of *in loco parentis*, Justice Thomas dissented.[213]

IV. PERSONAL ANALYSIS

In *Mahanoy*, the majority focused on how the school's interests were not enough to overcome B.L.'s First Amendment Rights.[214] The dissent then highlighted how the majority failed to address the intersection of student speech and social media.[215] After analyzing the majority and dissenting opinion, it is apparent that the Court missed an opportunity to carve out an additional exception to *Tinker* for student speech transmitted through social media. Therefore, the Supreme Court should adopt a new social media exception to the *Tinker* test if another student speech case is granted certiorari.

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207. *Mahanoy II*, 141 S. Ct., at 2062 (emphasis in original) (noting that off-campus speech made through social media platforms "can be received on campus (and can spread rapidly to countless people), it will often have a greater proximate tendency to harm the school environment than will an off-campus in person conversation.").

208. *Id.* at 2063 (noting that a school would have "*in loco parentis* authority over a student (and can discipline him) when he passes out vulgar flyers on campus – even if he created them at home but received on campus.").

209. *Id*. (highlighting that "[t]here is little evidence that B.L.'s speech was received on campus."). The cheerleading coach, in fact, did not view B.L.'s speech but rather a *copy* of the speech (a screenshot) created by another student. *Id.* The dissent also differentiated B.L.'s speech from that in *Porter v. Ascension Parish School Bd*., where a student accidentally brought a sibling's sketch to school years after it was made, and that this is not speech that is likely to be received on campus. *Id.*; Porter v. Ascension Parish School Bd., 393 F. 3d 608, 611 (2004).

210. *Mahanoy II*, 141 S. Ct. at 2063.

211. *Id*. (noting the likely confusion in courts and school due to the majority's failure to set out a clear rule regarding student speech and social media (quoting *id.* at 2046 (majority opinion))).

212. *Id.*

213. *Id.*

214. *Id.* at 2047 (majority opinion).

215. *Id.* at 2062-63 (Thomas, J., dissenting).

Here, the majority broke down the school's interests in punishing B.L.'s speech into three parts and ultimately, found none of them convincing enough to overcome B.L.'s First Amendment rights.[216] Yet, the Supreme Court did not set forth any sort of express or defined rule on how to approach student speech situations moving forward.[217] According to the dissent, the majority set forth but one rule: schools are able to "regulate speech less often" when it does not occur on campus.[218] Justice Thomas highlighted how this rule will not help Courts decide student speech issues in the future.[219]

The majority reached the correct conclusion in holding that the school violated B.L.'s First Amendment Rights. However, the dissent was also correct in that it failed to establish a rule capable of serving as sound legal precedent to aid in future student speech cases. Perhaps most significantly, the majority failed to focus on what set *Mahanoy* apart from previous student speech precedent – student speech that is transmitted through social media applications.

As Justice Thomas pointed out in his dissenting opinion, the majority failed to consider whether schools will have more authority to address student speech through social media because of how it can be received on campus.[220] Social media applications present a unique challenge to the world of student speech and First Amendment rights in schools.[221] The use of social media applications is at an all-time high and new applications are constantly being created.[222] As the presence of social media

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216. *Id.* at 2047-48 (majority opinion). First, the school advanced its "interest in teaching good manners and consequently in punishing the use of vulgar language that is aimed at part of the school community." *Id.* at 2047. The Court stated that this interest was weakened because B.L.'s speech took place on her own time and off-campus. *Id.* The school did not present any evidence of any efforts "to prevent students from using vulgarity outside of the classroom" and therefore, "the school's interest in teaching good manners was not sufficient . . . to overcome" B.L.'s freedom of expression. *Id.* Second, the school argued "it was trying to prevent disruption . . . within the bounds of a school-sponsored extracurricular activity." *Id.* However, there was "no evidence . . . of" any "sort of 'substantial disruption' of a school activity" in this case that would justify the school's actions under *Tinker's* standard. *Id.* Third, the school expressed "a concern for team morale." *Id.* Yet there was no evidence that suggested a serious decline in team morale because of B.L.'s speech. *Id.* The majority stated that "simple 'undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression.'" *Id.* (quoting *Tinker*, 393 U.S. at 508).

217. *Id.* at 2063 (Thomas, J., dissenting).

218. *Id.*

219. *Id.*

220. *Id.* at 2062 (noting that social media posts can "spread rapidly" due to the nature of modern technology, often with "a greater proximate tendency to harm the school environment than . . . off-campus in person conversation.").

221. *Id*. (stating that "[u]nlike *Tinker*, which involved a school's authority under a straightforward fact pattern, this case involves speech made in one location but capable of being received in countless others—an issue that has been aggravated exponentially by recent technological advances."). The dissent was concerned that the majority's focus on speech *location* as opposed to its *effect*, is unsustainable "[b]ecause speech travels" and thus schools "may be able to treat" student speech as on-campus speech, even if it occurs off-campus. *Id.* at 2062-63.

222. Max J. Coppes, *Teens and Social Media: When is it too much?*, UNIV. NEV. RENO

applications continues to grow, they continue to present further issues in student speech cases, which is why the Court's failure to address the intersectionality here was a missed opportunity to resolve this growing concern.

With this rise of social media and the internet, the location of speech becomes less important. It is the *context* of the speech that is important and what courts should be focusing on. In looking at the context of the speech, it is essential to consider the situation or environment where the speech occurs and the intended audience of the speech. Justice Thomas' dissenting opinion focused on this as he stated the *Lander* test should have been applied to B.L.'s speech.[223] Applying the *Lander* test to the facts of *Mahanoy*, the focus would not be on where B.L. posted but rather on her speech's effect.[224] B.L.'s speech was received on campus and caused an effect on students and coaches at the school.[225] However, as the majority pointed out, the effect B.L.'s speech had on the school community was not enough to overcome her First Amendment Rights.[226]

Similar to that of the *Lander* test, the *Tinker* test established that in order to punish expression of opinion, the prohibited conduct must "materially and substantially interfere with the requirements of appropriate discipline in the operation of a school."[227] The *Tinker* test also focused on the effect of the speech and where it was received and not so much on where the speech took place.[228] Applying the *Tinker* test to B.L.'s speech, the majority found no substantial disruption occurred because of B.L.'s speech.[229]

The majority focused on the *Tinker* test, while the dissent focused on the *Lander* test.[230] Both of these tests focus more so on the content and the impact of the speech. However, they both fail to create a clear rule in

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SCH. MED. (Jan. 23, 2019), www.med.unr.edu/news/archive/2019/coppes-teens-and-social-media [perma.cc/7M97-VN2C]. As of 2019, "90 percent of teenagers use social media" and "approximately 75 percent have at least one active social media profile by age 17." *Id.* Further, "over two-thirds of teens have their own mobile devices with internet capabilities" which allows them to have to have access to social media that differs greatly to that of different generations. *Id.*

223. *Id.* at 2059-61 (referencing the test in *Lander*, which focuses more on the speech itself and not its location). *See also Lander*, 32 Vt. at 120 (holding that the right to punish lies with the parents and the school master did not have the authority to discipline the student for remarks made away from the schoolroom).

224. *Mahanoy II*, 141 S. Ct. at 2062.

225. *Id*. (explaining in reaction to B.L.'s speech "several cheerleaders and other students approached the cheerleading coached while 'visibly upset' about B.L.'s posts."). During that same week, questions about B.L.'s posts carried over into an "algebra class taught by one of the two [cheerleading] coaches." *Id. See also* discussion *infra* Section II.C.

226. *Mahanoy II*, 141 S. Ct. at 2048 (majority opinion).

227. *Tinker*, 393 U.S. at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (holding that schools must justify punishing expressions of opinion by demonstrating that the prohibited conduct would "materially and substantially" interfere with the school's appropriate discipline requirements).

228. *Id*.

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

230. *Id*.

terms of addressing student speech via social media applications.

In two cases where student speech via social media applications was at issue, the lower courts reverted to applying the *Tinker* test. In *J.S. ex rel Snyder v. Blue Mountain School District*, the Third Circuit applied *Tinker* and found that ridiculing the school principal online did not create a substantial disruption.[231] In *T.V. v. Smith-Green Community High School Corporation*, the District Court for the Northern District of Indiana also reverted to *Tinker*, because it is the only applicable precedent to deal with online student speech, and held that there was no substantial disruption.[232]

Courts have consistently used *Tinker* to address various student speech claims and the *Tinker* test has acquired various exceptions in its application.[233] Yet, there has been no exception for social media.[234] In analyzing *Mahanoy*, the Court missed an opportunity to specifically address social media student speech. The majority should have used *Mahanoy* to extend the *Tinker* test to student speech that occurs via social media applications.

The proposed extension of *Tinker* to social media will protect student speech that is posted or transmitted through social media unless it causes a substantial disruption to students and school organizations, and is harmful to students, school organizations or the school community. Extending *Tinker* to apply to social media speech puts the safety of students and the safety of the school environment at the forefront, while not infringing on a student's First Amendment Rights to free speech. Courts and school administrators have valid concerns for protecting the school environment from the effects of students' off-campus social media and "cyberspeech."[235] Social media and cyber speech increase the window of opportunity for bullies to act.[236] Bullies' actions follow students outside of school as texts and posts can be sent all day, they last forever, and they can be shared amongst many.[237] Social media's effect on cyberbullying creates a pressing concern for schools as they have a responsibility to

231. *Blue Mountain*, 650 F.3d at 930, 941 (holding that the Myspace profile did not create even a reasonably foreseeable risk of substantial disruption and stating, "[i]f *Tinker's* black armbands – an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war – could not 'reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,' neither can J.S.'s profile, despite the . . . humiliation it caused [the principal]" (quoting *Tinker*, 393 U.S. at 514)).

232. *Smith-Green*, 807 F. Supp. 2d at 781 (discussing the lack of precedent concerning expressive conduct taking place off school grounds and not during a school activity when confronted with students posting provocative photos on the Internet). The *Smith-Green* court held that the speech was entitled to First Amendment protection because it "had a particularized message of crude humor likely to be understood by those they expected to view the [photos]." *Id.* at 776.

233. *Tinker*, 393 U.S. at 503 (referencing how the cases that followed *Tinker* applied its rule and created various exceptions to the *Tinker* test).

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

235. Rieger, *supra* note 74, at 726.

236. Araujo, *supra* note 26, at 333.

237. *Id*.

ensure a safe learning environment. These concerns include both the protection of students' and faculty members' well-being and reputations from the effects of student cyber speech, alongside the promotion of an orderly school environment.[238]

In *Mahanoy*, B.L.'s speech simply expressed her frustration with not making the varsity cheerleading team.[239] Applying the proposed disruption-harm exception to B.L.'s speech, B.L.'s speech did not cause a substantial disruption to students or the school, nor was it harmful; therefore, her speech was protected and the school's punishment of B.L. was not justified.[240] If B.L. had made a threat in her Snapchat directed to the team or a threat to an individual student, then under the disruption-harm exception, that speech would not be protected and B.L.'s punishment would have been warranted.[241]

The proposed disruption-harm exception would protect a school's interest in ensuring the safety of students and the school community without infringing on student speech rights or infringing upon a school being a "nursery of democracy."[242] This exception would punish student speech over social media only when it crosses the line and disrupts the school community and puts the safety of students or student organizations in question. This exception also takes into consideration the protection of student speech and strikes a balance so that students are still able to speak freely.[243] If a student is simply expressing frustration or discussing a school event on social media, as B.L. did here, their speech should be protected. On the other hand, if a student threatened to harm an individual student via social media, this speech must be regulated. It is imperative that students can speak freely, and social media is the platform where most speech takes place in this day and age.[244] But if student speech through social media causes a

238. *Id*.

239. *Mahanoy II*, 141 S. Ct. at 2043. The Court noted that B.L.'s speech upset fellow cheerleaders but did not actually cause any sort of substantial disruption. *Id.* at 2047-48.

240. *Id*.

241. *See, e.g.*, Araujo, *supra* note 26, at 334. For example, Nicole Edgington was celebrating her seventeenth birthday when she started receiving text messages that called her offensive names after she was mistakenly identified by classmates as the one who alerted school officials of intoxicated students. *Id*. She then became the "target of school-wide cyberbullying campaign executed through text messages and Facebook." *Id.* Nicole became terrified by the threats she received, "humiliated by the joint effort of the entire school" and her feelings of self-worth were negatively impacted as a result. *Id.* The school did nothing other than offer her condolences. *Id.* This would be an example where the disruption-harm test would allow the school to discipline the students involved in the harm done to Nicole. *Id.*

242. *Id.* at 2045.

243. A large percentage of minors' speech occurs off campus, but online, so it is capable of being received on campus. Liptak, *supra* note 82. Judicial decisions that permit schools to regulate off-campus speech give schools the authority "to reach into any student's home and declare critical statements verboten, something that should deeply alarm all Americans." *Id.*

244. David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, AM. BAR ASS'N (Feb. 27, 2023, 1:38PM),

substantial disruption or contains a threat of any harm to any student, school organization, or the school community, that speech would not be protected under the disruption-harm exception and therefore be subject to regulation by the school officials.

The implications of implementing this type of exception would be positive. First, the disruption-harm exception would aid in reducing cyberbullying of students, teachers, and student organizations of a school. Social media applications play a large role in cyberbullying and allowing some regulation of student speech will aid in deterring this issue.[245] Second, the proposed exception would not infringe upon the First Amendment Rights of students and student speech. Some may view this exception as an infringement upon student's free speech rights, as it allows regulation of speech outside of school and on the student's own time. However, this exception does not regulate student speech in a way that would deprive students from exercising their First Amendment Rights. It will still allow for schools to be the nurseries of democracy and allow for free exchange of ideas and opinions. It will not, however, allow for student speech on social media applications that is substantially disruptive to the school community or student speech that becomes harmful to students, student organizations or the school community itself. Third, this exception will be easy to implement moving forward because it is clear when student speech goes too far. Here, B.L.'s speech she posted on her Snapchat story was not a situation that caused any disruption or potential harm to students or the school community. However, if B.L.'s speech included a threat to the cheerleading team or the school community, the school would be able to step in and discipline B.L. for her speech. It is imperative that the Court set forth a clear social media exception with the ever-continuing rise of social media and the strong presence it has in our school communities today.

The disruption-harm exception to the *Tinker* test will help future Courts decide cases dealing with student speech transmitted through social media. By extending *Tinker* to allow for a social media exception, the Court can properly address student speech issues for their content and its disruption or harmfulness to students and the school itself, and not focus on whether the student speech actually took place on campus.

V. CONCLUSION

In *Mahanoy*, the Supreme Court addressed whether or not a

www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/ [perma.cc/X8GC-JF2F] (noting that in 2018, "speech takes place online much more so than it does in traditional public forums such as public parks and streets.").

245. *See* Peter Suciu, *Cyberbullying Remains Rampant on Social Media,* FORBES (Dec. 30, 2022, 11:15 PM), www.forbes.com/sites/petersuciu/2021/09/29/cyberbullying-remains-rampant-on-social-media/?sh=188b421043c6 [perma.cc/52C8-4Q9Z] (discussing cyber bullying via social media).

student's First Amendment rights were violated after she was punished for posting a Snapchat image that criticized the school cheerleading team.[246] The majority opinion relied on *Tinker* and held that B.L. (1) did not create a substantial disruption; and (2) that the school's interests in punishing her speech did not outweigh her First Amendment Rights.[247] The dissent noted that the Court failed to address the relevant issue in this case – whether student speech that is transmitted through a social media platform is punishable by a public school.[248] By not addressing this aspect of the case at all, the Supreme Court left the question of how to address such speech going forward unanswered.[249]

To help resolve his issue, *Tinker* should be extended to create a disruption-harm exception for student speech through social media platforms. Student speech transmitted through social media platforms will not be protected by the First Amendment if the speech causes a substantial disruption and is harmful to students, student organizations and the school community itself. This rule puts the safety of students and the safety of the school environment at the forefront, without infringing on students' First Amendment Rights. With the rising prevalence of social media in school communities, the Court must create a clear rule to provide guidance and clarity for lower courts, students, and school districts when addressing student social media speech. Extending *Tinker* with a disruption-harm exception for social media does just that.

246. *Mahanoy II*, 142 S. Ct. at 2042-43.
247. *Id*. at 2047-48.
248. *Id*. at 2059 (Thomas, J., dissenting).
249. *Id*. at 2063.