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2-4-6-8 Who Do We Appreciate? The Third Circuit Scores a Touchdown for Student-Athlete Free Speech Rights

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COMMENTS

2-4-6-8, WHO DO WE APPRECIATE? THE THIRD CIRCUIT SCORES A TOUCHDOWN FOR STUDENT-ATHLETE FREE SPEECH RIGHTS

I. Introduction: Punishing Student-Athletes' Off-Campus Speech

The First Amendment is a continuous source of conflict within the public school context.[1] Schools wield vast discretionary authority to regulate student conduct.[2] However, schools are not totally immune from the dictates of the First Amendment.[3] Schools must comport with the First Amendment's commands, albeit in a limited way due to their unique position.[4] Students' social media presents unique free speech problems in public schools because schools have reached beyond the schoolhouse gate and disciplined students for off-campus remarks on social media.[5]

1. *Compare* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates."), *with id.* at 526 (Black, J., dissenting) ("I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.").

2. *See Tinker*, 393 U.S. at 507 (majority opinion) (noting Supreme Court has repeatedly upheld school's broad authority to "prescribe and control conduct in the schools").

3. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("[Boards of education] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.").

4. *See* Curtis G. Bentley, *Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education*, 2009 BYU Educ. & L.J. 1, 4 (2009) (arguing school's basic mission is to educate students in "essential democratic values of nonrepression and nondiscrimination").

5. *See* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020) [hereinafter *Mahanoy III*] ("[N]ew communicative technologies open new territories where regulators might seek to suppress speech they consider inappropriate, uncouth, or provocative."); Allison N. Sweeney, Note, *The Trouble with Tinker: An Examination of Student Free Speech Rights in the Digital Age*, 29 Fordham Intell. Prop. Media & Ent. L.J. 359, 365-66 (2018) (underscoring social media concerns in terms of assessing student free speech rights in light of ease of transmitting information); *see also* Chris Fry, *School Punishes Girl for Tweet From Home*, Courthouse News Serv. (Mar. 18, 2014), https://www.courthousenews.com/school-punishes-girl-for-tweet-from-home/ [https://perma.cc/7QS6-4BE7] (discussing school's decision to prohibit female student from attending prom and graduation because of vulgar Tweet); Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and*

Individuals have leveraged their publicity in order to promote messages for centuries.[6] Notably, Colin Kaepernick knelt during the National Anthem to protest police brutality, sparking criticism from some and praise from others.[7] This trend is not limited to the professional sports arena; even college athletes have used their platforms to promote social change.[8] As the next generation of this Nation's citizens, high school athletes have a stake in being able to use their platform to promote the messages they find most important.[9]

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the Regulation of Cyberbullying, 2016 UTAH L. REV. 831, 834 (2016) (arguing cyberbullying, even if entirely off-campus, deserves diminished First Amendment protections); *Watch What You Tweet: Schools, Censorship, and Social Media*, NAT'L COALITION AGAINST CENSORSHIP (Jan. 2, 2020), https://ncac.org/watch-what-you-tweet-schools-censorship-and-social-media [https://perma.cc/8W45-U3VD] (discussing fifteen instances when schools punished students for online, off-campus speech).

6. *See Martin Luther King Jr.*, NOBEL PRIZE, https://www.nobelprize.org/prizes/peace/1964/king/lecture/ [https://perma.cc/M3QH-WBWD] (last visited Feb. 3, 2021) (explaining Martin Luther King Jr.'s involvement as pastor and member of executive committee for NAACP); *Abolitionist Movement*, HISTORY (last updated Jan. 25, 2021), https://www.history.com/topics/black-history/abolitionist-movement [https://perma.cc/K9A4-PGZN] (listing famous abolitionists who used status and public image to promote anti-slavery movement). Women's rights advocacy, for example, has its roots in America's earliest years with some presence in England as well. *See* Allison Lange, *Women's Rights in the Early Republic*, NAT'L WOMEN'S RIGHTS MUSEUM (2015), http://www.crusadeforthevote.org/early-republic [https://perma.cc/Q99V-7Z3W] (explaining origins of early women's rights movement). Abigail Adams advocated for more stringent legal protections and recognitions for women and England's Mary Wollstonecraft wrote the groundbreaking *The Vindication of the Rights of Women*. *See id.*

7. *See* Euan McKirdy, *Colin Kaepernick Continues Kneeling Protest Ahead of 49ers Opener*, CNN (Sept. 13, 2016), https://www.cnn.com/2016/09/12/sport/colin-kaepernick-nfl-opening-day-reaction-trnd/index.html [https://perma.cc/FUN7-KCEC] (noting differing reactions from public figures and private citizens).

8. *See* Corbin McGuire, *College Athletes Using Platforms to Speak Out on Social Justice Athletes*, NCAA (Aug. 18, 2020), http://www.ncaa.org/about/resources/media-center/feature/college-athletes-using-platforms-speak-out-social-justice-issues [https://perma.cc/5YCG-G3NS] (highlighting how college athletes promote social justice following NCAA's new initiative educating athletes how to effectively use their platform to promote change); Greta Anderson, *On the Offensive and In the Lead*, INSIDE HIGHER ED (July 2, 2020), https://www.insidehighered.com/news/2020/07/02/athletes-push-and-achieve-social-justice-goals [https://perma.cc/7JGX-XDRX] (explaining how nationally ranked college running back used platform to urge Alabama to change state flag).

9. *See* Barry Svrluga, *Why Does It Matter When Athletes Speak Out? Just Ask the Kids.*, WASH. POST (Sept. 24, 2020), https://www.washingtonpost.com/sports/2020/09/25/athlete-activism-children/ [https://perma.cc/72MH-ATN2] (describing high school athletes' reactions to professional athletes using platforms to promote racial justice); *see also About Us*, SOUL, https://soulprograms.org/about-us/ [https://perma.cc/EDJ5-HWZN] (last visited Jan. 27, 2021) (highlighting Student-Athletes Organized to Understand Leadership's mission of promoting education and leadership values in high school athletes).

Exercises of free speech are consistently met with attempts to stifle or chill speech because the First Amendment protects uncomfortable, controversial, and even downright hateful speech.[10] High school sports teams have stirred controversy by disciplining student-athletes for off-campus speech violating team rules.[11] The Third Circuit stood against this troubling trend in *Mahanoy III* by reversing a school district's decision to uphold a cheerleader's suspension from the cheerleading squad for certain colorable, off-campus messages on Snapchat.[12] This trailblazing opinion starkly contrasts other Courts of Appeals' broad regulation of student speech regardless of where it originates, and may garner the Supreme Court's attention to finally determine whether the First Amendment protects off-campus speech.[13]

This Casenote discusses the Third Circuit's recent decision in *Mahanoy III;* explaining why its approach is most faithful to Supreme Court precedent and most protective of student-athlete free

10. *See Freedom of Expression - ACLU Position Paper*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/other/freedom-expression-aclu-position-paper [https://perma.cc/L7R5-GQDR] ("We should not give the government the power to decide which opinions are hateful, for history has taught us that government is more apt to use this power to prosecute minorities than to protect them."); *id.* ("Throughout the 19th century, sedition, criminal anarchy and criminal conspiracy laws were used to suppress the speech of abolitionists, religious minorities, suffragists, labor organizers, and pacifists.").

11. *See* Chris Fore, *Top 5 Issues Getting Student-Athletes In Trouble On Social Media*, COACH FORE, (Aug. 28, 2020), http://coachfore.org/2020/08/28/top-5-issues-getting-student-athletes-in-trouble-on-social-media/ [https://perma.cc/V3X8-HQ65] (surveying around two hundred high school coaches and finding 43% punished students based on their social media posts); *High School That Dismissed Cheerleader From Team for Private Tweets Not Liable for Violating Her Free Speech Rights*, ROGERS & MOORE (Feb. 6, 2020), https://rogersmoorelaw.com/high-school-that-dismissed-cheerleader-from-team-for-private-tweets-not-liable-for-violating-her-free-speech-rights/ [https://perma.cc/XA6E-ZHGV] (outlining recent Fifth Circuit's decision to remove student for violating cheerleading team's rules when coaches found several tweets with expletives on her profile page); *see also* 3 JAMES A. RAPP, EDUCATION LAW § 8.07(2)(b) (2020) (noting majority of states describe extracurriculars as privilege that school may revoke at any time).

12. *See* Mahanoy III, 964 F.3d 170 (3d Cir. 2020) (holding school may not regulate off-campus speech that does not use school resources or make observer believe school sponsored off-campus speech). For further discussion on *Mahanoy*'s holding, see *infra* notes 194-203 and accompanying text.

13. *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 394 (5th Cir. 2015) (en banc) (assuming school could punish off-campus student speech in certain circumstances); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 577 (4th Cir. 2011) (applying sufficient nexus test to uphold school's punishment of student for off-campus speech), *cert denied* 565 U.S. 1173 (2012); Wisniewski ex rel. Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007) (applying reasonable foreseeability test to justify school's punishment of off-campus speech).

speech rights.[14] Specifically, Section II discusses the history of Supreme Court student speech cases as well as various courts of appeals' approaches.[15] Next, Section III lays out the facts and procedural history surrounding *Mahanoy III*.[16] Section IV highlights the Third Circuit's decision and rationale.[17] Section V argues *Mahanoy III* was properly decided for student-athletes' First Amendment rights, but also made the only correct decision under applicable case law.[18] Finally, Section VI discusses the potential implications of the Third Circuit's decision and the prospects of eliciting a response from the Supreme Court.[19]

II. A BRIEF HISTORY OF STUDENT SPEECH JURISPRUDENCE

In 1791, the Founders amended the Constitution to include the Free Speech Clause, which provides that "Congress shall make no law. . . abridging the freedom of speech".[20] The Supreme Court did not regularly decide cases on the basis of the First Amendment until the early twentieth century when it applied it to the States.[21] The Nation's highest court has interpreted the First Amendment to prohibit the government from censoring offensive or controversial ideas.[22] In *Barnette*, the Supreme Court added public schools to the

14. For further discussion of the Third Circuit's compliance with *Tinker* and other student speech caselaw, see *infra* notes 211-247 and accompanying text.

15. For further discussion of different approaches to off-campus speech, see *infra* notes 60-125 and accompanying text.

16. For further discussion of facts and procedural history of *Mahanoy III*, see *infra* notes 126-145 and accompanying text.

17. For further discussion of the Third Circuit's holding that *Tinker* is inapplicable to off-campus speech, see *infra* notes 146-207 and accompanying text.

18. For further discussion and analysis of Third Circuit's faithfulness to student speech caselaw, see *infra* notes 211-262 and accompanying text.

19. For further discussion of the Third Circuit decision's impact and potential for Supreme Court resolution of circuit split, see *infra* notes 275-308 and accompanying text.

20. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress or grievances.").

21. *See* Abrams v. United States, 250 U.S. 616 (1919) (holding First Amendment does not protect handing out papers urging resistance to war effort); Debs v. United States, 249 U.S. 211 (1919) (holding First Amendment does not shield speech that disrupted war and draft effort); Schenck v. United States, 249 U.S. 47 (1919) (holding First Amendment does not protect speech advocating violent overthrow of government); *see also* U.S. CONST. amend. XIV, § 1, cl. 2 ("[N]or shall any state deprive any person of life, liberty, or property without due process of law"); Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming Fourteenth Amendment's Due Process Clause prevents states from violating First Amendment).

22. *See generally* McCullen v. Coakley, 573 U.S. 464, 476 (2014) ("In short, traditional public fora are areas [like public streets and sidewalks] that have histor-

list of places where individuals preserve their First Amendment rights.[23] At the height of the Vietnam War, the Supreme Court again faced a major public school speech case in *Tinker*.[24]

A. *Tinker*-ing with Tumultuous Times

In *Tinker*, the Supreme Court considered a challenge to a school's decision to suspend students who wore black armbands in opposition to the Vietnam War.[25] When school officials learned several students protested the war by wearing black armbands and fasted at school during the holiday season, they began suspending those who refused to remove the bands upon request.[26] The students sought an injunction against the policy, which the district court rejected and the Court of Appeals for the Eighth Circuit affirmed.[27]

The Supreme Court reversed, holding "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[28] The Supreme Court differentiated wearing black arm-

ically been open to the public for speech activities."); Virginia v. Black, 538 U.S. 343, 358 (2003) (holding government may not criminalize "even ideas the overwhelming majority of people find distasteful or discomforting"); Hill v. Colorado, 530 U.S. 703, 715 (2000) (describing public streets and sidewalks as "quintessential" public forums where speech may not be regulated absent regulation narrowly tailored to serve compelling governmental interest); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., dissenting) (discussing how state may not "prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believe to be false and fraught with evil consequence").

23. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."); *see also id.* at 631 (holding school's justifiably important role in promoting democratic values in students does not overcome students' First Amendment rights).

24. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (addressing peaceful student protest of American involvement in Vietnam War). For further discussion of *Tinker*, see *infra* notes 25-33 and accompanying text.

25. *See Tinker*, 393 U.S. at 504 (detailing facts giving rise to case before Supreme Court).

26. *See id.* (noting school's policy in response to students' plans to protest Vietnam War).

27. *See id.* at 504-05 (noting Eighth Circuit's divided *en banc* opinion affirming district court's denial of injunctive relief).

28. *Id.* at 506 (stating First Amendment restrictions apply to public school officials); *see also* Melissa C. Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 362-63 (2007) (recounting *Tinker*'s famous holding).

bands from other permissibly proscribable forms of expression because the students merely wore armbands.[29] The *Tinker* Court relied heavily on lack of disturbance in its opinion.[30] The Supreme Court declared "undifferentiated fear or apprehension of disturbance is not enough" to supersede students' free speech rights.[31] Moreover, school officials may not proscribe expression by "the mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[32] Ultimately, the Supreme Court held schools may only regulate speech that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[33]

B. Limited Expansions of School Authority

A trilogy of Supreme Court cases recognized limited areas where schools may regulate student expression outside of *Tinker*'s standards.[34] In *Bethel Sch. Dist. v. Fraser*,[35] the Supreme Court considered a First Amendment challenge to a school's suspension of a student who used sexual metaphor in his speech nominating another student for "student elective office."[36] The *Fraser* Court differentiated *Tinker* because the student's speech here interfered with "the work of the schools or the rights of other students."[37] *Fraser* recognized schools must be afforded authority to discipline student

29. *See id.* at 508 ("The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."). *But see id.* at 507-08 (maintaining school may regulate students' hair length or aggressive behavior).

30. *See id.* at 508-11 (noting only five out of eighteen thousand students were suspended and no classes were interrupted).

31. *See id.* (denying school's authority to regulate any expression whatsoever based on slightest apprehension); *see also* RAPP, *supra* note 11, § 9.04(2)(b)(i) (noting *Tinker*'s requirement of school showing more than undifferentiated fear).

32. *See Tinker*, 393 U.S. at 509 (emphasizing popularity of opinion may not serve as basis for regulating certain speech).

33. *Id.* (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (establishing appropriate standard for when schools may regulate student speech).

34. *See* Dickler, *supra* note 28, at 356 (noting trilogy of cases following *Tinker* with "each govern[ing] a different category of speech"); *see also* RAPP, *supra* note 11, § 9.04(2)(b)(i) ("The core principles of *Tinker* remain unaltered, but are tempered by several important decisions—[*Fraser*, *Kuhlmeier*, and *Morse*].") For further discussion of Supreme Court extensions to *Tinker*'s substantial disruption standard, see *infra* notes 35-52 and accompanying text.

35. 478 U.S. 675 (1986). For further discussion of *Fraser*, see *infra* notes 36-39 and accompanying text.

36. *See id.* at 677-78 (stating facts leading to student's suspension and noting various reactions to speech including embarrassment and teacher pausing scheduled lesson to discuss speech).

37. *See id.* at 680 (quoting *Tinker*, 393 U.S. at 508) (underscoring non-disruptive, passive message associated with wearing black armband); *see also* Dickler, *supra*

speech when it disrupts others' rights.[38] *Fraser* buttressed *Tinker*'s implicit holding: students' free speech rights "are not automatically coextensive" with those of adults.[39]

The next chapter in expanding school authority over student speech came with *Hazelwood Sch. Dist. v. Kuhlmeier*.[40] The Supreme Court considered whether school officials could constitutionally remove pages from "Spectrum," a school-funded, student-run newspaper.[41] The controversial issue included stories about student pregnancies and divorce's effects on some students.[42] The journalism teacher followed standard procedure in submitting the proposed issue to the principal, who published all but the divorce and pregnancy stories.[43]

The *Kuhlmeier* Court rejected the Eighth Circuit's argument that the school's actions violated the First Amendment because Spectrum was a public forum.[44] *Kuhlmeier* emphasized the school-supervised nature of Spectrum by holding schools may exercise "authority over school-sponsored publications, theatrical productions, and other expressive activities students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[45] The *Kuhlmeier* Court concluded schools may exercise "editorial control over the style and content of student speech in

note 28, at 365 (emphasizing *Fraser*'s focus on rights of others rather than substantial disrupting).

38. *See Fraser*, 478 U.S. at 681 (emphasizing school's important mission of inculcating civility and appropriate behavior in students).

39. *See id.* at 683 (holding schools may appropriately "prohibit the use of vulgar and offensive terms . . . in the classroom or in school assembly" (quoting New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985))). *But see Tinker*, 393 U.S. at 506 (implying First Amendment precepts protecting students are equivalent to those protecting adult teachers).

40. 484 U.S. 260 (1988). For further discussion of *Kuhlmeier*, see *infra* notes 41-46 and accompanying text.

41. *See Kuhlmeier*, 484 U.S. at 262-66 (describing main issue before Supreme Court and describing Spectrum as published through journalism class and entirely funded by school board).

42. *See id.* at 263 (discussing contents of last proposed issue of year).

43. *See id.* at 262-63 (discussing how principal was concerned with releasing identity of students in divorce story and lack of parental consent as well as concerns with delaying publication).

44. *See id.* at 267-70 ("[The school district] 'reserved the forum for its intended purpos[e],' . . . as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable matter. . . . [I]t is this standard, *rather than* our decision in *Tinker*, that governs this case." (emphasis added) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983))).

45. *Id.* at 271 (underscoring activity's designation as part of curriculum and teacher supervision that renders activity subject to school regulation).

school-sponsored expressive activities" if doing so is "reasonably related to legitimate pedagogical concerns."[46]

The trilogy concluded with *Morse v. Frederick*.[47] The Supreme Court upheld a principal's suspension of a student who refused to take down a banner promoting drug use as violative of the First Amendment.[48] Students could see the banner during a "school-sanctioned and school-sponsored event" and the principal believed it encouraged illegal drug use.[49] The *Morse* Court described the televised event as a school event because it took place during school hours, was "an approved social event or school trip," and the student stood with his peers.[50] The *Morse* Court affirmed the school's authority to regulate such messages because of the danger that drugs pose to students.[51] *Morse* justified a school's authority to "restrict student expression that they reasonably regard as promoting illegal drug use."[52]

C. Internet Speech and First Amendment Analyses

The Supreme Court has offered some clarification on how the internet affects the First Amendment amidst boundary issues.[53] In *Reno v. ACLU*, the Supreme Court analyzed a First Amendment challenge in the early years of the internet, noting its quickly expanding nature and wide availability to millions of people.[54] The

46. *Id.* at 273 (stating schools may exercise some control over expression conducted in school-sponsored venues); *see also* Dickler, *supra* note 28, at 368 (noting Court's additional exception to substantial disruption standard to less stringent standard comparable to rational basis review).

47. 551 U.S. 393 (2007). For further discussion of *Morse*, see *infra* notes 48-52 and accompanying text.

48. *See id.* at 396 (explaining principal's reaction to seeing large student-placed banner she believed promoted illicit drug use).

49. *See id.* at 396-97 (noting students unfurled banner reading "BONG HiTS 4 JESUS" during Olympic torch-bearing event that passed by school as camera crews passed by).

50. *See id.* at 400-01 (justifying decision to classify case as school speech case).

51. *See id.* at 402, 407-08 (noting two reasonable interpretations of banner promoting illegal drug use and citing increasing dangerousness of drugs across country).

52. *Id.* at 408 (holding school officials may regulate student speech promoting illicit drug use because of important governmental interest in curtailing childhood drug use); *see also* Dickler, *supra* note 28, at 356 (restating *Morse*'s holding).

53. *See* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (considering First Amendment challenge to punishing sex offenders who accessed website where offender knew minor children could become members or create personal webpage); Reno v. ACLU, 521 U.S. 844 (1997) (considering First Amendment challenge to two provisions criminalizing knowing transmission of sexually explicit material to minors).

54. *See Reno*, 521 U.S. at 852-53 ("From the publishers' point of view, [the internet] constitutes a vast platform from which to address and hear from a world-

Supreme Court aligned itself with prior precedent that no separate or different method of analysis governed Internet speech because the Internet makes individuals "town criers."[55]

In *Packingham v. North Carolina*, the Supreme Court reaffirmed First Amendment analyses should not change simultaneously with the expansion of the digital age.[56] After acknowledging the importance of the internet and social media in the exchange of ideas, *Packingham* proceeded to apply traditional First Amendment analyses to the speech at issue.[57] *Reno* and *Packingham* argue courts should address free speech claims involving the internet with particular reliance on established First Amendment principles and only slight context-specific modifications.[58]

D. Taking a Swing at It: Circuit Court Applications and Expansions of Supreme Court Groundwork

The Supreme Court laid significant groundwork on the various dimensions of student speech cases.[59] Federal appellate courts have heard cases with fact patterns that do not neatly align with any specific Supreme Court case, particularly in the off-campus speech domain.[60] Various circuits have carved out special off-campus exceptions to Supreme Court caselaw because the Supreme Court has not spoken on the subject since *Morse*.[61] Most courts apply a rea-

wide audience of millions of readers, viewers, researchers, and buyers."); *id.* at 868 (describing Internet as "vast democratic forum").

55. *See id.* at 870 (holding Supreme Court precedent supports conclusion to not carve out qualification to internet speech as specific forum).

56. *See Packingham*, 137 S. Ct. at 1736 ("[T]he Court must exercise extreme caution before suggesting the First Amendment provides scant protection for access to vast networks in that medium.").

57. *See id.* at 1736-38 (applying traditional First Amendment intermediate scrutiny test for content-based speech restrictions).

58. *See Mahanoy III*, 964 F.3d at 180 (3d Cir. 2020) (describing lesson of both cases as requiring courts to "carefully adjust and apply—but not discard—our existing precedent").

59. *See, e.g.*, RAPP, *supra* note 11, § 9.04(2)(b) (noting *Tinker*'s substantial disruption standard applies where *Fraser*, *Kuhlmeier*, and *Morse* do not). For further discussion of Supreme Court precedent laying out student speech cases, see *supra* notes 25-52 and accompanying text.

60. *See* Stephen Wermiel, *Tinker at 50: Student Activism on Campus: Tinkering with Circuit Conflicts Beyond the Schoolhouse Gate*, 22 U. PA. J. CONST. L. 1135, 1136 (2020) (expressing one judge's concern for clarity on student speech from Supreme Court). For further discussion of different circuits' student speech tests and holdings, see *infra* notes 60-125 and accompanying text.

61. *See generally* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1149 (9th Cir. 2016) ("Each of these leading cases [*Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*], however, concerns only a school's ability to regulate students' *on-campus* speech. Whether and how these precedents apply to off-campus speech are questions the Supreme Court has yet to answer.").

sonable foreseeability or sufficient nexus test, or apply *Tinker* without articulating a specific standard.[62]

1. *Saw It Coming a Mile Away: Reasonable Foreseeability*

Many circuit courts apply the reasonable foreseeability test in off-campus student speech cases.[63] The Second Circuit laid out this standard in *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*[64] In *Wisniewski*, a student used an instant messaging system to create a picture of a handgun firing a bullet through a teacher's head with blood spatters as his icon with the words "Kill Mr. VanderMolen" in the background.[65] The student was charged with "endangering the health and welfare of other students and staff," and was suspended for a month.[66]

The Second Circuit argued even if *Tinker* applied, the student's speech was unprotected speech and "constitute[d] student conduct that pose[d] a reasonably foreseeable risk that the icon would come to the attention of the school" and cause a substantial disruption.[67] *Wisniewski* held the student's off-campus speech did not insulate him from school discipline.[68] If a reasonable person could foresee the speech reaching school officials with the risk of causing a substantial disruption, then school officials may regulate it.[69] Applying its new reasonable foreseeability test, the Second Circuit concluded

62. *See, e.g.,* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565 (4th Cir. 2011) (applying sufficient nexus test); Wisniewski ex rel. Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007) (adopting reasonable foreseeability test). For further discussion of the Third Circuit's criticism of these approaches, see *infra* notes 185-193 and accompanying text.

63. For further discussion of the reasonable foreseeability test, see *infra* notes 64-82 and accompanying text.

64. *See Wisniewski*, 494 F.3d at 34 (establishing reasonable foreseeability test).

65. *Id.* at 35-36 (noting Mr. VanderMolen was student's English teacher and student's actions were in response to school's recent zero-tolerance policy on threats of violence).

66. *Id.* (noting hearing officer's decision icon was threatening and violated school rules and recommending suspension).

67. *Id.* at 38-39 (justifying school's authority to regulate unprotected speech regardless of whether *Tinker* applies).

68. *See id.* at 39 ("The fact that [the student's] creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline.").

69. *See id.* (holding reasonably foreseeable that student's icon would reach school officials); *see also* Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) (supporting contention off-campus speech can satisfy *Tinker*'s substantial disruption standard).

the threatening nature and "extensive distribution of" the icon made it reasonably foreseeable to reach the school.[70]

In *Doninger v. Niehoff*,[71] the Second Circuit relied on *Wisniewski* to consider whether a student's off-campus blog post created a foreseeable risk of a substantial disruption of school environment.[72] The controversy arose from rumors the school would be cancelling an event, called "Jamfest," which student council members helped plan.[73] Plaintiff posted on her blog, encouraging other students to "piss [the principal] off" because "Jamfest [was] cancelled due to douchebags in central office."[74] When the principal discovered the blog post, she "effectively prohibited" the student from running for office during her senior year.[75] The student filed suit in district court alleging the school had violated her First Amendment rights.[76]

Surprisingly, *Doninger* found the on-versus off-campus distinction irrelevant to determining a school's authority to regulate speech.[77] Applying *Wisniewski*'s first prong, the court concluded it was reasonably foreseeable that the student's speech would reach school because the student attempted to motivate students into calling the principal.[78] The court found the school district had satisfied *Tinker* and the reasonable foreseeability test for several reasons.[79] Specifically, the student's use of "potentially incendiary language" was offensive and disruptive to the school environment because the student's misleading blog led to confusion within the

70. *Id.* at 39-40 (stating fifteen students over three weeks saw icon).

71. 527 F.3d 41 (2d Cir. 2008) (relying on *Wisniewski*'s reasonable foreseeability test).

72. *See id.* at 43 (considering whether *Tinker* applied to off-campus speech through *Wisniewski*).

73. *Id.* at 44 (describing dispute that brought case before court).

74. *Id.* at 45 (reproducing student's blog post). For further discussion of how this blog post and other off-campus speech are different than B.L.'s Snap, see *infra* notes 292-296 and accompanying text.

75. *Doninger*, 527 F.3d at 46 (noting principal's refusal to officially acknowledge student's candidacy).

76. *See id.* at 46-47 (explaining student's civil action against school).

77. *See id.* at 48-49 ("[T]erritoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority." (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring in result))).

78. *See id.* at 50 (stating student, although posting online and off-campus, knew and intended blog post to reach school). For further discussion of *Wisniewski*'s first reasonable foreseeability prong, see *supra* notes 67-70 and accompanying text.

79. *See Doninger*, 527 F.3d at 50-52 (satisfying *Wisniewski*'s reasonable foreseeability test).

school.[80] Additionally, the court held schools may revoke the privilege of participation in extracurricular activities if the student violates an activity's rules.[81] The *Doninger* court concluded the student's First Amendment rights were not violated because her speech was reasonably foreseeable to reach the school and cause a substantial disruption within the school.[82]

2. *All About Making Connections: Sufficient Nexus*

Under the second approach, courts ask if the controversial speech is "closely tied to the school" and uphold school authority to regulate off-campus speech if it there is a sufficient nexus to a school's legitimate pedagogical concerns.[83] In *Kowalski*, a student had created a MySpace page alleging another student had a sexually transmitted disease.[84] When the page came to their attention, school officials declared the page a "hate website," held that it violated the school's harassment policy, and suspended the student who created the page.[85]

Applying the sufficient nexus test, the *Kowalski* court asked whether the speech concerned the school's interest in "maintaining

80. *See id.* at 50-51 (noting blog post contained language that caused reasonably foreseeable disruption to school environment).

81. *Id.* at 52 (supporting school's argument that extracurricular activities are privileges subject to broader school disciplinary authority).

82. *See id.* at 50, 53 (concluding student's speech was not protected by First Amendment because it was reasonably foreseeable to reach school and cause substantial disruption). The Eighth Circuit has applied the reasonable foreseeability test to off-campus racial harassment. *See* S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012) (holding blog was targeted at school and would cause reasonably foreseeable substantial disruption). The Eighth Circuit upheld a school's suspension of two students who created a blog containing racist comments towards other students. *Id.* at 773-74 (noting blog posts contained racist and sexist comments about other students). Because the court found the blog to be directed at the school, it found the blog's off-campus nature and content irrelevant. *Id.* at 778 ("The parties dispute the extent to which the Wilsons' speech was 'off-campus,' but the location from which the Wilson's spoke may be less important than the District Court's finding that the posts were directed at [the school]."). The Ninth Circuit applied the test in upholding a school's suspension of students who had sexually harassed another student in an off-campus park. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1151-52 (9th Cir. 2016) (holding harassment satisfied reasonable foreseeability test because it was "so closely connected to campus").

83. *See, e.g., C.R.*, 835 F.3d at 1150 ("Although the harassment at issue in this case took place off school property, it was closely tied to the school."); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (justifying school's punishment of student whose speech contained sufficient nexus to school's pedagogical interests).

84. *See Kowalski*, 652 F.3d at 567-68 (highlighting content of student's MySpace page).

85. *Id.* at 568-69 (noting school's suspension decision based on school policy).

order in the school and protecting the well-being and educational rights of its children."[86] The court supported a school's interest in disciplining harassment or bullying in both *Tinker* and a Third Circuit case applying it.[87] Classifying anti-bullying sentiment as having a sufficient nexus to the school's "pedagogical interest," the *Kowalski* court upheld the school's authority to regulate off-campus speech.[88]

Other circuits have applied the nexus test.[89] In *Wynar*, the Ninth Circuit held a student's off-campus harassment of other students, was nonetheless subject to school discipline because there was a sufficient nexus to the school.[90] Specifically, the *Wyynar* court emphasized the harassment exclusively involved students from the same school.[91] However, *Wynar* tailored a school's off-campus speech regulation to "identifiable threat[s] of school violence."[92]

In *C.R.*, the Ninth Circuit applied the nexus test to off-campus harassment and held a school may regulate such speech.[93] The Ninth Circuit found it especially relevant that only students were involved and the incident occurred on a path leading to the school minutes after school ended (though, still off school property).[94] Additionally, the court stated the school may exercise "*in loco parentis* authority" to concern itself with "students' well-being as they begin their homeward journey at the end of the school day."[95] The

86. *Id.* at 571 (framing issue of off-campus speech in terms of whether it affects school's educational mission having satisfied reasonable foreseeability test).

87. *See id.* at 572 (citing DeJohn v. Temple Univ., 537 F.3d 301, 319-20 (3d Cir. 2008)) (highlighting school's interest with speech like bullying or harassment impacting students in school).

88. *Id.* at 573 (stating bullying as related to school's pedagogical interests subject to regulation).

89. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) (applying nexus test to part of its reasoning); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1068 (9th Cir. 2013) (identifying nexus test as one of two viable off-campus speech tests).

90. *See Wynar*, 728 F.3d at 1069 (finding direct nexus to school).

91. *See id.* (finding participation of same school's students having direct nexus to school).

92. *Id.* (holding schools may discipline off-campus student speech that threatens school violence).

93. *See C.R.*, 835 F.3d at 1150-51 (finding sufficient nexus to school). For further discussion of facts of *C.R.* and its use of reasonable foreseeability test, see *supra* notes 82-83 and accompanying text.

94. *See C.R.*, 835 F.3d at 1150-51 (noting specific factual factors tending to show nexus to school environment).

95. *Id.* at 1151 (citing Veronica Sch. Dist. 47J v. Action, 515 U.S. 646, 654-56 (1995); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986)) (listing relevant factors in finding nexus to school). *But see* Thomas v. Bd. of Educ., 607 F.2d 1043, 1051 (2d Cir. 1979) (rejecting school's *in loco parentis* authority over students after school hours).

C.R. court upheld the school's authority to regulate such off-campus harassment.[96]

3. *Tough Call: Tinker Just Applies*

Other circuit courts have not utilized either of the aforementioned tests, applying *Tinker* to off-campus speech without any specific test.[97] In *Bell*, the Fifth Circuit considered a First Amendment challenge to a school's disciplinary action against a student who composed, published, and distributed rap video alleging sexual harassment by two coaches at the school.[98] School officials took disciplinary action against the student when they discovered the video referenced shooting both coaches.[99] The Fifth Circuit determined the case presented special facts and circumstances that did not clearly fit within any of the Supreme Court's exceptions.[100]

The *Bell* court upheld the student's suspension because of the increased prevalence of school violence and school officials' role in protecting students and teachers from threats of violence.[101] The Fifth Circuit rejected the student's argument that *Tinker* does not apply to off-campus speech because *Tinker* does not place proper weight on technological advances.[102] The court also cited Fifth Circuit precedent that considered a speaker's intent for their speech to reach the school in applying *Tinker* to off-campus speech.[103] Applying *Tinker*, the Fifth Circuit determined the student's speech

96. *See C.R.*, 835 F.3d at 1153, 1155 (affirming district court's grant of school's motion for summary judgment).

97. *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 383 (5th Cir. 2015) (en banc) (assuming, without deciding, *Tinker* applies to off-campus speech). For further discussion of circuits applying *Tinker* to off-campus speech without a particular test, see *infra* notes 98-104 and accompanying text.

98. *See Bell*, 799 F.3d at 383-84 (discussing student's reason for producing rap video).

99. *See id.* at 384-85 (noting video contained references to shooting coaches and how coach found video and relayed it to school's principal).

100. *See id.* at 391-92 (citing Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 771-72 n.2 (5th Cir. 2007)) (noting case did not fall neatly within *Fraser*, *Kuhlmeier*, or *Morse*, but nonetheless believed *Tinker* applied to violent threats).

101. *See id.* at 393 (highlighting rise of school violence and school officials' special role given these circumstances).

102. *See id.* (contending technological advances mooted student's argument that *Tinker* does not apply to off-campus speech).

103. *See id.* at 394-95 (citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 611 (5th Cir. 2004)) ("A speaker's intention that his speech reach the school community, buttressed by his actions in bringing about that consequence, supports applying *Tinker*'s school-speech standard to that speech.").

constituted a substantial disruption, upholding the student's suspension.[104]

E. The Third Circuit's Off-Campus Speech Caselaw

Amongst the many different approaches, the Third Circuit also had its fair share of off-campus speech cases.[105] In 2011, the full Third Circuit twice rejected exercises of school authorities' discipline against off-campus speech that included minimal school resources and relatively minor connection to the schools.[106] Both cases involved students creating a fake MySpace profile page, criticizing school officials with vulgar language.[107] However, each case contains specific facts that require individual explanations.[108]

In *Layshock*, a student created demeaning and offensive MySpace profiles and posted pictures negatively depicting their principal.[109] The student created the "parody profile" while at his "grandmother's house during non-school hours" and copied and pasted the principal's picture into the profile from the school district's website.[110] Several students accessed the profile in school despite attempts to block the page from the school's computers.[111] When the school identified the profile's author, the school district found him guilty of several discipline code violations and sus-

104. *See id.* at 398 (classifying student's speech as foreseeably causing substantial disruption within school and affirming school's suspension of student).

105. *See, e.g.,* J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011) (en banc), *cert denied*, Blue Mt. Sch. Dist. v. J.S., 565 U.S. 1156 (2012) (holding *Tinker* inapplicable to off-campus speech); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216, 219 (3d Cir. 2011) (en banc), *cert denied sub nom.* Blue Mt. Sch. Dist. v. J.S., 565 U.S. 1156 (2012) (holding *Tinker* and *Fraser* inapplicable to off-campus speech).

106. *See, e.g., Layshock*, 650 F.3d at 214-16 (holding mere fact speech was directed at school community not enough to permit school regulation or discipline).

107. *See J.S.*, 650 F.3d at 920 ("The profile contained adult language and sexually explicit language."); *Layshock*, 650 F.3d at 207-08 (noting profile's vulgar and offensive content).

108. *Compare Layshock*, 650 F.3d at 207-09 (noting several students accessed page on school computer and directly mentioned principal), *with J.S.*, 650 F.3d at 920-21 (noting no school computer ever accessed page and page never explicitly referenced principal). For further discussion surrounding facts of *Layshock*, see *infra* notes 109-113 and accompanying text. For further discussion of *J.S.*'s factual background, see *infra* notes 114-116 and accompanying text.

109. *See Layshock*, 650 F.3d at 207-08 (explaining factual background).

110. *See id.* (highlighting only school resource student used was principal's picture on school district website).

111. *See id.* at 209 (detailing school's investigation of profile's origins and attempts to block profile from access within school).

pended him.[112] The district court granted summary judgment in the student's favor; the school district appealed.[113]

In *J.S.*, two students created a MySpace profile about their principal, without explicitly referencing the principal or the school, and included many sexually explicit references and the principal's official school district photograph as the profile picture.[114] The publicly available profile was later made available only to the students' friends, and no computer in the school ever accessed the profile and the profile only entered the school at the principal's express request.[115] The district court granted the school district's motion for summary judgment after the principal suspended the student for causing a substantial disruption in the school.[116]

The Third Circuit delivered its opinions on these cases on the same day, affirmed the district court's judgment as to whether the school could regulate off-campus speech in *Layshock*, and reversed in *J.S.*.[117] In *Layshock*, the court rejected the school's argument that the student established a sufficient nexus with the school when he used the principal's picture from the school district's website.[118] Similarly unsuccessful was the school district's argument that it could regulate off-campus speech aimed at the school and reasonably foreseeable to come to school officials' attention.[119]

In *J.S.*, the Third Circuit held *Tinker* did not allow the school to punish the off-campus speech because the MySpace profile was "so

112. *See id.* at 209-10 (noting school suspended student for ten days, prohibited him from participating in extracurricular activities, and forbade him from participating in his graduation ceremony).

113. *See id.* at 210-11 (detailing lower court's judgment).

114. *See* J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 920-21 (3d Cir. 2011) ("The profile contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family.").

115. *See id.* at 921 (noting student changed profile accessibility after several students complimented profile and referencing principal's request for another student to bring printout of profile into school).

116. *See id.* at 921-23 (explaining district court's decision that off-campus speech fell under hybrid of *Fraser* and *Morse*).

117. *See J.S.*, 650 F.3d at 933-36 (reversing district court's grant of summary judgment for school district but affirming court's summary judgment for school district on overbreadth claims); *Layshock*, 650 F.3d at 219 (affirming summary judgment for student).

118. *See Layshock*, 650 F.3d at 214-16 (holding First Amendment prohibits school from "stretching its authority into Justin's grandmother's home and reaching Justin while he is sitting at her computer after school hours"); *id.* at 214 (noting school district did not contest lack of substantial disruption under *Tinker*).

119. *See id.* at 216-19 (rejecting school district's use of three cases allowing schools to regulate off-campus speech because each case involved speech that caused substantial disruption).

ridiculous" it could not have caused a substantial disruption and the student "did not even intend for the speech to reach the school."[120] Furthermore, the court rejected the argument that *Fraser* justifies punishing the students for their vulgar off-campus speech because students are afforded the same constitutional rights as adults outside the school context.[121] In both cases, the Third Circuit expressly held *Fraser* does not apply to off-campus speech and *Tinker*, as always, prohibits regulating off-campus speech that does not substantially create a reasonably foreseeable disruption.[122] Furthermore, the Third Circuit explained *Tinker* does not apply solely to political speech.[123] To the contrary, *Kuhlmeier* allows schools to regulate speech a reasonable observer would perceive as "the school's own speech," and Supreme Court precedent demonstrates *Tinker* is a general rule "subject to several *narrow* exceptions."[124] The Third Circuit also highlighted Alito's *Morse* concurrence where he advocated against a broad application of student speech caselaw to regulate any speech that may interfere with a school's "educational mission" whatsoever.[125]

120. *J.S.*, 650 F.3d at 928-31 (holding *Tinker* did not apply because there was no substantial disruption or sufficient nexus to school).

121. *See id.* at 932-33 ("The School District's argument fails at the outset because *Fraser* does not apply to off-campus speech. Specifically in *Morse*, Chief Justice Roberts, writing for the majority, emphasized '[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.'"); *see also* Morse v. Frederick, 551 U.S. 393, 405 (2007) (citing Cohen v. California, 403 U.S. 15, 26 (1971)) (relying upon idea that state government may not punish vulgar speech in public forum).

122. *See Layshock*, 650 F.3d at 214, 219 (reciting *Tinker*'s holding and holding *Fraser* does not apply to off-campus speech); *J.S.*, 650 F.3d at 926 (assuming *Tinker* applied and finding no substantial or material disruption); *see also J.S.*, 650 F.3d at 933 ("Under this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school authorities find the remark 'offensive.'").

123. *See J.S.*, 650 F.3d at 929-30 (holding less sensitive topics than opposing Vietnam War during school hours still entitled to First Amendment protection).

124. *Id.* at 933 (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211-12, 215-17 (3d Cir. 2001) ("Since *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption.")).

125. *Id.* at 927 (quoting *Morse*, 551 U.S. at 425 (Alito, J., concurring)) (cautioning expansion of Supreme Court precedent to include flexible standard of speech regulation).

III. HOW THE THIRD CIRCUIT GOT HERE: FACTS AND PROCEDURAL HISTORY

The Mahanoy Area School District is located in Schuylkill County, Pennsylvania in Mahanoy City.[126] Betty Lou ("B.L.") was a freshman when she made and joined the junior varsity cheerleading squad.[127] Before B.L. tried out in May for next school year's cheerleading squad, she was required to read, sign, and abide by the "Cheerleading Rules."[128] The "Cheerleading Rules" prohibited "foul language and inappropriate gestures," as well as "negative information regarding cheerleading, cheerleaders, or coaching placed on the Internet."[129]

B.L. tried out again for next year's varsity squad and, much to her chagrin, made the junior varsity squad again.[130] Frustrated, she took a "selfie" of her raising her middle finger alongside a friend at a local store outside of the high school's campus.[131] B.L. captioned the Snap with "f*** school f*** softball f*** cheer f*** everything" and posted it to her private account where around two-hundred fifty of her Snapchat friends could have seen the Snap.[132] A fellow cheerleader brought the Snap to the coaches' attention.[133] Believing the Snaps were inappropriate, non-cheerleading students at B.L.'s school also brought the Snap to the coaches' attention.[134]

126. *See* B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 432 (M.D. Pa. 2017) [hereinafter *Mahanoy II*] (describing school district's location).

127. *See id.* (stating B.L. tried out for cheer squad after joining high school as freshman).

128. *See id.* ("Coaches [Nicole] Luchetta-Rump and [April] Gnoll adopted these Rules from their predecessor and did not need the District's permission to adopt or enforce them.").

129. *Id.* ("These rules—the 'Cheerleading Rules' or 'Rules'—state: 'Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures.'" (citation omitted)).

130. *See* B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 610 (M.D. Pa. 2017) [hereinafter *Mahanoy I*] (describing how B.L. had been involved in cheerleading since fifth grade and helped fundraise for cheerleading program); *see also Mahanoy III*, 964 F.3d at 175 ("To add insult to injury, an incoming freshman made the varsity team.").

131. *Mahanoy II*, 376 F. Supp. 3d at 433 (describing Snapchat as application that allows users to send temporary texts, pictures, or videos to others and noting B.L. was wearing street clothes in Snap).

132. *See id.* (expletives omitted) (noting many of B.L.'s Snapchat friends were fellow cheerleaders at her high school and B.L. posted another non-profane Snap expressing frustration shortly after first Snap).

133. *See id.* (noting coaches' daughter took screenshot of B.L.'s Snap to report it to coaches).

134. See *id.* ("Several students, 'both cheerleaders and non-cheerleaders[,] approached Coach Luchetta-Rump to express their concerns that the Snaps were

The coaches suspended B.L. from the team for a year for violating the team's rules.[135]

B.L.'s father appealed the coaches' decision to the school board who ultimately declined to get involved.[136] B.L. filed suit in district court seeking a temporary restraining order and preliminary injunction against the school district.[137] The district court granted B.L.'s preliminary injunction motion.[138] The school district and B.L. both moved for summary judgment.[139] B.L. advanced several claims under 42 U.S.C. Section 1983, specifically that the coaches violated B.L.'s First Amendment rights when they suspended her from the team, the "Cheerleading Rules" were overbroad and viewpoint-discriminatory, and the "Cheerleading Rules" were unconstitutionally vague.[140]

The district court held B.L. had not waived her First Amendment 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."[141] The district court also concluded *Tinker* and *Morse* did not apply because B.L.'s speech was off-campus speech and "had not caused any actual or foreseeable substantial disruption of the school environment."[142]

inappropriate. . . . [S]tudents were visibly upset and voiced their concerns to [Coach] Luchetta-Rump repeatedly for several days.'"). For further discussion of how B.L.'s Snap did not cause substantial disruption and factual distinctions from cases where other circuits found substantial disruption, see *infra* notes 248-262 and accompanying text.

135. *Mahanoy II*, 376 F. Supp. 3d at 433 (noting coaches would not have suspended B.L. had she not referenced cheerleading program).

136. *See id.* (indicating school board's refusal to get involved).

137. *See id.* (showing B.L.'s parents filed suit in District Court for Middle District of Pennsylvania seeking injunctive and declaratory relief).

138. *See id.* ("[Judge Caputo] issued the [temporary restraining order] pending resolution of the preliminary injunction. . . . [A]fter holding a hearing, [Judge Caputo] issued a preliminary injunction, finding that, among other things, B.L. was likely to succeed on the motions.").

139. *See id.* (noting school district responded to B.L.'s complaint, each party engaged in discovery, and both parties filed summary judgment motions).

140. *See* 42 U.S.C. § 1983 (1871) ("Every person who, under color of any statute . . . or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."); *see also Mahanoy III*, 964 F.3d 170, 176 (3d Cir. 2020) (restating B.L.'s arguments before district court).

141. *See Mahanoy III*, 964 F.3d at 176 (recounting district court's holding).

142. *See id.* (noting district court's rejection of school district's arguments relying on two Supreme Court school speech cases to justify B.L.'s suspension); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding school may prohibit use of on-campus vulgar or offensive student speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding schools may lawfully regulate speech that materially and substantially interferes with school's discipli-

Ultimately, the district court determined the school district violated B.L.'s First Amendment rights by disciplining her off-campus speech and required the school to expunge her disciplinary record.[143] The school district appealed to the U.S. Court of Appeals for the Third Circuit.[144] The Third Circuit affirmed the district court in holding B.L.'s speech was protected speech and she had not waived her First Amendment rights by agreeing to abide by the team's rules.[145]

IV. THE THIRD CIRCUIT STEPS UP TO THE PLATE (AGAIN)

Circuit Judge Krause, writing for the panel, started by identifying a "vital distinction" impacting students' free speech rights: on-campus and off-campus speech.[146] The Third Circuit discussed how schools have felt emboldened to regulate online student speech with the concomitant rise of social media.[147] The Court narrowed the plethora of issues presented on appeal down to whether B.L.'s Snap was protected speech, and, if so, whether B.L. waived her free speech rights.[148]

A. B.L. Engaged in Off-Campus Speech

First, the Third Circuit surveyed relevant student speech caselaw, analyzed whether B.L.'s speech was on- or off-campus, and decided whether the school district was justified in punishing

nary mission). For further discussion of *Tinker* and *Fraser*, see *supra* notes 25-39 and accompanying text.

143. *See Mahanoy III*, 964 F.3d at 176 (noting district court's decision to not consider B.L.'s other claims because her First Amendment rights were not violated).

144. *See id.* (noting school district appealed to Third Circuit following judgment in B.L.'s favor).

145. *See id.* (explaining Third Circuit's judgment).

146. *See id.* at 175 ("We 'defer to the school[ ]' when its 'arm of authority does not reach beyond the schoolhouse gate,' but when it reaches beyond that gate, it 'must answer to the same constitutional commands that bind all other institutions of government.'" (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1044-45 (2d Cir. 1979))).

147. *See id.* at 175, 179 (acknowledging technological revolution complicates distinguishing between on- and off-campus speech and opining on school officials' increased desires for regulatory expansion); *see also* Harriet A. Hader, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. REV. 1563, 1563 (2009) (highlighting school's decision to punish student for using blog, exclusively at home, to criticize school's administrators).

148. *See Mahanoy III*, 964 F.3d at 176 ("The briefs here are a testament to that complexity [of First Amendment jurisprudence], citing a wealth of cases involving not only student speech, but also public employee speech, obscenity, indecency, and many other doctrines."). For further discussion of protected speech and waiver issues, see *infra* notes 204-207 and accompanying text.

B.L.[149] The Third Circuit proceeded to distinguish its approach from other circuit courts' approaches.[150] Finally, the *Mahanoy* III court decided whether B.L. waived her free speech rights by agreeing to the team's rules.[151] The Third Circuit vindicated student-athlete free speech rights, holding schools may not regulate off-campus speech that does not bear a school's imprimatur, use school resources, or involve school supervision and agreeing to vague rules do not constitute waivers of First Amendment rights.[152]

The Third Circuit began by explaining students' free speech rights exist in much more than just the classroom.[153] The Third Circuit explicitly recognized these rights were limited and schools may regulate substantially disruptive speech under *Tinker*.[154] The court notes where *Tinker* applies schools must either specifically identify a potential disruption, or "answer to the same constitutional commands that bind all other institutions of government."[155] The majority concluded its overview of student speech rights by explaining the post-*Tinker* trilogy's holdings before finding that students' free speech rights are "coextensive with adults outside of these limited exceptions."[156]

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149. *Mahanoy III*, 964 F.3d at 177 (explaining court's method of analysis for first issue of whether B.L.'s Snap was protected speech).

150. *See id.* at 186-91 (outlining other circuits' approaches, issues with those approaches, and why this court's approach is most appropriate). For further discussion of other circuits' approaches and the Third Circuit's reasoning, see *infra* notes 185-203 and accompanying text.

151. *Mahanoy III*, 964 F.3d at 192-94 (holding B.L. did not waive her First Amendment rights because her conduct was outside of team rules' scope). For further discussion of whether B.L. waived her free speech rights by agreeing to team rules, see *infra* notes 204-207 and accompanying text.

152. *Mahanoy III*, 964 F.3d at 189 (explaining why Third Circuit did not apply *Tinker* to off-campus speech).

153. *See id.* ("[Students' free speech rights] extend to all aspects of 'the process of attending school,' whether 'in the cafeteria, or on the playing field, or on the campus during authorized hours.'" (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969))).

154. *See id.* (arguing schools' educational mission accords school authorities with some latitude to regulate speech that would "substantially and materially interfere with the requirements of appropriate discipline in the operation of the school" (quoting *Tinker*, 393 U.S. at 509)).

155. *See id.* at 178 ("Where *Tinker* applies, a school may prohibit student speech only by showing 'a specific and significant fear of disruption.'") (quoting J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) (en banc)).

156. *Id.* at 178 (quoting *J.S.*, 650 F.3d at 932) (stating Bill of Rights provides students with same protections as adults outside school context); *see also id.* "In each of three later cases [*Fraser*, *Kuhlmeier*, and *Morse*], the Court identified a limited area in which schools have leeway to regulate student speech without meeting *Tinker*'s substantial disruption standard."). For further discussion of post-*Tinker* trilogy, see *supra* notes 34-52 and accompanying text.

The Third Circuit argued while a school's authority may reach beyond the school building, it may not extend into students' homes.[157] The court identified the important challenge of demarcating a school's boundaries to determine where a school's authority to regulate student speech ends.[158] The Third Circuit reaffirmed courts must apply traditional free speech analyses in light of the Internet's "vast democratic forums."[159] The court believed it had to establish a clear test for *Tinker*'s applicability to off-campus speech.[160] The *B.L.* panel stated that speech does not become on-campus speech solely because it reached the school's attention, nor does speech that mentions the school establish a sufficient nexus with the school.[161] Therefore, B.L.'s speech was off-campus.[162]

157. *See Mahanoy* III, 964 F.3d at 178 (noting physical building limitation view fails to recognize extent of schools' educational mission but no-limits view would seriously diminish students' free speech rights).

158. *See id.* at 179 ("[T]he Supreme Court, on defining the scope of schools' authority, has consistently focused on the extent to which schools control or sponsor the forum or the speech."); *id.* at 180 (noting court's difficult task in carefully delineating workable standard identifying school's regulatory boundaries especially during digital revolution).

159. *See Mahanoy III*, 964 F.3d at 180 (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)) ("In applying the First Amendment to this technology, the Court was careful not to discard existing doctrines. . . . [T]he lesson from *Reno* and *Packingham* is that faced with new technologies, we must carefully adjust and apply—not discard—our existing precedent.").

160. *See id.* (recognizing difficult, but necessary, task of identifying boundary between on- and off-campus speech to address student concerns in light of social media's pervasiveness).

161. *See id.* ("*J.S.* and *Layshock* yield the insight that a student's online speech is not rendered 'on campus' simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment."); *see also* J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011) (en banc) ("[T]he fact that another student printed J.S.'s [MySpace] profile [making fun of the school's principal] and brought it to school at the express request of [the principal] does not turn J.S.'s off-campus speech into on-campus speech."); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (holding student's use of school principal's photograph from school district's website in fake MySpace profile shown as belonging to principal was not enough to transform his speech into on-campus speech). *But see* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (finding schools may regulate student speech others might reasonably perceive as bearing school's imprimatur); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986) (holding schools may regulate student vulgarity and lewdness if done in school-sponsored forum).

162. *See Mahanoy III*, 964 F.3d at 180-81 (resolving threshold issue by holding B.L.'s speech took place off-campus).

B. The School's Punishment Violated B.L.'s First Amendment Rights

After classifying B.L.'s speech as off-campus, the Third Circuit then considered, and summarily rejected, the school district's two arguments justifying B.L.'s punishment.[163] The school district first argued *Fraser* and other First Amendment precedence justified its decision to punish B.L.[164] Next, the school district argued *Tinker* justified its decision.[165]

1. *Fraser and Other First Amendment Doctrines Did Not Justify B.L.'s Punishment*

The school district argued *Fraser* permits schools to prohibit "vulgar, lewd, obscene, or plainly offensive speech in order to promote student civility.[166] The school district further argued *Fraser* permits schools to regulate speech when it involves an extracurricular activity, regardless of whether B.L.'s speech was on- or off-campus.[167] However, the court rejected the school district's novel argument that *Fraser* extends to extracurricular-related speech because its precedent limits a school's ability to regulate vulgar or obscene student speech to only on-campus speech.[168]

The Third Circuit also found the balancing tests intrinsic in Fourth Amendment reasonableness analyses incompatible to the First Amendment's strictures.[169] Furthermore, the government's

163. *See id.* at 181-86 ("We next ask whether the First Amendment allowed the School District to punish B.L. for her off-campus speech.").

164. *See id.* at 181 (identifying school district's first argument based on *Fraser*). For further discussion of Third Circuit's rejection of *Fraser* argument, see *infra* notes 166-168 and accompanying text.

165. *See Mahanoy III*, 964 F.3d at 181 (identifying school district's second argument based on *Tinker*). For further discussion of Third Circuit's rejection of *Tinker* argument, see *infra* notes 176-184 and accompanying text.

166. *See Mahanoy III*, 964 F.3d at 180-81 ("Under *Fraser*, such speech 'receives no First Amendment . . . protection *in school*.'" (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213 (3d Cir. 2001))).

167. *See id.* (arguing *Fraser* should be applied to extracurricular activities); *see also* Mahanoy Area Sch. Dist., FACEBOOK (Mar. 25, 2019, 2:15 PM) https://www.facebook.com/MahanoyAreaSchoolDistrict/posts/2344545778930110 [https://perma.cc/84MF-GUJR] ("The basic premise is simple, extra-curricular activates [sic] are privileges to be earned rather than rights to be guaranteed.").

168. *See Mahanoy III*, 964 F.3d at 181 ("To prevail under *Fraser*, therefore, the School District must explain why *J.S.* and *Layshock* do not supply the decision as rule [limiting *Fraser* to on-campus speech] . . . [W]e are unpersuaded."); *id.* (noting Third Circuit's previous citation to Second Circuit opinion implying less First Amendment protection to students engaged in extracurriculars did not suggest agreement with Second Circuit's holding).

169. *See Mahanoy III*, 964 F.3d at 182 ("The First Amendment, however, abhors 'ad hoc balancing of relative social costs and benefits.'" (citing United States

interest in suppressing speech related to extracurricular activities did not outweigh students' free speech rights.[170] The court also rejected the school district's argument that team members must comply with the coaches' demands unless their speech involved matters of public concern.[171] The school district's argument that speech directed towards minors was entitled to less First Amendment protection also failed.[172] Finally, the panel emphasized its unwavering reliance on *J.S.* and *Layshock* in maintaining *Fraser* only applies to on-campus speech, whether or not extracurricular activities are involved.[173] The Third Circuit noted any form of school discipline for student expression implicates the First Amendment.[174] Overall, *Fraser* did not permit the school to discipline B.L. for her off-campus speech.[175]

2. *Tinker Did Not Justify B.L.'s Punishment*

Failing to convince the Court *Fraser* applied, the school district argued *Tinker* authorized the school to punish B.L. because B.L.'s

v. Stevens, 559 U.S. 460, 470 (2010))); *id.* (holding Fourth Amendment analyses inapplicable and incompatible with First Amendment analyses); *see also* Josh Blackman, *The First Amendment and Balancing Tests*, http://joshblackman.com/blog/2010/04/20/the-first-amendment-and-balancing-tests/ [https://perma.cc/LRA8-7QXQ] (Apr. 20, 2010) (explaining *Stevens* rejected government's contention First Amendment requires weighing of social costs and benefits).

170. *See Mahanoy III*, 964 F.3d at 182 (holding due process weighing test inapplicable to First Amendment analysis even when involving so-called privilege of extracurricular participation); *see also* Br. of Amicus Curiae Found. for Indiv. Rights in Educ., *Mahanoy III*, 964 F.3d 170, at 11-12 (Aug. 28, 2019), (arguing Fourteenth Amendment analysis is incompatible with First Amendment claims).

171. *See Mahanoy III*, 964 F.3d at 182-83 (rejecting public concern exception, typically applied to government employees, for student speech cases); *id.* at 183 ("[S]tudents' free speech rights are not limited to matters of public concern."); *see also* David L. Hudson Jr., *Public Employees, Private Speech: 1st Amendment Doesn't Always Protect Government Workers*, AM. BAR ASS'N. J. (May 1, 2017), https://www.abajournal.com/magazine/article/public_employees_private_speech [https://perma.cc/3N8K-ES7Y] (explaining matters of public concern only applies to employees who speak not on private grievances, but on matters important for public at-large).

172. *See Mahanoy III*, 964 F.3d at 192 (rejecting school district's argument relying on *sui generis* case of vulgar content on radio station "uniquely accessible to children." (quoting FCC v. Pacifica Found., 438 U.S. 726, 749 (1978))).

173. *See id.* at 182-83 ("What was 'unseemly and dangerous' about the efforts to apply *Fraser* to off-campus speech was not the punishments the students received, but that those punishments were used to 'control' students' free expression in an area traditionally beyond regulation.") (quoting Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2010)).

174. *See id.* at 183 ("Thus, whatever the school's preferred mode of discipline, it implicates the First Amendment so long as it comes in response to the student's exercise of free speech rights.").

175. *See id.* (concluding *Fraser* did not authorize B.L.'s punishment for off-campus speech).

speech would have substantially disrupted the school's cheerleading program.[176] Reaffirming B.L.'s Snap was off-campus, the court had to determine whether *Tinker* applies to off-campus speech.[177] The Third Circuit had previously avoided addressing this issue, deciding student speech cases by referencing *Fraser* or "assum[ing], without deciding" *Tinker*'s applicability to off-campus speech.[178]

The *Mahanoy III* court justified delineating *Tinker's* applicability to off-campus speech with three reasons.[179] First, the court concluded the traditional norm of avoiding constitutional issues where possible was not feasible in this particular instance.[180] Second, the *Mahanoy III* court highlighted social media's ever-expanding confusion among circuit and district courts.[181] The panel felt it was necessary to affirmatively decide the issue because "no dominant approach has developed" and district courts have grown increasingly frustrated with lacking guidance.[182] Third, the court believed remaining neutral on the issue would exacerbate uncertainties re-

176. *See id.* ("The School District falls back on *Tinker*, arguing that B.L.'s snap was likely to substantially disrupt the cheerleading program.").

177. *See id.* ("We therefore confront the question whether *Tinker* applies to off-campus speech.").

178. *See id.* at 183-84 (quoting J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011)) (noting *J.S.* court had assumed so because it found school had not shown substantial disruption); *see also Layshock*, 650 F.3d at 216 (holding *Fraser* inapplicable to off-campus student speech). For further discussion of *J.S.* and *Layshock*, see *supra* notes 105-125 and accompanying text

179. *See Mahanoy III*, 964 F.3d at 184 (justifying its decision to decide on *Tinker*'s applicability to off-campus speech for three reasons).

180. *See id.* (resolving issue without deciding whether *Tinker*'s applicability would leave several important questions unanswered for students engaged in extracurricular activities); *see also* Guerrero-Sanchez v. Warden York Cty. Prison, 905 F.3d 208, 222, n.11 (3d Cir. 2018) ("Indeed, the entire purpose of the canon [of constitutional avoidance] is to avoid reaching the merits of the constitutional issue." (citing Santana Prods., Inc. v. Bobrick Washroom Equip., Inc. 401 F.3d 123, 130-31 (3d Cir. 2005))); FCC v. Fox TV Stations, Inc., 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.").

181. *See Mahanoy III*, 964 F.3d at 185 (opining recent circuit court decisions have still not taken proper account of social media expansion and district courts have no dominant test to rely on, frustrating some courts' off-campus student speech cases); *see also* Dunkley v. Bd. of Educ., 216 F. Supp. 3d 485, 492-93 (D. N.J. 2016) (rejecting applicability of Third Circuit precedent to off-campus student speech case and applying Fourth Circuit precedent instead).

182. *See Mahanoy III*, 964 F.3d at 185 ("All the while, we have relegated district courts in this Circuit to confronting this issue without clear guidance, prompting them to turn elsewhere for support . . . and to voice their growing frustration. . . . [A]s one of our district judges put it, 'a district court in this Circuit takes up a student off-campus speech case for review with considerable apprehension and anxiety.'") (quoting R.L. ex rel. Lordan v. Cent. York Sch. Dist., 183 F. Supp. 3d 625, 635 (M.D. Pa. 2016)).

garding boundaries of student speech which would ultimately chill student speech altogether.[183] For these three reasons, the Third Circuit concluded *Tinker* did not apply to off-campus speech, analyzing other circuit courts' approaches and explaining their preferred method.[184]

C. Critiquing Other Circuit's Approaches

The Third Circuit identified and summarily scrutinized the three different approaches.[185] First, the *Mahanoy III* court underscored the extraordinary circumstances under which the leading reasonable foreseeability case was decided and its wide-ranging application to harassment.[186] Next, the court identified the "sufficient nexus" test as an impermissibly sweeping, policy-based argument regarding a school's educational mission to prevent harassment.[187] Finally, the court pointed out a series of decisions in which no definitive test was created for *Tinker*'s applicability for off-campus student speech as unhelpful.[188]

Although the Third Circuit expressed admiration for addressing the increasing prevalence of off-campus student speech cases, it

183. *See id.* ("Finally, while legal uncertainty of any kind is undesirable, uncertainty in this context creates unique problems. Obscure lines between permissible and impermissible speech have an independent chilling effect on speech." (citation omitted)); *see also* Ashcroft v. ACLU, 535, U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech with the First Amendment's vast and privileged sphere.").

184. *See Mahanoy III*, 964 F.3d at 185 ("The time has come for us to answer the question. We begin by canvassing the decisions of our sister circuits. We then consider the wisdom of their various approaches, tested against *Tinker*'s precepts. Finally, we adopt and explain our own, concluding that *Tinker* does not apply to off-campus speech and reserving for another day the First Amendment implications of off-campus student speech that threatens violence or harasses others.").

185. *See id.* at 186-87 (describing reasonable foreseeability, sufficient nexus, and application of *Tinker* without particular standard or test). For further discussion of other circuits' approaches, see *supra* notes 63-104 and accompanying text.

186. *See Mahanoy III*, 964 F.3d at 186 (citing Wisniewski ex rel. Wisniewski v. Bd. of Educ., 494 F.3d 34, 35-39 (2d Cir. 2007)) (explaining how student created image of teacher with pistol shooting bullet through teacher's head and how it was reasonably foreseeable for image to reach school authorities and cause substantial disruption under *Tinker*); *see also* Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008) (relying on *Wisniewski* in concluding blog post urging students to harass principal constituted substantial disruption).

187. *See Mahanoy III*, 964 F.3d at 186 (citing Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 572 (4th Cir. 2011)) (noting *Kowalski* justified its decision based on school's supposed mission to prevent harassment and bullying).

188. *See id.* at 186-87 (citing Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 394 (5th Cir. 2015); Wynar v. Douglas Cty. Sch. Bd., 728 F.3d 1062, 1069 (9th Cir. 2013)) (explaining those decisions explicitly refused to develop specific rule to determine whether *Tinker* covers off-campus speech but nonetheless upheld school punishment of off-campus speech under *Tinker*).

found the other circuit courts' decisions "unsatisfying in three respects."[189] First, courts applying the reasonable foreseeability standard have done so reflexively without considering the specific facts that justified the standard.[190] Second, other circuits' approaches were impermissibly overbroad and dangerous to students' free speech rights, especially in light of social media.[191] Third, the court begrudged the great confusion the disparate approaches to off-campus speech has caused for students, teachers, and administrators alike.[192] Overall, other circuits' approaches "sweep in too much speech and distort *Tinker*'s narrow exception into a vast font of regulatory authority."[193]

D. Home Run: The Third Circuit's Approach

The Third Circuit set out why its approach was not only necessary, but far more clear-cut than other inadequate, confusing, and impermissibly broad approaches.[194] The court held "*Tinker* does not apply to off-campus speech—that is, speech outside school-

189. *See Mahanoy III*, 964 F.3d at 187 (sympathizing with other circuits' decisions but being ultimately unsatisfied by scope of their holdings).

190. *See id.* (criticizing courts for applying rules from factually distinct patterns to dissimilar, nonviolent contexts).

191. *See id.* (arguing other courts' approaches delegated too much authority to school officials to regulate student speech and opining on pre-social media age where off-campus speech rarely would reach school authorities and, therefore, not cause reasonably foreseeable disruption); *id.* at 188 (citing Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011)) (expressing concern that schools may manipulate sufficient nexus test to sweep any off-campus speech into its regulatory jurisdiction and blur *Tinker*'s key focus on school context); *see also* Katherine A. Ferry, Comment, *Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech*, 49 LOY. U. CHIC. L.J. 717, 751-54 (2018) (highlighting overbreadth and discretionary abuse by school officials as most prevalent concerns with reasonable foreseeability test).

192. *See Mahanoy III*, 964 F.3d at 188 ("Third, other circuits' approaches have failed to provide clarity and predictability. This is true for those that have declined to adopt a rule . . . leaving 'students, teachers, and school administrators' without 'clear guidance.'") (quoting Longoria v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 265 (5th Cir. 2019)); *id.* (emphasizing other circuits' approaches made it difficult for students to predict whether their speech was protected, arguing students exercise minimal control over their information's destination when it is relayed over social media).

193. *Mahanoy III*, 964 F.3d at 188-89 (noting court's disapproval of other circuit courts' approaches because they regulate far more speech than permissible).

194. *See id.* at 187, 189 (opining on commendable, yet unsatisfactory, efforts of other circuits and court's decision to "forge [its] own path"); *see also* Sarah A. Gober, *Third Circuit Clarifies Free Speech Rights of Public School Students*, SCARINCI HOLLENBECK (Sept. 3, 2020), https://scarincilawyer.com/third-circuit-clarifies-free-speech-rights-of-public-school-students/ [https://perma.cc/8WLV-F77Q] (explaining how Third Circuit "clarified how existing precedent will be applied to social media").

owned, -operated, or -supervised channels and not reasonably interpreted as bearing the school's imprimatur."[195] The court believed its holding was in line with *Tinker*, most adequately defended students' free speech rights, and cleared the confusion the other circuits have caused.[196]

Furthermore, the *B.L.* Court found the use of social media inapposite to the type of speech delivered in *Fraser*; there is no captive audience in the off-campus, social media realm.[197] The Third Circuit also noted how speech like B.L.'s would not qualify under *Tinker* if not posted online.[198] Therefore, according to *Reno* and *Packingham*, such online speech would also not qualify under *Tinker*.[199]

The Third Circuit's test is easily understood and applicable by lower courts.[200] The decision does not diminish a school's disciplinary authority over on-campus speech that caused a substantial disruption.[201] Schools can discipline some students' reactions to off-campus speech, as long as that speech satisfies *Tinker*'s substantial disruption standard or implicates other "sufficiently weighty inter-

195. *See Mahanoy III*, 964 F.3d at 189 (explaining *Tinker*'s applicability to student off-campus speech).

196. *See id.* (explaining students' free speech rights mirroring those of citizens in public contexts most fully comports with *Tinker*'s framework). Judge Ambro concurred in affirming the district court's judgment but believed the case could have been decided via Third Circuit precedent without deciding a constitutional question. *See id.* at 194, 196 ("Thus *Tinker* and its progeny, and our en banc decisions in *Layshock* and *J.S.* dictate that the School District violated B.L.'s First Amendment rights. That is all we had to say."). Ambro believed this decision will create a circuit split, further confusing schools and lower courts. *See id.* at 197 ("I fear that our decision will sow further confusion.").

197. *See id.* ("*Tinker*'s focus on disruption makes sense when a student stands in the school context, amid the 'captive audience' of his peers. . . . [B]ut it makes little sense where the student stands outside that context, given that any effect on the school environment will depend on others' choices and reactions." (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986))).

198. *See id.* ("The consensus in the analog era was that controversial off-campus speech was not subject to school regulation." (citation omitted)); *see also* Thomas v. Bd. of Educ., 607 F.2d 1043, 1045, 1050-51 (2d Cir. 1979) (holding school may not "punish[ ] students for expression that took place off school property" even when students sometimes wrote articles in school after hours "pasquinading school lunches, cheerleaders, classmates, and teachers . . . masturbation and prostitution").

199. *See Mahanoy III*, 964 F.3d at 189 (emphasizing rigid First Amendment analyses despite technological advancement).

200. *See id.* at 189-90 (providing much-needed clarity for students, teachers, and administrators).

201. *See id.* at 190 ("Nothing in this opinion questions school officials' 'comprehensive authority' to regulate students when they act or speak within the school environment." (quoting J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 925 (3d Cir. 2011))).

est[s]."[202] Finally, the court justified its decision despite the natural consequence that some offensive speech would be protected.[203]

E. B.L. Did Not Waive Her Free Speech Rights

The court explained that waivers of free speech rights "must be voluntary, knowing . . . intelligent . . . [and] established by 'clear' and 'compelling' evidence" with a presumption against waiver.[204] Addressing each of the school district's and team's rules in light of these standards for waivers, the court concluded B.L.'s Snap "does not clearly 'fall within the scope'" of those rules.[205] The court also found the rules overly broad.[206] Therefore, the court held B.L. had not waived her free speech rights and, because *Tinker* does not apply to off-campus speech, affirmed the district court's judgment.[207]

V. CRITICAL ANALYSIS: WHY THE THIRD CIRCUIT HIT A GRAND SLAM

The Third Circuit faithfully applied major principles from Supreme Court precedence in its decision and adhered to its own precedent.[208] Additionally, the Third Circuit correctly held B.L.'s Snap did not satisfy *Tinker*'s substantial disruption standard.[209] Finally, because B.L.'s Snap did not cause a substantial disruption in

202. *See id.* at 190-91 (maintaining school may discipline student for reaction to off-campus speech that causes substantial disruption within school environment or for other heightened interests).

203. *See id.* at 191 (noting some unpleasant and vulgar speech will be shielded from school regulation and discipline).

204. *Id.* at 192 (quoting Erie Telecomm., Inc. v. City of Erie, 853 F.2d 1084, 1094-95 (3d Cir. 1988)) (explaining free speech waiver requirements); *see also id.* (declining to address district court's unconstitutional conditions ruling where state actor may not condition public benefit on constitutional violation).

205. *See Mahanoy III*, 964 F.3d at 192-93 (concluding neither school district's nor team's rules apply to B.L.'s Snap and that respect rule does not cover events outside of sports season); *id.* at 193 (finding school's punishment based on B.L.'s opinions rather than information about cheerleading program covered by negative information rule).

206. *See Mahanoy III*, 964 F.3d at 193-94 ("First, [the rule] applies only 'during the sports season. . . .' [T]hat language is too obscure, and too dependent on the whims of school officials, to give rise to a knowing and voluntary waiver of B.L.'s rights to speak as she did." (citation omitted)).

207. *See id.* at 194 (holding B.L. had not waived free speech rights and affirming district court's judgment). For further discussion of district court's holding, see *supra* notes 141-143 and accompanying text.

208. For further discussion of how Third Circuit faithfully and correctly applied Supreme Court precedent, see *infra* notes 211-233 and accompanying text. For further discussion of how Third Circuit faithfully applied its own precedent, see *infra* notes 234-240 and accompanying text.

209. For further discussion of Third Circuit's hybrid rule, see *infra* notes 241-247 and accompanying text.

the school environment and her Snap did not implicate other concerns present in other circuits' decisions, the Third Circuit correctly decided *Mahanoy III* regardless of whether *Tinker* applied to off campus speech.[210]

A. The Third Circuit Faithfully Applied the Supreme Court's Student Speech Precedent

The Third Circuit, like other circuits, retraced the evolution of Student speech rights and analyzed *Tinker* and the holding's interaction with the post-*Tinker* trilogy.[211] However, this was the only similarity; the Third Circuit buttressed the other circuits' approaches by reiterating *Tinker* and its progeny apply only to on-campus speech or other specific types of off-campus speech.[212] In doing so, not only did the Third Circuit create a rule fully incorporating Supreme Court precedent, but it also followed its own established precedent.[213]

1. *The Supreme Court Limited School's Regulatory Authority to Specific Categories of Off-Campus Speech*

The Third Circuit's opinion stands out by fully incorporating the Supreme Court's applicable caselaw.[214] Specifically, the Third Circuit properly characterized the post-*Tinker* decisions as narrow, context-specific exceptions to, as opposed to over-rulings of, *Tinker*.[215] The Third Circuit also properly emphasized the applicability of *Tinker* to on-campus speech only.[216] Schools may only regu-

210. For further discussion of how Third Circuit correctly decided *Mahanoy III*, even if *Tinker* applied to off-campus speech, see *infra* notes 248-262 and accompanying text.

211. *See* Wermiel, *supra* note 60, at 1137 (noting Supreme Court's intention and circuit courts' application of starting every student speech case analysis with *Tinker*); *see also Mahanoy III*, 964 F.3d at 178 (discussing *Tinker* exceptions).

212. *See Mahanoy III*, 964 F.3d at 178 (describing post-*Tinker* trilogy as narrow exceptions to *Tinker*'s general rule).

213. For further discussion of how Third Circuit followed its own precedent, see *infra* notes 234-240 and accompanying text.

214. *See Mahanoy III*, 964 F.3d at 178 ("[The Third Circuit's] rule is true to the spirit of *Tinker*, respects student rights, and provides much-needed clarity to students and officials alike.").

215. *See id.* (stating *Tinker* was, and still is, narrow exception to school's regulatory authority).

216. *See id.* ("Fraser could not have been disciplined had he 'delivered the same speech in a public forum outside the school context.'") (quoting Frederick v. Morse, 551 U.S. 393, 405 (2007)).

late specific instances of off-campus speech so long as it fits within any of the post-*Tinker* trilogy's frameworks.[217]

As the Third Circuit pointed out, *Tinker* is the standard rule and sets forth specific, limited student speech circumstances before a school may discipline the student, suggesting a presumption in favor of student speech.[218] As *Tinker* affirmatively recognized, the court has consistently recognized the existence of First Amendment rights for public school students.[219] Furthermore, the *Tinker* court held a school must make a "specific showing of constitutionally valid reasons" before regulating student speech.[220]

Some critics may argue *Tinker*'s "beyond the schoolhouse gate" language endows schools with regulatory authority extending beyond the classroom and commanding judicial deference to schools.[221] However, the Supreme Court prefaced this language exclusively on student and teacher speech rights within the school environment and not on school authority's reach.[222] Thus, *Tinker* holds students' First Amendment rights follow them *into* the school environment, not that school's authority extends *outside* that environment.[223]

Furthermore, the Supreme Court's student speech framework determines whether speech is protected under *Tinker* or an exception applies. If *Tinker* does not apply, a school may only regulate

217. *See id.* at 190 ("The school can punish any disruptive speech or expressive conduct within the school context that meets *Tinker*'s standards—no matter how that disruption was 'provoke[d].'").

218. *See id.* (noting *Tinker*'s role as baseline "narrow accommodation"); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (placing burden on school to show more than just "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

219. *See Tinker*, 393 U.S. at 506-07 (citing string of cases in previous fifty years standing for proposition that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

220. *See id.* at 511 (suggesting school may not merely speculate or present totally hypothetical situation to justify burden on student speech).

221. *See* Erwin Chemerinsky, *What's Left of* Tinker?, 48 DRAKE L. REV. 527, 545-46 (2000) (explaining how post-*Tinker* Supreme Court and district court decisions echo Justice Black's deference-based approach instead of Justice Fortas's broad constitutional rights approach).

222. *See Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *see also* Daniel Marcus-Toll, *Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3436 (2014) (arguing students are entitled to full First Amendment protections outside school context).

223. *See Tinker*, 393 U.S. at 506 (recognizing students and teachers' First Amendment rights do not diminish when entering school premises, though on-campus speech that causes substantial disruption may be regulated).

student speech within the narrow circumstances of the post-*Tinker* trilogy.[224] Therefore, the Supreme Court delivered each of these opinions without actually or intentionally eschewing *Tinker* and viewed each exception as specifically delineated and limited.[225] Accordingly, the Third Circuit explained the post-*Tinker* trilogy was an exception to meeting the substantial disruption standard, allowing schools to regulate only certain speech without undergoing a *Tinker* analysis.[226] Moreover, it is clear from *Tinker* and its progeny that *Tinker* only applies to on-campus speech.[227] Here, the Third Circuit properly emphasized B.L.'s off-campus location when she sent her

224. *See Mahanoy III*, 964 F.3d at 178 (noting while "each of these [post-*Tinker*] cases added a wrinkle, none disturbed the basic framework on which *Tinker* relied" and trilogy recognized "a limited area in which schools have leeway to regulate student speech without meeting *Tinker*'s substantial disruption standard"); *see also* Wermiel, *supra* note 60, at 1137 ("The Supreme Court has made clear, and virtually all lower courts accept the fact, that the starting point for analyzing any student speech case is derived from *Tinker*.").

225. *See* Morse v. Frederick, 551 U.S. 393, 404 (2007) (citing Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 689 (1986) (Brennan, J., concurring)) (noting *Fraser* applied different analysis than *Tinker* because public school administrators have interest in "ensur[ing] that a high school assembly proceeds in an orderly manner").

226. *See Mahanoy III*, 964 F.3d at 178 ("In each of three later cases, the Court identified a limited area in which schools have leeway to regulate student speech without meeting *Tinker*'s substantial disruption standard.").

227. *See* Steve Varel, *Limits on School Disciplinary Authority over Online Student Speech*, 33 N. ILL. U. L. REV. 423, 427 (2013) (noting Supreme Court has never held *Tinker* to apply to off-campus speech); *see also Mahanoy III*, 964 F.3d at 191 ("We hold only that off-campus speech not implicating that class of interests lies beyond the school's regulatory authority."); *see also* David L. Hudson, Jr., *Student Free Speech Case 'Chipped Away' at After 50 Years, But 'Overall Idea' Remains*, AM. BAR ASS'N J. (Feb. 25, 2019), https://www.abajournal.com/web/article/50th-anniversary-of-tinker-v-des-moines [https://perma.cc/B9RG-GA5S] (quoting Professor Emily Gold Waldman who argues student speech controversies must fall under post-*Tinker* trilogy exception or else have to withstand *Tinker*); Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1136 (2011) (stating school must either satisfy *Tinker* substantial disruption test or fall within post-*Tinker* trilogy to regulate speech). A highly relevant and instructive post-*Tinker*, pre-trilogy case is *Thomas v. Bd. of Educ.*, 607 F.2d 1043 (2d Cir. 1979). *Mahanoy III*, 964 F.3d at 180 (citing *Thomas* as standing for proposition that mere mention of school, teacher, or administration does not transform speech into on-campus speech). There, the Second Circuit considered whether a school could regulate an off-campus newspaper distributed to purposely avoid the school environment. *See Thomas*, 607 F.2d at 1050 ("That a few articles were transcribed on school typewriters, and that the finished product was secretly and unobtrusively stored in a teacher's closet do not alter the facts that [the paper] was conceived, executed, and distributed outside the school."). The court explicitly recognized *Tinker* applied only to on-campus speech and students are entitled to the same First Amendment protections as adults "out of the school yard." *Id.* at 1050-51 (stating school authority's "reaching into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena"). The Second Circuit also found it relevant all speech occurred outside school grounds. *See id.* at 1050 ("At best, therefore, any activity within the school itself was de minimis.").

friends the controversial private Snapchat story.[228] A student who is in their grandparent's home is able to exercise their First Amendment rights without fear of repercussion.[229] Thus, a school cannot justify punishing student athletes for off-campus speech occurring over the weekend.[230]

Furthermore, *Fraser*, *Kuhlmeier*, and *Morse* all explicitly reaffirm the school context is most relevant in determining whether schools may regulate or discipline student speech.[231] The sum total of the Supreme Court's student speech caselaw applies to on-campus speech that materially or substantially disrupts the school's educational mission or falls under "carefully restricted circumstances"; otherwise, a school may not regulate off-campus speech.[232] There-

228. *Compare Mahanoy III*, 964 F.3d at 175, 180 (noting B.L.'s speech occurred off-campus, without school resources, and outside school hours), *with* Morse v. Frederick, 551 U.S. 393, 396-79 (2007) (describing student's suspension in relation to "school-sanctioned and school-sponsored" event occurring immediately outside school building during school hours, in plain view of other students, and on camera); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (citing Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966)) (holding schools may only regulate speech on school property and citing *Blackwell* case to justify "conduct by the student, in class or out of it" that causes substantial disruption is not protected).

229. *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (en banc) ("[W]e do not think that the First Amendment can tolerate the School District stretching its authority into [a student's] grandmother's home and reaching [the student] while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there.").

230. *See Mahanoy III*, 964 F.3d at 190 ("[N]o one, including our [concurring] colleague, has . . . suggested that a student who advocated a controversial position on a placard in a public park one Saturday would be subject to school discipline.").

231. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988) (stating *Tinker* analysis "addresses educators' ability to silence a student's personal expression that happens to *occur on the school premises*") (emphasis added); *Morse*, 551 U.S. at 404 (citing Bethel Sch. Dist v. Fraser, 478 U.S. 675, 682-83 (1986)) (emphasizing student speech would have been protected "in a public forum outside the school context"); *see also* J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011) (en banc) (holding Supreme Court precedent confirms *Fraser* does not apply to off-campus speech); *Kuhlmeier*, 484 U.S. at 266 (citing (*Fraser*, 478 U.S. at 685) (noting in *Fraser*, school could not punish sexually explicit speech outside school context); *Tinker*, 393 U.S. at 506 (underscoring its holding applied "in light of the special characteristics of the school environment"); Lee C. Baxter, *The Unrealistic Geographic Limitations of the Supreme Court's School-Speech Precedents:* Tinker *in the Digital Age*, 75 MONT. L. REV. 103, 116 (2014) (noting Third Circuit correctly held *Fraser* applied only to on-campus speech).

232. *Tinker*, 393 U.S. at 512-13 (clarifying students' free speech rights extend beyond classroom, but within school environment); *see also Morse*, 551 U.S. at 405-06 (assuming schools may regulate speech only within its premises by acknowledging "the government could not censor similar speech *outside* the school" (quoting *Kuhlmeier*, 484 U.S. at 266)); *Kuhlmeier*, 484 U.S. at 266-68 (1988) (affirming school's authority to regulate contents of newspaper published as part of regular classroom activities and reiterating *Tinker*'s applicability only to "expressing [one's] personal views on the school premises"); *Fraser*, 478 U.S. at 683 ("The de-

fore, the Third Circuit correctly held the school district failed to show a substantial disruption or post-*Tinker* exception applied to discipline B.L. for her off-campus speech.[233]

2. *Third Circuit Precedent Supports Holding Tinker Inapplicable to Off-Campus Speech*

The Third Circuit naturally extended its previous decisions in *J.S.* and *Layshock*.[234] Both cases assert schools do not possess the authority to regulate speech occurring mostly off-campus with minimal school resources.[235] Both also explicitly hold the Supreme Court expressly limited *Fraser* to on-campus speech.[236] Additionally, both cases note off-campus speech that mentions the school in some way or reaches the school through friends does not transform it into on-campus speech.[237]

Third Circuit precedent effectively commanded the result in *Mahanoy III*.[238] The facts of *Mahanoy III* reveal similarities to *J.S.* and *Layshock* because B.L. was off-campus, outside of normal

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termination of what manner of speech *in the classroom* or *in school assembly* is inappropriate properly rests with the school board.") (emphasis added).

233. *See Mahanoy III*, 964 F.3d at 183, 185-86 (holding neither *Fraser* nor *Tinker* justified B.L.'s off-campus speech punishment).

234. *See* J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011) (holding school had not affirmatively shown material and substantial disruption); *Layshock*, 650 F.3d at 216 (holding school could not punish student for speech only slightly connected to school resources).

235. *See J.S.*, 650 F.3d at 932-33 (holding even though friends who saw controversial MySpace page were page creator's schoolmates, speech was not directed to school); *Layshock*, 650 F.3d at 215-19 (noting school may not regulate off-campus speech after school hours to same extent as if speech occurred on campus).

236. *See J.S.*, 650 F.3d at 932 (citing *Morse*, 551 U.S. at 405) (noting Supreme Court explicitly rejected idea school could regulate speech outside school context); *Layshock*, 650 F.3d at 216 (stating *Fraser* is limited to on-campus speech).

237. *See Tinker*, 393 U.S. at 514 (finding wearing black armbands could not "reasonably . . . [lead] school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."). *But see Mahanoy III*, 964 F.3d at 190 ("The school can punish any disruptive speech or expressive conduct *within the school context* that meets *Tinker*'s standards—no matter how that disruption was "provoke[d]. It is the *off-campus statement itself* that is not subject to *Tinker*'s narrow recognition of school authority.") (emphasis added); *J.S.*, 650 F.3d at 933 (holding student bringing printout of MySpace profile at principal's request not enough to transform off-campus speech into on-campus speech); *Layshock*, 650 F.3d at 217, 219 (emphasizing profile mentioned principal and reaching school and student using school website to get principal's official picture were not enough to justify discipline or punish student).

238. *See Mahanoy III*, 964 F.3d at 180 ("*J.S.* and *Layshock* yield the insight that a student's off-campus speech is not rendered 'on campus' simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment.").

school hours, and mentioned the school's cheerleading program and she was punished only when one of her Snapchat friends brought the Snap to the coaches' attention.[239] *Mahanoy III* shows such factual similarity yields similar outcomes.[240]

3. *Mahanoy III Fully Incorporates Supreme Court's Framework*

The Third Circuit laid out a clear, comprehensive, and workable standard that took the Supreme Court's entire student speech precedent into account.[241] *Mahanoy III* invokes *Tinker*'s holding by restricting school's regulatory authority to on-campus speech.[242] The Third Circuit incorporated *Fraser* by considering "captive audience" concerns arising from on-campus speech or at school-sponsored events.[243] Furthermore, the Third Circuit evoked *Kuhlmeier* by focusing on a school's authority over speech reasonable observers would believe bears the school's endorsement.[244] Finally, *Morse* respected schools' heightened concern over *on-campus* speech which school authorities reasonably perceive as promoting illegal drug use.[245] *Mahanoy III* weaved *Morse*'s reaffirmation of prohibit-

239. *See id.* at 175-76 (detailing facts surrounding controversy before Third Circuit); *see also J.S.*, 650 F.3d at 920 (noting student created profile at home on weekend); *Layshock*, 650 F.3d at 207 (noting student created profile off-campus during non-school hours).

240. *See Mahanoy III,* 964 F.3d at 180-81 (highlighting too little contact between student and school for Snap to be on-campus).

241. For further discussion of how Third Circuit represented blending of Supreme Court precedent, see *infra* notes 242-247 and accompanying text.

242. *See Mahanoy III*, 964 F.3d at 189 (holding *Tinker* inapplicable to off-campus speech); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513-14 (1969) (citing Hammond v. S.C. Cmty. Coll., 272 F. Supp. 947 (D.S.C. 1967)) (emphasizing impermissibility of regulating speech "anywhere on school property"); Dickey v. Ala. State Bd. of Educ. (M.D. Ala. 1967)) (posing hypothetical where school prohibits all speech on Vietnam conflict "anywhere on *school property* except as part of a prescribed classroom exercise" would violate First Amendment) (emphasis added).

243. *Mahanoy III*, 964 F.3d at 189 (focusing on substantial disruption is irrelevant where there are no concerns with school children being captive audience and unable to turn ears away from speech and holding school may not regulate speech outside "school-owned, -operated, or -supervised channels"); *see also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986) (noting heightened school authority to regulate speech where captive audience includes minors).

244. *See Mahanoy III*, 964 F.3d at 189 (recounting Third Circuit's rule that school may not regulate speech "that is not reasonably interpreted as bearing the school's imprimatur"); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (holding school may regulate student expression in "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school").

245. *See* Morse v. Frederick, 551 U.S. 393, 405 (2007) (noting school may not regulate or discipline speech in public forum outside school context).

ing schools from regulating speech outside of the school context into its opinion.[246] Therefore, the Third Circuit faithfully applied Supreme Court and Third Circuit precedent in concluding *Tinker* does not apply to off-campus speech.[247]

B. B.L.'s Snap Did Not Satisfy *Tinker*'s Substantial Disruption Standard

Under *Tinker* and progeny, B.L.'s Snap did not cause a material or substantial disruption in the school environment.[248] Additionally, the other appellate courts' approaches involved threats of violence or other such factual patterns reasonably likely to satisfy *Tinker*'s substantial disruption standard.[249] Therefore, the Third Circuit correctly held neither *Tinker* nor the post-*Tinker* trilogy applied to B.L.'s off-campus speech.[250]

1. *B.L.'s Snap Did Not Create Material or Substantial Disruption*

B.L.'s Snap did not constitute a material or substantial disruption of the school environment.[251] Some cheerleaders and other schoolmates were merely concerned it was inappropriate.[252] The students who wore black armbands in *Tinker* created more of a disruption in the school than B.L. did, and the majority still held the school had not met its burden of justifying its disciplinary actions.[253] The Third Circuit also vindicated the rights of student athletes when it held the First Amendment does not protect athletes or

246. *See Mahanoy III*, 964 F.3d at 189 (citing *Morse*, 551 U.S. at 405) (emphasizing *Tinker*'s substantial disruption standard only addresses speech delivered on-campus that causes substantial disruption).

247. For further discussion of Supreme Court's caselaw refuting *Tinker*'s applicability to off-campus speech, see *supra* notes 34-52 and accompanying text.

248. For further discussion of how B.L.'s Snap did not cause material or substantial disruption, see *infra* notes 251-255 and accompanying text.

249. For further discussion of how *Mahanoy III*'s facts differed from other circuit court cases, see *infra* notes 256-262 and accompanying text.

250. *See Mahanoy III*, 964 F.3d at 181-86 (holding *Tinker* and *Fraser* did not justify school's decision to punish B.L.).

251. *See id.* at 190 (holding *Tinker* inapplicable but affirming *Tinker*'s applicability to off-campus expressive activity that *does* cause substantial disruption in school); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (outlining substantial disruption standard).

252. *See Mahanoy III*, 964 F.3d at 175-76 (noting only disruption B.L. caused by her Snap was students bringing Snap to coaches' attention).

253. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting) (highlighting record included instances of warnings by other students and disruption to math class arising from one student's wearing of black armband). For further discussion of lack of substantial disruption, see *supra* notes 133-134 and accompanying text.

extracurricular-related speech any less vigorously than those uttered in the classroom.[254] B.L.'s Snap clearly did not satisfy the substantial disruption standard and, therefore, even if *Tinker* or *Fraser* applied to off-campus speech, the Third Circuit correctly held the school violated B.L.'s First Amendment rights.[255]

2. *Mahanoy III is Factually Distinct from Other Circuits' Cases*

Additionally, the Third Circuit properly distinguished this case from those implicating threats of violence.[256] Violent threats have a tendency of causing a substantial disruption of the school environment.[257] However, violent threats were notably absent from the record in *Mahanoy III*.[258] Furthermore, the facts surrounding B.L.'s Snap were distinguishable from any of the other circuits' approaches involving violent threats.[259] B.L.'s Snap also did not involve sexual or racial harassment.[260] Even if off-campus harassment of other students were enough to justify school discipline, off-campus social media posts venting frustrations like B.L.'s do not implicate such safety concerns and, thus, would be protected speech.[261] Thus, *Mahanoy III* was correctly decided and stands as a landmark

254. *See Mahanoy III*, 964 F.3d at 181-82 (rejecting Fourth Amendment reasonableness and due process weighing tests arguments that students have reduced First Amendment rights when participating in extracurricular activities).

255. *See id.* at 190 (stating source of disruption—whether on- or off-campus—is irrelevant and only whether disruption occurred on-campus is relevant); *id.* (opining that threats of violence might still justify disciplining students for off-campus speech in certain circumstances).

256. *See Mahanoy III*, 964 F.3d at 190-91 (distinguishing this case from others involving violent threats and leaving question of *Tinker*'s applicability to such threats for another time).

257. *See* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 771 (5th Cir. 2007) (stating teachers and administrators must take violent threats seriously due to increased prevalence of school shootings); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001) (noting rise of school shootings raises special concerns regarding teacher and student safety).

258. *See Mahanoy III*, 964 F.3d at 176 (detailing B.L.'s Snap).

259. *Compare id.* (outlining B.L.'s Snap expressing her frustration with cheerleading program), *with* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1064-65 (9th Cir. 2013) (describing student threats to shoot school amid evoking images of Virginia Tech shooting), *and* Wisniewski ex rel. Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007) (describing student's creation of instant messaging icon depicting bullet passing through teacher's head).

260. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016) (involving harassment in off-campus public park); S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012) (involving racist blog posts directed towards students).

261. *See Mahanoy III*, 964 F.3d at 191 (emphasizing its holding does not weigh against *Morse*'s weighing of "sufficiently weighty interest" to "justify a narrow exception to students' broader free speech rights").

decision protecting student athlete rights even when participating in activities considered by many to be a "privilege."[262]

C. The Third Circuit Vindicates Student-Athlete Rights

The Third Circuit made clear student athletes do not sign away their First Amendment off-campus speech rights to participate in school sports.[263] Many student free speech advocates regard the Third Circuit's decision as fully defending off-campus speech and advocating a heavily contrarian position to the current norm of disciplining students for social media usage.[264] These advocates contend that such a ruling provides a clear-cut rule that schools and courts hearing related challenges may produce more predictable outcomes.[265] Others praise the decision as re-establishing fundamental *Tinker* principles: students do not walk into a constitutional decontamination zone, even in the digital age.[266]

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262. For further discussion of Third Circuit's adherence to Supreme Court and its own precedent, see *supra* notes 211-247 and accompanying text.

263. *See* Adam Goldstein, *Students in Sports Keep Off-Campus Speech Rights, Third Circuit Rules*, FOUND. FOR INDIV. RIGHTS IN EDUC. (July 1, 2020), https://www.thefire.org/students-in-sports-keep-off-campus-speech-rights-third-circuit-rules [https://perma.cc/Z634-6FG3] (stating Third Circuit's decision stands for proposition that student athletes do not lose First Amendment rights even when participating in extracurriculars usually deemed privilege).

264. *See* Theresa E. Loscalzo & Arleigh P. Helfer III, *Third Circuit Expands First Amendment Speech Protection for Students' Off-Campus Speech*, SCHNADER (July 1, 2020), http://www.schnader.com/wp-content/uploads/2020/07/ALERT-3rd-Circuit-Expands-First-Amendment-Speech-Protection-for-Students-Off-Campus-Speech-7-1-20-3.pdf [https://perma.cc/SJ5Y-WXQ7] ("The Third Circuit affirmed . . . expressly holding for the first time that off-campus student speech was protected to the full extent afforded by the First Amendment and not subject to the well-known *Tinker* standard that applies to student speech in school."); *see also* Corey Friedman, *Circuit Court Cheers Student Speech Rights*, NOOZHAWK (July 15, 2020), https://www.noozhawk.com/article/corey_friedman_circuit_court_cheers_student_speech_rights_20200715 [https://perma.cc/V7D8-L6Y6] ("That's a bona fide bombshell in the education world, where snooping on students' social media pages is a popular pastime.").

265. *See* Cameren Boatner, *Federal Appeals Court Ruling Affirms Students' Off-Campus First Amendment Rights*, STUDENT PRESS L. CTR. (July 16, 2020), https://splc.org/2020/07/federal-appeals-court-ruling-affirms-students-off-campus-first-amendment-rights/ [https://perma.cc/AF6J-GGA7] (noting ruling's clarity actually helps school administrators for reducing liability for disciplining and benefits courts with bright-line rule, and praising decision as pro-student speech victory)); *see also* Mark Walsh, *Federal Appeals Court Rejects Student Discipline for Vulgar Off-Campus Message*, ED. WEEK (July 1, 2020), https://blogs.edweek.org/edweek/school_law/2020/07/federal_appeals_court_rejects.html [https://perma.cc/S3CJ-6KFH] (quoting Yale Law Professor Justin Driver's contention that Third Circuit's decision was strongly in favor of students' rights and "lower courts—and educators—desperately need some guidance on this incredibly common question").

266. *See* Adam Tragone, *Third Circuit Broadens First Amendment Speech Protection for Students' Off-Campus Speech* , https://www.smgglaw.com/blog/third-circuit-broadens-first-amendment-speech-protection-for-students-off-campus-speech

As groundbreaking as *Mahanoy III* is for student-athlete speech rights, the decision is not without its critics.[267] Many proponents of greater deference to school authorities advance the typical argument that extracurricular participation is a privilege outside the school's curriculum.[268] They argue participating students are entitled to less First Amendment protections so schools may more properly discipline rule-breakers.[269] Further, such proponents argue schools may subject students participating in extracurricular activities to more regulations and intrusions than other students.[270] Critics suggest that removal from extracurricular activities is permissible as long as students' ability to attend class remains intact.[271] However, these criticisms do not specifically address First Amendment implications of punishing off-campus student-athlete speech, nor does the "privileged" nature of extracurricular participation establish a zone of reduced First Amendment protection.[272] Indeed, given the special characteristics of the school environment, students' free speech rights are not "automatically coextensive with the rights of adults in other settings."[273] However, as *Mahanoy III*

[https://perma.cc/N6KA-2YR6] (July 6, 2020) ("The [*Mahanoy III*] Court thus reaffirmed the long-held principle that 'the schoolyard is not without boundaries and the reach of school authorities is not without limits.'").

267. *See* Br. of Amici Curiae Pa. Sch. Bds. Ass'net al, Mahanoy Area Sch. Dist. v. B.L., No. 20-255, at 12 (Oct. 1, 2020) ("[T]he Third Circuit's strict on-campus, off-campus distinction places school administrators in the untenable position of being responsible for more and more student conduct while possessing less and less leeway to maintain order and instill civility.").

268. *See* Mahanoy Area Sch. Dist., *supra* note 167 (quoting Dr. Lawrence Mussoline, educational expert, who believed "[s]chool related extracurricular activities . . . are student privileges not mandated by statute . . . that could be removed for much less reason than needed to suspend someone from the property right of attending school itself").

269. *See* Br. of Amici Curiae Nat'l Sch. Bds. Ass'net al, Mahanoy Area Sch. Dist. v. B.L., No. 20-255, at 11-12 (Oct. 1, 2020) (arguing schools "must be able to suitably discipline students who undermine rules and expectations" in order to instill "a broader and more diffuse set of values than those implicated by classroom learning").

270. *See id.* at 12-13 (citing two cases suggesting students have less rights when engaging in extracurricular activities).

271. *See id.* at 14-16 (suggesting nature of extracurricular-related punishment differs from academic-related punishment and schools should have more flexibility in addressing students who break extracurricular rules).

272. For further discussion of how *Mahanoy III*'s critics' arguments regarding diminished free speech rights when participating in extracurricular activities fall short, see *infra* note 298-300 and accompanying text.

273. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986) (rejecting argument student free speech rights are automatically equivalent to adults in public forum). *But see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (underscoring importance of school's mission to teach civility and maintain discipline).

explains, reduced constitutional protections have been upheld only in the Fourth Amendment's reasonableness and the Fourteenth Amendment's due process context.[274]

VI. HOW *MAHANOY III* IMPACTS THE REST OF THE GAME

The Third Circuit's opinion profoundly impacts students' free speech rights within the Third Circuit and has the potential to protect student-athletes across the country.[275] The Third Circuit delivered what both proponents and opponents of liberal student free speech rights consider the "most expansive ruling on students' off-campus speech rights in the country" and as a landmark ruling.[276] *Mahanoy III* diverged from the growing trend in other federal appellate courts permitting school officials to discipline off-campus speech so long as it is likely to cause a substantial or material disruption of the school environment.[277] This decision may impact both the legal framework of student speech, while encouraging and empowering student athletes to know and exercise their constitutional rights whether it centers on criticizing the school or its sports program, or advances a social cause.[278]

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274. *See Mahanoy III*, 964 F.3d at 192 (holding First Amendment abhors "ad hoc balancing of relative social costs and benefits" typical of reasonableness and due process analyses).

275. For further discussion of impact of *Mahanoy III*, see *infra* notes 276-308 and accompanying text.

276. *Federal Appeals Court Upholds and Expands Students' Free Speech in Schuylkill County Case*, AM. CIVIL LIBERTIES UNION OF PA. (June 30, 2020), https://www.aclupa.org/en/press-releases/federal-appeals-court-upholds-and-expands-students-free-speech-schuylkill-county-case [https://perma.cc/FV9D-MJ5H] (describing *Mahanoy III* as historic case and most expansive protection of off-campus student speech). For further discussion of how Third Circuit's opinion protects more student speech than any other circuit, see *supra* notes 185-193 and accompanying text.

277. For further discussion of how Third Circuit's decision differs from other circuit approaches to *Tinker*'s applicability to off-campus speech, see *supra* notes 194-203 and accompanying text.

278. *See* Elura Nanos, *A High School Cheerleader's F-Bombs on Snapchat Could Blow Up Free Speech for U.S. Students*, L. & CRIME (Dec. 28, 2020), ("A student participating in a school-sponsored extracurricular activity may face limited free-speech rights, but one entirely on her own does not."); *see also* Thomas Whitley, *NBA Takes A Stand Vs. Social Justice*, RAIDER REV. (Nov. 12, 2020), https://erhsraider.org/14575/sports/nba-takes-a-stand-vs-social-justice/ [https://perma.cc/9P42-T6NM] (describing fellow student-athlete's idea of advocating social justice as "posting videos").

A. Shaking Up the Legal Framework

The Third Circuit stands alone in its broad, pro-student-athlete holding.[279] *Mahanoy III* might garner the Supreme Court's attention to finally resolve the contentious issue of whether students may be free to post on social media without fear of repercussion.[280] This opinion splits various appellate courts, leaving unequal protection for students within the Third Circuit and, say, the Second Circuit.[281] The Second, Fourth, Fifth, Eighth, and Ninth Circuits account for 55.6% of public schools, 54.8% of school teachers, and 56.3% of public schoolchildren in the country and affirm a school's authority to regulate off-campus speech under *Tinker*.[282] The presence of a circuit split may increase confusion among the circuits, though Third Circuit schools benefit from the new rule.[283] Contrary to critics' arguments, the Third Circuit explicitly held nothing in its opinion detracts from schools' vast discretionary authority to regulate speech within the school context.[284]

279. *See Mahanoy III*, 964 F.3d at 196 (Ambro, J., concurring) ("[The Third Circuit] is the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech. A few Circuits have flirted with such a holding and have declined to apply *Tinker* to off-campus speech on a case-by-case basis. . . . [H]owever, those same Circuit Courts have subsequently applied *Tinker* to off-campus speech.").

280. *See* Robert B. Nussbaum, *Third Circuit Upholds Public School Student's First Amendment Rights*, TRENDING L. BLOG , https://trendinglawblog.com/2020/09/01/third-circuit-upholds-public-school-students-first-amendment-rights/ [https://perma.cc/L69J-PM7C] (Sept. 1, 2020) (noting decision might lead to Supreme Court resolving circuit split).

281. *See* Sophia Cope, *In Historic Opinion, Third Circuit Protects Public School Students' Off-Campus Social Media Speech*, ELEC. FRONTIER FOUND. (July 31, 2020), https://www.eff.org/deeplinks/2020/07/historic-opinion-third-circuit-protects-public-school-students-campus-social-media [https://perma.cc/P5MU-E36J] (highlighting Third Circuit's conflict with other circuits).

282. *See Digest of Education Statistics 2019*, NAT'L CTR. FOR EDUC. STAT. (2019) (describing relevant statistics about makeup of schools, teachers, and students in Second, Fourth, Fifth, Eighth, and Ninth Circuits). For further discussion of these circuits' approaches, see *supra* notes 63-104 and accompanying text.

283. *See Mahanoy III*, 964 F.3d at 196-97 (Ambro, J., concurring) (cautioning opinion may "sow confusion" and leave more questions unanswered than answered). For further discussion of Third Circuit's emphasis on providing clarity to students, teachers, and administrators, see *supra* notes 194-200 and accompanying text.

284. *See Mahanoy III*, 964 F.3d at 190 (majority opinion) ("Nothing in this opinion questions school officials' 'comprehensive authority' to regulate students when they act or speak within the school environment." (quoting J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 925 (3d Cir. 2011))); *see also* Cope, *supra* note 281 (stating schools may still discipline students who share or react to off-campus speech in way disruptive to school environment). For further discussion of *Mahanoy III*'s recognition and respect for school's "comprehensive authority" over on-campus speech and possible exceptions to off-campus speech involving threats of violence, see *supra* 201-202 and accompanying text.

Additionally, this opinion will transform the education law field and perhaps cause hesitation in administrators who would like to discipline students for social media usage.[285] Third Circuit educators will have to re-craft their student discipline policies to comport with *Mahanoy III* and policies restricting student-athlete social media usage may be revised or removed altogether.[286] As an out-of-circuit example, the University of Iowa recently lifted an otherwise broad ban on football players' Twitter usage following public scrutiny and backlash.[287] *Mahanoy III* may place indirect pressure on schools to rescind such rules in order to avoid legal battles.[288]

Finally, the Third Circuit's divergence from other circuits' approaches makes it more likely that the Supreme Court will enter the arena and resolve the circuit split.[289] The Mahanoy Area School District has already filed a writ for certiorari with the Supreme Court.[290] Given the Third Circuit's diametrically opposed ap-

285. *See Mahanoy III*, 964 F.3d at 194 (noting parents have primary responsibility in teaching children civility and schools must be careful to not transform its legitimate authority to "quash student expression deemed crude or offensive—which far too easily metastasizes into the power to censor valuable speech and legitimate criticism"). For further discussion of previously permissible, but potentially unconstitutional, school disciplinary action under the Third Circuit's standard, see *supra* notes 197-199 and accompanying text.

286. *See* Pet. for Writ of Cert., Mahanoy Area Sch. Dist. v. B.L., No. 20-255, at 18 (Aug. 28, 2020) ("Absent this Court's immediate intervention, those schools must now jettison the disciplinary policies they have relied on to protect student welfare.").

287. *See* Chad Leistikow, *Iowa Football: Kirk Ferentz Places Chris Doyle on Administrative Leave, Lifts Twitter Ban*, HAWK CENTRAL (June 6, 2020), https://www.hawkcentral.com/story/sports/college/iowa/football/2020/06/06/iowa-footballs-chris-doyle-placed-administrative-leave-by-kirk-ferentz-begin-cultural-shift/3166432001/ [https://perma.cc/NLR2-T52V] (noting University of Iowa's removal of student-athlete Twitter ban following controversy surrounding team's policy restricting players from tweeting on social justice issues); *see also Letter to the University of Iowa*, FOUND. FOR INDIV. RIGHTS IN EDUC. (June 8, 2020), https://www.thefire.org/fire-letter-to-the-university-of-iowa-june-8-2020/ [https://perma.cc/AFP2-H9X4] (asking for clarification on university's decision to lift ban and allow football players one pre-approved tweet in response to requests to speak on racial injustice).

288. *See* Br. of Amici Curiae Pa. Sch. Bds. Ass'n et al, *supra* note 267, at 9-10 ("And a school that believes itself to be within *Tinker*'s exception could end up facing a costly and burdensome lawsuit.").

289. *See* Cope, *supra* 281 (noting chance that Supreme Court will review writs of certiorari).

290. *See* Pet. for Writ of Cert., *supra* note 286, at 1 (requesting Supreme Court to grant certiorari to resolve question of whether *Tinker* applies to off-campus speech). The Supreme Court granted B.L.'s request to extend their response time to November 30, 2020. *See* Mot. to Extend Respondent's Time to File Br. in Opp. to the Pet. for Writ of Cert., *Mahanoy*, No. 20-255 (Sept. 21, 2020) (requesting extension to file opposing brief in light of ACLU's upcoming election litigation concerns). B.L. filed a response to the school district's petition, claiming there was no circuit split and the case was not appropriate in determining whether *Tinker*

proach to the other circuits, the gravity of the issue, the rapid expansion of social media usage and access, and the Supreme Court's last student speech case was decided thirteen years ago, the Supreme Court will likely grant certiorari and hopefully deliver some finality.[291]

While it is impossible to accurately predict the Supreme Court's ruling on the matter, the Court will likely affirm the Third Circuit's decision.[292] The primary justification for this prediction is the factual uniqueness of this case and the impact an opposite ruling will have on students' free speech rights.[293] Namely, none of the other Supreme Court cases involved speech outside the school-supervised or -controlled context.[294] Furthermore, none of those

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applied to off-campus speech because B.L.'s Snap did not cause a substantial disruption. *See* Br. in Opp. to the Pet. for Writ. of Cert., *Mahanoy*, No. 20-255 (Nov. 30, 2020) (emphasizing case was poor vehicle for resolving whether *Tinker* applies to off-campus speech). The school district responded, continuing to allege the decision created a circuit split, presents an important constitutional issue, and was incorrect. *See* Reply Br. for Pet., *Mahanoy*, No. 20-255 (Dec. 14, 2020) (asking Court to grant for writ of certiorari to resolve important constitutional question). All material was distributed to the Justices for their January 8, 2021 conference, where they will decide whether to grant the school district's petition for the highest court's review. *See* Nanos, *supra* note 278 ("When the justices reconvene after their holiday break, they will consider the case in their first conference of the new year.").

291. *See* Morse v. Frederick, 551 U.S. 393, 400-01 (2007) (noting student speech case involved normal school hours, was an approved school event, and teachers and administrators supervised event).

292. *See* Adam Liptak, *A Cheerleader's Vulgar Message Prompts a First Amendment Showdown*, N.Y. TIMES (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/us/supreme-court-schools-free-speech.html [https://perma.cc/ZB6W-HVVG] (noting Supreme Court, despite post-*Tinker* trilogy's siding with schools, "has a reputation for being protective of First Amendment rights" and tends to review important constitutional issues causing circuit splits).

293. *Compare Mahanoy III*, 964 F.3d 170, 175 (3d Cir. 2020) (explaining B.L. made Snap outside school grounds, after school hours, and without school resources), *with* Doninger v. Niehoff, 527 F.3d 41, 44-45 (2d Cir. 2008) (noting several student council members met in computer lab during school hours to send email convincing students to call principal after principal cancelled popular school event), *and* Wisniewski ex rel. Wisniewski v. Bd. of Educ., 494 F.3d 34, 35-36 (2d Cir. 2007) (noting student used AOL Instant Messenger, program allowing users to send messages only to pre-approved friends, whereas current social media usage allows entire public to view various posts).

294. *See Morse*, 551 U.S. at 396 ("At a *school-sanctioned* and *school-supervised* event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use.") (emphasis added); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988) (noting school may exercise editorial control over "school-sponsored publications, theatrical publications, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school"); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 677 (1986) (describing student speech delivered during official school assembly); Tinker v. Des Moines Indep.

cases involved speech uttered during the weekend.[295] Also, the rise of social media presents unique problems that may potentially subject students and student-athletes to disciplinary action, such as suspension or removal, respectively, only for sharing an opinion to one's limited group of friends.[296] Finally, the Supreme Court's recent addition of an originalist Justice may increase the odds of a favorable disposition for student speech, especially when considering the possibility of allowing a school's regulatory authority to extend into one's home for merely mentioning the school.[297]

B. Freeing Student-Athletes From Speech Suppression

Mahanoy III allows students to post, Tweet, or Snap distasteful comments or pictures without fear of arbitrary retaliation and empowers students to use social media to advocate for social justice.[298] No longer does the First Amendment authorize schools to "censor any disfavored student speech in exchange for the ability to partici-

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Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (explaining students wore black armbands in school).

295. *See Morse*, 551 U.S. at 397 (noting event took place "while school was in session"); *Kuhlmeier*, 484 U.S. at 262, 266 (describing newspaper publication as part of school's curriculum and reaffirming *Fraser*'s holding that schools cannot censor speech outside school, inferring publication was always worked on exclusively during school hours on school grounds (citing *Fraser*, 478 U.S. at 685)); *Fraser*, 478 U.S. at 677 (noting student gave lewd speech at assembly during normal school day); *Tinker*, 393 U.S. at 504 (explaining students returned to school during normal school week wearing black armbands).

296. *See Mahanoy III*, 964 F.3d at 189 ("Recent technological changes reinforce, not weaken, [the] conclusion [*Tinker* does not apply to off-campus speech] . . . We are equally mindful, however, that new communicative technologies open new territories where regulators might seek to suppress speech they consider inappropriate, uncouth, or provocative.").

297. *See Three Seventh Circuit Cases Showcase Judge Amy Coney Barrett's Willingness to Expand Free Speech Protections in Certain Contexts*, INST. FOR FREE SPEECH (Sept. 23, 2020), https://www.ifs.org/blog/cases-judge-coney-barrett-expand-free-speech-protections/ [https://perma.cc/9VYW-Z22P] (analyzing then-Judge Barrett's involvement with three free speech cases suggesting she is in favor of more First Amendment protections); *see also* Adams v. Bd. of Educ. of Harvey Sch. Dist. 152, 968 F.3d 713, 716 (7th Cir. 2020) (showing then-Judge Barrett's joining of Judge Easterbrook's holding that public employees do not automatically lose free speech rights solely because speech implicates some matter of public concern).

298. *See Mahanoy III*, 964 F.3d at 189-90 (emphasizing Third Circuit's ruling provides clarity to students to know whether speech they are about to engage in may subject them to school discipline); *see also* Goldstein, *supra* note 263 (warning other schools should consider changing their policies on student-athlete social media usage); *Letter to the University of Iowa*, *supra* note 287 (placing pressure on University of Iowa for position on social media usage and requesting all open records regarding football team's Twitter ban).

pate in extracurricular activities."[299] Furthermore, the Third Circuit's bright-line rule provides "upfront clarity" in giving fair notice to students so there is no ambiguity on whether certain speech may be subject to discipline.[300] Similar to professional athletes, student-athletes can use their platforms within the school to be catalysts for positive social change.[301] Additionally, *Mahanoy III* allows coaches to create a comfortable environment for student-athletes where they will not air grievances over social media and educate students on positive uses and negative abuses of social media.[302] School officials should take affirmative measures to avoid potential legal battles in a way that encourages students to use social media to advance certain causes without infringing their First Amendment rights.[303] For example, coaches should educate each student-athlete prior to the regular season so they know early on how to use social media responsibly, such as waiting twenty-four hours prior to

299. Br. of Amicus Curiae Found. for Indiv. Rights in Educ., *Mahanoy III*, 964 F.3d 170, at 19 (Aug. 28, 2019) (warning schools may not unconstitutionally condition extracurricular participation on acceptable speech).

300. *Mahanoy III*, 964 F.3d at 189 (stating its rule enables students to know whether certain speech could subject them to school discipline).

301. *See Our Approach*, CMTY. MATTERS, https://community-matters.org/about/our-approach/ [https://perma.cc/E36Y-WQNC] (last visited Dec. 8, 2020) (explaining program empowering young student-athletes with leadership values and ability to change social norms).

302. *See* Kevin DeShazo, *Are You Empowering or Overpowering Your Student Athletes on Social Media?*, FIELDHOUSE MEDIA (Oct. 27, 2014), https://www.fieldhousemedia.net/are-you-empowering-or-overpowering-your-student-athletes-on-social-media/ [https://perma.cc/UX3U-DCG9] (encouraging coaches to urge students to positively use social media); *see also* Michael Gaio, *Blog: 9 Social Media Dos and Don'ts for Student-Athletes*, https://www.athleticbusiness.com/corporate/blog-9-social-media-dos-and-don-ts-for-student-athletes.html [https://perma.cc/BR32-UJR5] (Oct. 2013) (explaining ways educators and coaches may instruct student-athletes on positive ways to use social media).

303. *See, e.g.*, Andy Buhler, *Students Launch Social Media Campaign to Urge State Officials to Allow Return of High School Sports in Washington*, SCOREBOOK LIVE (Dec. 11, 2020), https://washington.scorebooklive.com/2020/12/11/students-launch-social-media-campaign-to-urge-state-officials-to-allow-return-of-high-school-sports-in-washington/ [https://perma.cc/VK7C-WFFF] (noting high school athletes used social media to urge Washington governor and state department to amend COVID-19 restrictions for sports); *see also* Adam Juratovac, *How High School Coaches Can Create and Enforce Social Media Policies*, https://blogs.usafootball.com/blog/2062/how-high-school-coaches-can-create-and-enforce-social-media-policies [https://perma.cc/5LJ6-TKRV] (Nov. 9, 2016) ("This subject [of crafting social media policies] is intricate because coaches can not restrict their student-athletes from posting on social media because those restrictions infringe on student-athletes' free speech rights. However, coaches can instill guiding principles for their student-athletes on social media use that can be more effective than stringent rules.").

posting potentially emotionalized content and not posting anything their parent would not want to see.[304]

The Third Circuit went leaps and bounds in advocating for student-athlete speech rights, especially those engaged in extracurricular activities, and hopefully attracted the attention of the Supreme Court.[305] This case is a stepping-stone for nationwide recognition of the importance of student-athlete free speech rights.[306] The Third Circuit delivered a grand slam for student-athletes by affirming they do not lose their First Amendment rights by participating in sports.[307] Now, the ball is in the Supreme Court.[308]

*Nicolas Burnosky**

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304. *See* Nelson Gord, *NCSA: Five Social Media Lessons for Coaches*, USA TODAY HIGH SCH. SPORTS (Nov. 12, 2019), https://usatodayhss.com/2019/ncsa-five-social-media-lessons-for-coaches [https://perma.cc/Z4QS-Q3NU] (highlighting several ways coaches may build successful sports program by teaching responsible social media use).

305. *See* Emilee Larkin, *Snapchatting Cheerleader Wins Free-Speech Case at 3rd Circuit*, COURTHOUSE NEWS (June 30, 2020), https://www.courthousenews.com/snapchatting-cheerleader-wins-free-speech-case-at-third-circuit/ [https://perma.cc/W47J-5EY2] (describing opinion as "enormously important for the safety and welfare of young people everywhere" (quoting Frank LoMonte, director of Brechner Center for Freedom of Information)).

306. *See* Cope, *supra* note 281 ("The Third Circuit's opinion is historic because it is the first federal appellate court to affirm that the substantial disruption exception from *Tinker* does not apply to off-campus speech.").

307. *See Mahanoy III*, 964 F.3d 170, 182 (3d Cir. 2020) (holding reduced free speech rights when participating in extracurricular activities runs counter to well-established First Amendment principles).

308. *See Mahanoy Area School District v. B.L.*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/mahanoy-area-school-district-v-b-l/ [https://perma.cc/H2TA-PXYM] (last visited Feb. 4, 2020) (listing petition as "GRANTED" on Jan. 8, 2021).

* J.D. Candidate, May 2022, Villanova University Charles Widger School of Law; B.A in Political Science, Temple University, 2019. I would like to dedicate this Note to my fiancé, Rachel, for her unyielding love and unwavering support, without whom I would not have had the drive and dedication to have this Note published.