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Unfriending Tinker : The Third Circuit Holds Schools Cannot Regulate Off-Campus Social Media Speech

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UNFRIENDING *TINKER*: THE THIRD CIRCUIT HOLDS SCHOOLS CANNOT REGULATE OFF-CAMPUS SOCIAL MEDIA SPEECH

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I. NOW TRENDING: THE INCREASE IN SOCIAL MEDIA USE AND ITS CONSEQUENCES

After coming across sexually explicit messages between sixteen-year-old Channing Smith and another male student, a peer shared the images to their public Instagram and Snapchat stories.[1] Hours later, Smith committed suicide.[2] Smith's story is unfortunately not an isolated event and illustrates the tragic consequences of cyberbullying and online hate speech.[3] Although the two interacted in the same classroom, the incident occurred outside the classroom through the use of social media.[4] This raises a question that public schools across the country are facing—could school officials have done anything about the posts, or must they helplessly stand by as students like Smith fall victim to cyberbullying?

It goes without saying that social media is a popular way for teens to communicate.[5] In 2019, roughly two-thirds of teens had at least one active

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1. Kat Tenbarge, *A 16-Year-Old Died by Suicide After a Classmate Posted Explicit Messages Between Him and Another Boy on Social Media. Now, His Family Is Seeking Justice*, INSIDER (Sept. 28, 2019, 11:09 PM), https://www.insider.com/tennessee-channing-smith-suicide-social-media-bullying-coffee-county-2019-9 [https://perma.cc/6CPX-JY3R] (explaining peer obtained private Facebook messages between Smith and another male).

2. *Id.* (noting Smith's family believes these social media posts were "the driving force behind his suicide"). Before taking his life, Smith shared on Instagram that he was taking a break from social media and wrote, "I really hate how I can't trust anyone because those I did were so fake. Bye . . . ." *Id.* (internal quotation marks omitted).

3. *See* Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RES. CTR. (Sept. 27, 2018), https://www.pewresearch.org/internet/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/ [https://perma.cc/3XKK-LM4T] (revealing survey results that show fifty-nine percent of teens have been cyberbullied).

4. *See* Tenbarge, *supra* note 1 (explaining Smith likely saw posts while home).

5. *See* Monica Anderson & JingJing Jiang, *Teens, Social Media & Technology 2018*, PEW RES. CTR. (May 31, 2018), https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/ [https://perma.cc/KF6T-N5DB] (acknowledging ninety-five percent of teens have or have access to a smartphone). For purposes of this study, teens were considered ages thirteen to seventeen. *See id.* When teens were asked what social media platform they use the most, eighty-five percent said YouTube, seventy-two percent said Instagram, sixty-

social media profile, and eighty-nine percent reported being online "almost constantly" or "several times a day."[6] More alarming, however, is that over half reported that they have experienced some form of bullying or harassment while online.[7]

The COVID-19 pandemic highlighted these concerns, as it increased the world's reliance on the internet.[8] Once students began learning remotely and interacting with peers exclusively online, instances of cyberbullying and social media hate speech increased.[9] An April 2020 report published by L1ght revealed that social media hate speech among students increased seventy percent since ceasing in-person learning.[10] Overall, ninety percent of teens view this misuse of social media as a problem among their age group, and over fifty percent believe that teachers fail to adequately address the situation.[11] Students may have various theories as to why their teachers do not intervene in online bullying or harassment.[12] But in reality, confusion as to who has authority to intervene may cause the teachers' hesitancy to interject.[13]

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nine percent said Snapchat, fifty-one percent said Facebook, and thirty-two percent said Twitter. *Id.*

6. *Id.* (noting about nine out of ten teens go online multiple times per day); *see also* American Academy of Child and Adolescent Psychiatry, *Social Media and Teens*, AACAP.ORG, https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Social-Media-and-Teens-100.aspx#:~:text=surveys%20show%20that%20ninety%20percent,mobile%20devices%20with%20internet%20capabilities [https://perma.cc/VB7P-DUCC] (last updated Mar. 2018) (explaining that, on average, teens are online for nine hours per day).

7. *See* Anderson, *supra* note 3 (emphasizing teens who spend more time online are more likely to experience online harassment). Offensive name-calling and rumor spreading were the most commonly reported forms of online harassment. *See id.*

8. *See* Lauren Barack, *Navigating Cyberbullying More Difficult Amid COVID-19, but There Are Options*, K-12 DIVE (Aug. 5, 2020), https://www.educationdive.com/news/navigating-cyberbullying-more-difficult-amid-covid-19-but-there-are-option/582771/ [https://perma.cc/5A2M-7GQN] (recognizing students' potential increased vulnerability to cyberbullying due to COVID-19 distanced learning requirements).

9. *See id.* (stating "one of the first things parents and educators may want to do when a student is cyberbullied is get them offline," but noting the impracticality of taking a student offline "when every one of a student's friends is probably online, along with many of their classes").

10. *See id.* (suggesting social distancing decreased physical bullying but increased cyberbullying). L1ght is a startup that "helps detect and filter abusive and toxic online content." *Id.*

11. *See* Anderson, *supra* note 3 ("[M]ajorities of young people think key groups, such as teachers, social media companies and politicians are failing at tackling [the online harassment] issue."). Fifty-eight percent of teenagers said that they had a negative view of how teachers handled incidents of cyberbullying or online harassment. *Id.*

12. *See id.*

13. *See* Lisa Smith-Butler, *Walking the Regulatory Tightrope: Balancing Bullies' Free Speech Rights Against the Rights of Victims to Be Let Alone When Regulating Off-Campus K-12 Cyber-Speech*, 37 NOVA L. REV. 243, 299–301 (2013) (explaining schools are faced

The U.S. Constitution's First Amendment guarantees citizens the freedom of speech.[14] This right extends to online speech as well as speech that is offensive, vulgar, or controversial.[15] When students share questionable content on social media, schools struggle to balance this fundamental right with the need to maintain a safe academic environment.[16] For example, an Ohio high school suspended several students in 2018 after criticizing the school's superintendent on Twitter.[17] Alternatively,

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with "more questions than answers" when it comes to ability to regulate off campus speech that impacts on-campus activities).

14. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

15. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017) ("A fundamental First Amendment principle is that all persons have access to places where they can speak and listen . . . . [O]ne of the most important places to exchange views is cyberspace, particularly social media . . . ."); *see also* Snyder v. Phelps, 563 U.S. 443, 458 (2011) (explaining government cannot restrict speech merely because it is offensive).

16. *See* Smith-Butler, *supra* note 13, at 299 (noting a principal is "damned if they do and damned if they don't" when it comes to handling incidents of off campus cyberbullying that impact the on-campus environment (internal quotation marks omitted)); *see also Effects of Bullying on Mental Health*, STOPBULLYING.GOV (Oct. 25, 2019), https://www.stopbullying.gov/blog/2019/10/25/effects-bullying-mental-health [https://perma.cc/6GB4-Q64X] ("Research suggests that children and youth who are bullied over time are more likely . . . to experience depression, anxiety, and low self-esteem. They also are more likely to be lonely and want to avoid school."). Social media is relatively free from parental control and monitoring, which can result in posting students sharing questionable content. *See* Catherine E. Mendola, *Big Brother as Parent: Using Surveillance to Patrol Students' Internet Speech*, 35 B.C. L.J. & SOC. JUST. 153, 155 (2015) ("Absent oversight, students are left to their own devices, able to make independent, potentially dangerous moves in their otherwise micromanaged worlds."). While cyberbullying is one example of how a student may exercise poor judgment online, there are other ways students use social media in a negative manner. *See id.* at 156.

> Unaware or simply indifferent to the repercussions of public postings on the Internet, students have unveiled violent plans against themselves and others, including bomb threats and school shootings. They have discussed eating disorders, underage drinking, sexual encounters, and drug use. Students have also criticized teachers and school administration. Regardless of a student's motive—a cry for help, boredom, or peer pressure—a student's out-of-school Internet speech often has an impact on his educational environment, his peers, and his community.

Id. (footnotes omitted).

17. *See* Emily Mills, *Madison Students Get Detention After Criticizing Superintendent on Twitter*, MANSFIELD NEWS J., https://www.mansfieldnewsjournal.com/story/news/local/2018/09/14/madison-students-punished-after-criticizing-superintendent-twitter/1294713002/ [https://perma.cc/79GL-PELU] (last updated Sept. 14, 2018, 6:43 PM) (reporting that eight to ten students were punished for posting negative tweets about their superintendent). One student tweeted a message to the school's superintendent, writing, "'A leader wouldn't let (their) kids be educated in 100-degree heat' and 'In my opinion, you should leave the district.'" *Id.* The student sent the tweet while in school, and school officials asked the student to delete the message. *Id.* Although the student initially complied, another tweet was posted later that read "standing my ground," resulting in the three days of in-school detention. *Id.*

Princeton University recently declined to intervene when a student used a racial insult on Facebook.[18]

This inconsistent enforcement is prevalent not only in school districts but also in courts.[19] In *Tinker v. Des Moines Independent Community School District*,[20] the Supreme Court clearly delineated students' First Amendment rights *in* school.[21] But the Court decided *Tinker* before the invention of modern social media and has not yet extended its precedent to online speech.[22] This year, in *B.L. ex rel. Levy v. Mahanoy Area School District*,[23] the Third Circuit declined to extend the *Tinker* substantial disruption test (*Tinker* exception) to off-campus cyberspeech and concluded students retain full First Amendment rights outside of school.[24] This marked the broadest circuit court opinion about off-campus student cyberspeech thus far.[25] This broad-sweeping rationale differs from the Fourth Circuit's sufficient nexus test, which is consistent with *Tinker* and properly addresses off-campus electronic speech cases.[26]

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18. *See* Imani Mulrain et al., *Princeton, It's 2020: Stop Protecting Racial Slurs*, DAILY PRINCETONIAN (Aug. 6, 2020, 6:46 PM), https://www.dailyprincetonian.com/article/2020/08/princeton-free-speech-anti-racism-stop-protecting-racial-slurs [https://perma.cc/VJ4A-FTZH] (stating Vice President for Campus Life Rochelle Calhoun emailed students to express that the student's use of a racial slur did not violate University policy). Vice President Calhoun sent the message was in response to a petition drafted by students, which asked Princeton to hold a discrimination hearing. *Id.*

19. *Compare* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 577 (4th Cir. 2011) (finding school could constitutionally suspend student who used MySpace page to bully peer while off campus), *with* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (holding that school could not constitutionally punish student for parody MySpace page of school principal while off campus).

20. 393 U.S. 503 (1969). For a discussion of *Tinker* and Supreme Court precedent on student speech, see Section II.A.

21. *See Tinker*, 393 U.S. at 511 ("In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.").

22. *See id.* 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* William Calve, Comment, *The Amplified Need for Supreme Court Guidance on Student Speech Rights in the Digital Age*, 48 ST. MARY'S L.J. 377, 392 (2016) (explaining Supreme Court has not said whether *Tinker* exception applies to off-campus student speech).

23. 964 F.3d 170 (2020).

24. *See id.* at 191. While the holding in *Tinker* consists of multiple parts, for the purposes of this Note, the phrase "*Tinker* exception" will hereinafter be used to refer to *Tinker*'s substantial disruption test. For a discussion of *Tinker* and its substantial disruption test, see *infra* notes 30–36 and accompanying text.

25. *See B.L. ex rel. Levy*, 964 F.3d at 196 (Ambro, J., concurring) (noting the Third Circuit is first circuit court to find that students retain full First Amendment rights while off campus).

26. *See* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 572–73 (4th Cir. 2011) (applying *Tinker*'s sufficient nexus test). For a discussion of the Fourth Circuit's approach, see *infra* notes 72–79 and accompanying text.

This Note analyzes the Third Circuit's conclusion that the *Tinker* exception does not apply to off campus cyberspeech. Part II summarizes the relevant Supreme Court and Court of Appeals cases, emphasizing the different approaches to off campus electronic speech. Part III discusses the facts and procedural history of *B.L.* Part IV describes the Third Circuit's holding in *B.L.* that students retain full First Amendment rights while using social media off campus. Part V provides a critical analysis of the Third Circuit's holding and advocates that the Fourth Circuit's sufficient nexus test offers a more appropriate solution for precedential and policy reasons. Part VI illustrates the impact of *B.L.* and the need for Supreme Court guidance.

II. A SCREENSHOT OF STUDENTS' FIRST AMENDMENT RIGHTS

Between 1969 and 2007, the Supreme Court decided four student speech cases.[27] Many circuit courts have relied on these cases for guidance when addressing off-campus student speech.[28] However, their inconsistent approaches have confused school officials and demonstrated a need for further Supreme Court intervention.[29]

A. *Before Social Media Went Viral: Supreme Court Decisions on Student Speech*

Over fifty years ago in *Tinker*, the Supreme Court stated that public school students do not lose their First Amendment rights while on school

27. *See* Morse v. Frederick, 551 U.S. 393, 403 (2007) (finding "special characteristic of the school environment" enables schools to regulate student speech promoting illegal drug use (quoting *Tinker*, 393 U.S. at 506)); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (noting school officials may regulate expression associated with academic curriculum "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school"); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (determining appropriate for school district to regulate vulgar student expression).

28. *See* Elizabeth A. Shaver, *Denying Certiorari in* Bell v. Itawamba County School Board*: A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539, 1554 (2017) (discussing how lower courts have had to apply Supreme Court's "twentieth century" student speech cases to "twenty-first century" student speech issues).

29. *See, e.g.*, Doninger v. Niehoff, 642 F.3d 334, 353 (2d Cir. 2011) ("The law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile . . . ."); Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 657 (2011) (noting the circuit court split indicates the law is unclear); Mendola, *supra* note 16, at 161 (noting "[t]he resulting circuit split is based primarily on varying interpretations of the Court's 1969 holding in *Tinker*, as applied to Internet conduct decades later").

property.[30] The Court found the school's punishment of three students for wearing headbands to be an unconstitutional restriction on speech.[31] The Court emphasized that "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[32]

Although *Tinker* clarified that students retain significant First Amendment rights while in school, these rights are not as extensive as those of a regular citizen.[33] The Court inserted a narrow exception that allowed school officials to regulate student speech that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[34] Speech that is merely controversial or unpopular does not meet this standard.[35] Rather, the speech must threaten to disrupt the operation of the school or violate the rights of other students.[36]

A material and substantial disruption is not the only limit on students' First Amendment rights while in school. In three cases following *Tinker*, the Supreme Court carved out additional exceptions.[37] These cases reaffirm that there are boundaries to students' First Amendment rights in school.[38]

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30. *See Tinker*, 393 U.S. at 506 ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.").

31. *Id.* at 505–06 (stating that wearing armbands constitutes "pure speech," which is entitled to First Amendment protection (internal quotation marks omitted) (first citing Cox v. Louisiana, 379 U.S. 536 (1965); then citing Adderly v. Florida, 384 U.S. 39 (1966))).

32. *Id.* at 506 (clarifying that this has been the Court's stance for nearly fifty years).

33. *See id.* at 513. The *Tinker* court decided that a student's speech loses constitutional protection if it compromises the school environment:

> But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id.

34. *Id.* (internal quotation marks omitted) (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)) (explaining schools may regulate speech that disrupts school activities or rights of others).

35. *See id.* at 509 ("In order for the [s]tate in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

36. *See id.* at 514 (stating that school authorities must demonstrate that student speech "forecast[s] substantial disruption of or material interference with school activities" in order to justify regulation).

37. *See* Morse v. Frederick, 551 U.S. 393, 408 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

38. *See Morse*, 551 U.S. at 410 ("The First Amendment does not require schools to tolerate at school events student expression that contributes to . . . dan-

The first exception emerged in *Bethel School District No. 403 v. Fraser*.[39] In that case, Matthew Fraser used a sexual metaphor in a speech at a school assembly.[40] In response, the school suspended Fraser for two days.[41] The Court found the suspension did not violate the First Amendment because Fraser's speech contained vulgar and offensive language.[42] The Court noted part of a school's role is to exemplify and enforce appropriate forms of expression.[43] Unlike the political speech in *Tinker*, the sexual metaphor in Bethel affronted "the 'fundamental values' of public school education."[44]

The following year, the Court added another caveat to the *Tinker* exception in *Hazelwood School District v. Kuhlmeier*.[45] In that case, the Court found a principal did not violate students' First Amendment rights by removing student articles discussing divorce and abortion from a school-sponsored newspaper.[46] The Court reasoned that the school, as the publisher of the paper, may set high standards for student speech and refuse publication if those standards are not met.[47] The Court stated schools must consider the maturity of the speech's audience when trying to protect its students from inappropriate speech.[48] Thus, the Court held that it

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gers [such as illegal drug use]."); *Kuhlmeier*, 484 U.S. at 274 (deciding principal may constitutionally censor articles in school newspaper); *Fraser*, 478 U.S. at 683 (finding school may regulate vulgar, nonpolitical student speech).

39. 478 U.S. 675 (1986).

40. *Id.* at 677–78 (emphasizing Fraser's speech, which was in front of approximately 600 students). Fraser's stated purpose for his speech was to nominate a peer for student elective office. *Id.* at 677.

41. *Id.* at 679.

42. *See id.* at 683 (concluding that speech offensive to mature adults and damaging to younger, impressionable students is unprotected).

43. *See id.* ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."). The Court emphasized that education "is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Id.*

44. *Id.* at 685–86 (deeming appropriate and constitutional a school's measures to regulate vulgar speech and lewd conduct). *The Fraser* court noted the tensions between promoting viewpoint diversity at schools and protecting the sensibilities of fellow students. *See id.* at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.").

45. 484 U.S. 260 (1988).

46. *Id.* at 270–71 (distinguishing from *Tinker* because it concerns whether schools must promote student speech rather than whether schools may silence student speech).

47. *See id.* at 271–72 (explaining school newspapers can set higher standards than actual newspaper publishers). A school may refuse to associate itself with speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.* at 271.

48. *See id.* at 272 (noting emotional maturity "might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting").

is constitutionally permissible for schools to exercise this sort of control so long as it is "reasonably related to legitimate pedagogical concerns."[49] In other words, censorship of a school-sponsored form of expression is acceptable if justified by a legitimate educational purpose.[50]

In 2007, *Morse v. Frederick*[51] added the final exception to *Tinker*.[52] While at an off-campus, school-supervised event, Joseph Frederick waved a banner that read "BONG HiTS 4 JESUS."[53] When Frederick refused to take the banner down, the school principal issued him a ten-day suspension.[54] Ultimately, the Court upheld the suspension because the banner could reasonably be interpreted as promoting illegal drug use rather than articulating a political message.[55] The Court considered the speech "in light of the special characteristics of the school environment" and reasoned that the banner's message contradicts the school's interest in deterring drug use.[56] Moreover, the Court considered this a school speech case because Frederick was at a school-sponsored event and directed the banner at students.[57]

B. *A Blurry Picture: The Differing Circuit Court Approaches to Off-Campus Social Media Speech*

Although the Supreme Court has yet to comment on a school's ability to regulate off-campus student cyberspeech, many circuit courts have.[58] To date, the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh

49. *Id.* at 273 (explaining that a school's exercise of control over student speech in school-sponsored expressive activities does not violate First Amendment).

50. *See id.*

51. 551 U.S. 393 (2007).

52. *See id.* at 408 (finding "special characteristics of the school environment" enable school to regulate expression promoting illegal drug use (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969))).

53. *Id.* at 397. The event took place across the street from Frederick's school, those inside the school could view the banner. *Id.*

54. *Id.* at 398 (noting Frederick's principal believed the banner encouraged illegal drug use). Frederick's principal believed this banner violated the school's policy, which states in part, "[t]he Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . ." *Id.* (second and third alteration in original) (citation omitted).

55. *Id.* at 402–03 (stating the banner could not be interpreted as a political message). If the students created the banner to advocate for legalization of marijuana or to promote a religious belief, in all likelihood, the Court would have protected Frederick's speech because Tinker protects political messages. *See id.*

56. *Id.* at 405 (quoting *Tinker*, 393 U.S. at 506) (explaining a banner promoting drug use creates concrete danger in school environment).

57. *See id.* at 393–94 (rejecting the student's argument that these facts fall outside the purview of "school speech" cases).

58. *See e.g.*, 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. CHI. L.J. 717, 732–42 (2018) (summarizing courts' varying approaches to off-campus student cyberspeech).

Circuits have addressed the issue of off-campus student cyberspeech to varying outcomes.[59] Of these approaches, the Fourth Circuit's sufficient nexus test most effectively balances First Amendment rights and the school's need to maintain a safe environment.[60]

The Second Circuit typically has followed the reasonable foreseeability test, which examines whether it is reasonably foreseeable to school officials that the off-campus speech will reach school grounds.[61] If the answer is yes, the court applies the *Tinker* exception and asks whether the speech is likely to cause a substantial disruption.[62] If it is, school officials may discipline the student without running afoul of the First Amendment.[63]

Alternatively, before *B.L.*, rather than assessing whether the *Tinker* exception extends to instances of off-campus student speech, the Third Cir-

59. *See id.* at 730 (explaining that although most circuits have applied a form of the *Tinker* exception, they interpret and apply *Tinker* and its progeny in different ways); s*ee also* Daniel Marcus-Toll, Note, *Tinker Gone Viral: Diverging Threshold Tests for Student Regulation of Off Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3420 (2014) ("There is a split among the federal courts of appeals with respect to whether, and under what circumstances, [the *Tinker* exception] extends to off-campus student speech."). In *B.L. ex rel. Levy*, the Third Circuit discussed the Second, Third, Fourth, Fifth, and Eighth Circuit approaches. *See* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 180, 186–87 (3d Cir. 2020). For additional context, the Ninth Circuit applies the *Tinker* exception to cases of off-campus cyberspeech where there is "an identifiable threat of school violence." Ferry, *supra* note 58, at 731 (outlining the circumstances which warrant invoking the exception). Furthermore, when faced with an instance of off-campus student cyberspeech, the Eleventh Circuit asks whether school officials were justified in expelling a student based on a combination of the *Tinker* exception and the true threat approach. *See* Boim v. Fulton Cty. Sch. Dist., 494 F.3d 978, 982 (11th Cir. 2007).

60. *See* Kristopher L. Jiles, Note, *Trigger Fingers Turn to Twitter Fingers: The Evolution of the Tinker Standard and Its Impact on Cyberbullying Amongst Adolescents*, 61 How. L.J. 641, 663 (2018) (arguing the nexus test adequately balances interests because before regulating, a school must prove a nexus between speech and school). For a discussion of why the Fourth Circuit's sufficient nexus test best balances these interests, see *infra* notes 72–79 and accompanying text.

61. *See* Ferry, *supra* note 58, at 732 (describing the test as an "additional threshold" to the *Tinker* exception).

62. *See id.* (noting that Second Circuit rejected the true threat approach because "school administrators' authority is beyond what the true threat standard allows").

63. *See id.* ("[I]f off-campus conduct can create a foreseeable risk of substantial disruption within a school, the school has the authority to discipline the student."). In 2007, the court applied this test in *Wisniewski v. Board of Education of Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007). While at home, a student sent out a drawing of their English teacher being shot via instant message. *Wisniewski*, 494 F.3d at 35–36. As a punishment, the school suspended the student. *Id.* at 34–35. When addressing whether the suspension was constitutional, the court applied a combination of the reasonable foreseeability test and the *Tinker* exception. *See id.* at 40. It ultimately found that because the speech could reach school grounds and cause a substantial disruption. *Id.* Thus, the suspension was constitutional. *Id.*

cuit assumed that it applied.[64] In *J.S. ex rel. Snyder v. Blue Mountain School District*,[65] an eighth grade student created a MySpace profile to poke fun at their school principal.[66] Consequently, the school suspended J.S.[67] To assess the constitutionality of this suspension, the Third Circuit focused on the student's intent.[68] To uphold the suspension, the school had to provide express evidence that the student intended for the speech to make its way onto school grounds and that readers would take its content seriously.[69] Because the student made the page private, the Third Circuit found it unlikely that the speech would cause a substantial disruption.[70] Thus, the student's suspension was unconstitutional.[71]

The Fourth Circuit has followed the sufficient nexus test.[72] This test asks whether the off-campus conduct is sufficiently connected to the school's pedagogical interests to warrant punishment.[73] A school can regulate off-campus student speech if doing so protects the well-being of students and promotes education.[74] Applying the sufficient nexus test in

64. *See* J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) (assuming without explanation that the *Tinker* exception applies). In *Layshock ex rel. Layshock v. Hermitage School District*, the Third Circuit took this same approach. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (2011) ("[W]e need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate . . . .").

65. 650 F.3d 915 (3d Cir. 2011).

66. *Id.* at 920 (explaining profile contained "adult language and sexually explicit content").

67. *Id.*

68. *See id.* at 948 (Fisher, J., dissenting) ("The majority goes so far as to state that we should take J.S.'s speech less seriously because she intended it as a 'joke.'").

69. *See id.* at 930–31 (explaining that to justify suspension, J.S. must have intended for the student body to be the target audience).

70. *See id.* J.S. granted access to about twenty-two students at the school, and because the school district blocked MySpace, students could not view the page while on campus. *See id.* at 920–21. According to the record, the page was "so outrageous that no one took its content seriously." *Id.* at 921.

71. *See id.* at 931. Although the majority avoided addressing whether school officials can regulate off-campus student speech, Judge D. Brooks Smith—joined by four others—tackled the issue in a concurring opinion. *See id.* at 936 (Smith, J., concurring). Judge Smith argued that "[a]pplying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students' expressive activity no matter where it takes place . . . ." *Id.* at 939.

72. *See* Ferry, *supra* note 58, at 755 (noting that Fourth Circuit is only circuit to adopt sufficient nexus test). This Note asserts that the Fourth Circuit's sufficient nexus test appropriately addresses the concerns surrounding off-campus student cyberspeech. For an in-depth discussion of the advantages of the Fourth Circuit's test, see *infra* Section V.C.

73. *See* Calve, *supra* note 22, at 386 (describing sufficient nexus test as "threshold prong," meaning a sufficient connection between the speech and the school must be establish before applying *Tinker* exception).

74. *See* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 572 (4th Cir. 2011) ("[S]chool administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.").

Kowalski v. Berkeley County Schools,[75] the Fourth Circuit held that a school could punish a student who created a MySpace page to post hateful comments about a peer.[76] Although the incident occurred off campus, the Fourth Circuit said it was reasonably foreseeable to the student that their speech could create a substantial disruption in school because most of the people who interacted with the page were students.[77] Furthermore, the Fourth Circuit recognized that bullying and harassment are serious issues, and schools must be able to take action to maintain a safe environment.[78] The court noted that "the Constitution is not written to hinder school administrators' good faith efforts to address [bullying and harassment]."[79]

Unlike other circuits, the Fifth Circuit has declined to articulate a specific test for off-campus cyberspeech.[80] Rather, the Fifth Circuit has applied the *Tinker* exception on a case-by-case basis.[81] In *Bell v. Itawamba County School Board*,[82] a student created a rap video that accused two sports team coaches of sexual misconduct.[83] The Fifth Circuit applied the *Tinker* exception and held that the school may punish the student because the student intentionally directed the speech at the school.[84]

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75. 652 F.3d 565 (4th Cir. 2011).

76. *Id.* at 567 (concluding that the bullying occurred in such a way that "was sufficiently connected to the school environment as to implicate the School District's recognized authority to discipline speech"). Over twenty students were members of the page, where a peer named Shay was the main subject of discussion. *Id.* at 567–68. One student posted a photograph of themselves and a friend holding a sign that read "Shay Has Herpes." *Id.* at 568. Later, the same student posted another photograph with a photo of Shay's face with a sign that read, "portrait of a whore." *Id.*

77. *Id.* at 572–73. The court reasoned that although the hate speech originated on the bully's home computer, the bully "knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment." *Id.* at 573. Indeed, the victim noted they felt uncomfortable sitting in class with students who ridiculed them online. *Id.* at 568.

78. *See id.* at 572 (equating a school's duty to maintain an environment free from bullying to a school's duty to maintain an environment free from messages promoting illegal drug, which the Supreme Court articulated in *Morse*). The court briefly noted discussed some of the negative impacts of bullying, which "can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide." *Id.* (citing STOPBULLYING.GOV, www.stopbullying.gov [https://perma.cc/5HT6-ZJNU] (last visited Feb. 6, 2021)).

79. *Id.* at 577 (balancing student's First Amendment rights against school's need to maintain an appropriate academic environment).

80. *See* Ferry, *supra* note 58, at 737 (noting Fifth Circuit "failed to adopt or reject approaches advocated by other circuits").

81. *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 391 (5th Cir. 2015) (holding *Tinker* exception applies to speech at issue).

82. 799 F.3d 379 (5th Cir. 2015).

83. *Id.* at 384 (explaining student's rap video contained vulgar and threatening language, including "betta watch your back," and "going to get a pistol down your mouth").

84. *See id.* at 394 (following the four other circuit courts that chose to apply the *Tinker* exception in instances of off-campus student cyberspeech). The Fifth

Finally, the Eighth Circuit follows both the true threat approach and the *Tinker* exception in instances of off-campus student speech.[85] In *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*,[86] the Eighth Circuit adopted the Second Circuit's reasonable foreseeability approach and found the *Tinker* exception applies in cases of off-campus student speech when it is reasonably foreseeable that the speech will reach the school and cause a substantial disruption therein.[87] After D.J.M. used their home computer to send a classmate messages discussing a potential school shooting, the school issued a ten-day suspension.[88] The court first held the messages constituted a true threat because the school had enough information to reasonably conclude that D.J.M. was planning a school shooting.[89] Second, applying the *Tinker* exception, the court concluded that the school could intervene because the school community would otherwise be exposed to a serious risk of harm and a disrupted environment.[90]

III. SNAPCHAT STORY TO SUSPENSION: THE FACTS OF *B.L.*

As a freshman at Mahanoy Area High School (MAHS), B.L. tried out for the school's cheerleading team and made the junior varsity roster.[91] The following year, as a sophomore, B.L. was again placed on the junior varsity team.[92] Frustrated about not making the varsity team for the second year in a row, B.L. posted a picture (snap) on Snapchat of B.L. and a

Circuit pointed out that *Tinker* was decided in a time when cellphones and social media did not exist. *See id.* at 392. Although the court chose to apply the *Tinker* exception to these facts, it noted the need for clear guidance regarding the extent to which schools may regulate off-campus student speech, given the significant technological changes since the *Tucker* exception was established. *See id.* at 403.

85. *See* D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 763, 766 (8th Cir. 2011) (applying true threat approach and *Tinker* exception); *see also* Doe v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616, 621–22 (8th Cir. 2002) (applying true threat approach).

86. 647 F.3d 754 (2011).

87. *Id.* at 766. The Eighth Circuit followed Second Circuit's reasonable foreseeability approach from *Wisniewski v. Weedsport Central School District*. *Id.* at 765–66.

88. *Id.* at 758. The student that D.J.M. messaged saved the conversations and notified the school. *See id.* at 759.

89. *Id.* at 762 (finding D.J.M. had intent to communicate their threats). The Eighth Circuit defined a true threat as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." *Id.* at 762 (internal quotation marks omitted) (quoting Doe v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002)). Additionally, the speaker must intend to communicate the statement to the "object of the purported threat *or to a third party*." *Id.* (quoting *Doe*, 306 F.3d at 624). True threats are not protected by the First Amendment. *See id.* at 764.

90. *See id.* at 766 (holding First Amendment claim properly dismissed due to the reasonably foreseeable threat).

91. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020).

92. *Id.* (noting B.L.'s frustrations to advance in cheerleading while incoming freshman made varsity).

friend holding up their middle fingers with the caption "[f]uck school fuck softball fuck cheer fuck everything."[93] Roughly 250 people could view the snap, many of whom attended MAHS or were on the cheerleading team.[94] Several students, both cheerleaders and non-cheerleaders, screenshotted the snap and brought it to the attention of B.L.'s cheerleading coaches.[95]

Prior to joining the team, B.L. signed both team and school rules that required her to avoid "foul language," "inappropriate gestures," and sharing "negative information regarding cheerleading, cheerleaders, and coaches . . . on the internet."[96] The cheerleading coaches determined B.L.'s snap violated these rules and subsequently removed B.L. from the team as punishment.[97] B.L. unsuccessfully appealed the decision to school authorities.[98]

In response, B.L. sued the Mahanoy Area School District (School District), claiming the punishment violated their First Amendment right to freedom of speech.[99] The district court agreed with B.L. and granted summary judgment in B.L.'s favor.[100] The court determined that the school could not punish B.L. because the snap took place off campus and presented no actual or foreseeable disruption to the school environment, thus, failing to meet the *Tinker* exception.[101] The district court also noted that B.L. did not waive the right to free speech by signing the school and team policies.[102]

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93. *Id.* (internal quotation marks omitted). In addition to cheerleading, other school activities made B.L. unhappy, such as exam anxiety and B.L.'s role on the school softball team. *Id.* B.L. used Snapchat to vent these frustrations. *Id.*

94. *Id.* (explaining these 250 people were B.L.'s "friends" on Snapchat).

95. *Id.* at 175–76 (noting disgruntled students approached coaches to express concerns about B.L.'s snap being inappropriate).

96. *Id.* at 176 (alteration in original) (outlining school and team policies). The school also had a rule that required student athletes to "conduct[ ] themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner." *Id.* (alteration in original) (internal quotation marks omitted).

97. *Id.*

98. *Id.* (stating B.L. appealed suspension to the athletic director, school principal, district superintendent, and school board). Although they upheld the coaches' suspension, they said B.L. would be eligible to try out for the team the following year. *Id.*

99. *Id.*

100. *Id.*; B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 445 (M.D. Pa. 2019) (finding First Amendment violation because B.L.'s speech neither "bore the imprimatur of the school or squad" nor caused a substantial disruption), *aff'd*, 964 F.3d 17 (3d Cir. 2020).

101. *B.L.*, 376 F. Supp. 3d at 443–44.

102. *Id.* at 437–38 (noting it unnecessary to consider B.L.'s overbreadth, viewpoint discrimination, or vagueness claims because all relief sought by B.L. could be granted solely on First Amendment claim). The court awarded B.L. nominal damages and ordered the School District to expunge the suspension from B.L.'s disciplinary record. *See* Matt Miller, *Pa. School Violated Cheerleader's Rights by Punishing Her For Profanity-Laced Snapchat Post, U.S. Court Says*, PENN LIVE (June 30, 2020),

IV. THE THIRD CIRCUIT HAS ENTERED THE CHAT: A NARRATIVE ANALYSIS ON THE COURT'S REFUSAL TO APPLY *TINKER* TO OFF-CAMPUS STUDENT CYBERSPEECH

In *B.L. ex rel. Levy*, the Third Circuit's majority affirmed the district court's decision that the First Amendment protected B.L.'s speech.[103] In doing so, it rejected approaches taken by other circuits and found that the *Tinker* exception does not apply to any instances of off-campus student speech.[104] Although Judge Ambro agreed with the overarching outcome of the case, he issued a separate concurring opinion to express his concerns with the majority's broad rejection of the *Tinker* exception.[105]

A. *Uploading New Content: The Majority in B.L. Takes a Different Approach to Off-Campus Student Cyberspeech*

The School District appealed the district court's decision to the Third Circuit.[106] The court first had to determine whether B.L.'s snap was protected speech.[107] If the speech was protected, then the court would have to address whether B.L. validly waived that protection by agreeing to the MAHS policies.[108]

The court began by reviewing the Supreme Court's four main student speech cases: *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*.[109] Overall, it interpreted these four cases to demonstrate that students have limited First Amendment rights on school grounds, but their rights "are coextensive with [those] of an adult" when off of school grounds.[110] In the Third Circuit's view, this implied that school officials cannot constitutionally discipline students for their speech that occurs off of school grounds.[111]

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https://www.pennlive.com/news/2020/06/pa-school-violated-cheerleaders-rights-by-punishing-her-for-profanity-laced-snapchat-post-us-court-says.html [https://perma.cc/P34M-RRZL].

103. *B.L.*, 964 F.3d at 194 (reasoning that to allow schools to regulate this kind of speech gives schools "the power to quash student expression deemed crude or offensive").

104. *See id.* at 187–89 (rejecting Second, Fourth, Fifth, and Eighth Circuit's approaches in favor of new approach). For an overview of these approaches, see *supra* notes 61–63, 72–90, and accompanying text.

105. *See id.* at 194, 197 (Ambro, J., concurring) (agreeing with grant of summary judgment but disagreeing with finding that *Tinker* exception never applies to off-campus student speech).

106. *Id.* at 176.

107. *Id.*

108. *Id.* at 176–77 (noting that inquiry does not end if B.L.'s speech is found to be protected).

109. *See id.* at 177–78. For a more in-depth discussion of these four Supreme Court cases, see *supra* Section II.A.

110. *Id.* at 178 (alteration in original) (internal quotation marks omitted) (quoting J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011)).

111. *See id.* at 177–78 (emphasizing *Morse*'s holding was related to speech "during school hours" and "at a school-sanctioned activity" (quoting Morse v. Fred-

In light of this observation, the court then looked to where B.L.'s snap occurred.[112] It noted that Supreme Court cases "focus[ ] not on physical boundaries [of the school] but on the extent to which schools control or sponsor the forum of the speech."[113] The court acknowledged that at a certain point, the school's authority comes to an end and cannot "reach into a child's home and control his/her actions" in the same way that it could control the child's actions in school.[114] While the court recognized that defining this boundary is a difficult task, it ultimately looked to *J.S.* and *Layshock* for guidance.[115] Based on those cases, the Third Circuit concluded that B.L.'s snap occurred off campus because it was posted while off school grounds on a weekend.[116]

Next, the court assessed the School District's defense that it could constitutionally suspend B.L. under *Fraser*.[117] The School District argued that it had the power "to enforce socially acceptable behavior" by regulating speech that is "vulgar, lewd, obscene, or plainly offensive."[118] The Third Circuit rejected this argument because *Fraser* applied specifically to vulgar, lewd, or offensive speech *on campus*.[119] Thus, *Fraser* did not apply because B.L.'s speech took place off campus.[120]

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erick, 551 U.S. 393, 400–01, 407 (2007))). The court also mentioned that *Kuhlmeier* found a school's "editorial authority applies 'only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself.'" *Id.* at 178 (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213–14 (3d. Cir. 2001)).

112. *See id.* (explaining on campus and off campus are terms the court uses "with caution").

113. *Id.* at 179. The Third Circuit noted it previously stated that "[i]t is 'well-established' that the boundary demarcating schools' heightened authority to regulate student speech 'is not constructed solely of the bricks and mortar surrounding the school yard.'" *Id.* at 178 (quoting Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011)).

114. *Id.* at 179 (quoting *Layshock*, 650 F.3d at 216). The School District argued that as a member of the cheerleading team, B.L. represented MAHS in a way that is similar to how "government employees represent their employer." *Id.* at 183 (quoting Brief of Appellant at 30, *B.L.*, 964 F.3d 170 (No. 19-1842)). The Third Circuit rejected both arguments. *See id.*

115. *See id.* at 180 (noting that "significant groundwork has been laid"). In both of those cases, the Third Circuit concluded that online student speech is not considered to be on-campus speech even when the communication is shared between students, refers to the school and school faculty, and impacts the school environment. *See id.* For a more detailed discussion of these cases, see *supra* notes 64–71 and accompanying text.

116. *See id.* at 180–81 (concluding that because B.L.'s snap made only a "few points of contact" with MAHS).

117. *See id.* at 181. For an overview of *Fraser*, see *supra* notes 39–44 and accompanying text.

118. *Id.* (quoting Brief of Appellant at 7–8, *B.L.*, 964 F.3d 170 (No. 19-1842)).

119. *Id.* at 181. The court also noted that in *Morse*, the Court explained that if the speech in *Fraser* occurred "outside the school context, it would have been protected." *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 405 (2007)).

120. *See id.* at 183. The Third Circuit also reasoned that the School District's argument contradicts precedent. *See id.* In *Layshock*, the court declined to apply

Next, the court addressed the School District's claim that application of the *Tinker* exception justified B.L.'s punishment.[121] The court considered three main approaches applied by other circuits: the Second and Eighth Circuit's reasonable foreseeability test, the Fourth Circuit's sufficient nexus test, and the Fifth Circuit's approach.[122] After providing a brief overview of these three approaches, the court outlined criticisms of each.[123] First, the court emphasized that "bad facts make bad law."[124] It argued that while it makes sense to allow schools to regulate direct threats of violence or posts that target students, it creates a slippery slope that allows for the regulation of other less threatening kinds of online speech.[125] Second, the court felt that these approaches placed too much speech under the authority of the school because of social media's perva-

Fraser to off-campus speech, reasoning that doing so would otherwise allow schools to control expression that was not within their authority to begin with. *See id.* at 183 (citing Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011)).

121. *See id.* (addressing School District's argument that "B.L.'s snap was likely to substantially disrupt the cheerleading program"). Whether the *Tinker* exception could apply to off-campus speech was an issue of first impression and one the Third Circuit had avoided answering in the past. *Id.* In *J.S.*, the court "assume[d], without deciding" that *Tinker* exception applied to the off-campus speech because the school did not demonstrate that a substantial disruption was foreseeable. *Id.* at 183–84 (internal quotation marks omitted) (quoting J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d. Cir. 2011)). Additionally, the court recognized that when it decided *Layshock* and *J.S.*, social media just began gaining popularity, and the *Tinker* exception's application to electronic speech was a developing issue. *See id.* at 185. But in 2020, the court realized that this issue could no longer be ignored due to "social media['s] . . . expansion into every corner of modern life." *Id.*

122. *See id.* at 185–86. For a more in-depth discussion of the reasonable foreseeability test, the sufficient nexus test, and the Fifth Circuit approach, see Section II.A.

123. *See id.* at 187–89 (rejecting to follow the various approaches taken by its sister circuits). Nevertheless, the Third Circuit stated that it sympathized with the other circuit courts, recognizing the difficulty in navigating students' off-campus free speech rights in the context of social media. *See id.*

124. *Id.* at 187 (internal quotation marks omitted) (quoting United States v. Joseph, 730 F.3d 336, 337 (3d Cir. 2013)).

125. *See id.* (noting that "one unmistakable trend from the case law is that the most challenging fact patterns have produced rules untethered from the contexts in which they arose"). To illustrate this point, the court discussed how in *Wisniewski*, the Second Circuit used the reasonable foreseeability test to understandably allow a school to discipline a student who threatened violence. *Id.* However, the Second Circuit later applied the same test to uphold a school's punishment of a student who falsely claimed in a blog post that a school band contest was canceled. *Id.*

siveness.[126] Third, the court did not think that any of these approaches provided sufficient clarity or predictability.[127]

Overall, the Third Circuit believed that the three tests offer too broad of an approach and alter the meaning of *Tinker*.[128] It decided to instead "forge [its] own path."[129] Thus, the Third Circuit broadly concluded the *Tinker* exception does not extend to student cyberspeech that occurs outside of school-sponsored activities.[130] Ultimately, it affirmed the district court's finding that B.L.'s suspension was unconstitutional.[131]

B. *Snapping Back to the Majority: Judge Ambro's Concurrence*

Judge Ambro agreed with the overall judgment of the case but dissented from the majority's finding that the *Tinker* exception does not extend to off-campus cyberspeech, noting the facts currently at issue do not support such a broad-sweeping conclusion.[132] First, Judge Ambro emphasized that the Third Circuit previously declined to limit the *Tinker* exception to on-campus speech.[133] Judge Ambro also noted that no other

126. *See id.* at 187–88 (explaining that its sister circuits' tests are overly broad). Specifically, the court found the reasonable foreseeability test too broad because many students follow one another, and it is inevitable that a student's "message may automatically pop up on the face of classmates' phones in the form of notifications from Instagram, Facebook, Twitter, Snapchat, or any number of other social platforms." *Id.* at 187. Additionally, the court said that the sufficient nexus test was overly broad because it blurs the line between on and off campus. *See id.* at 188. The test allows for schools to regulate speech anytime it disrupts the schools' educational mission, which the court fears is a power that can be abused. *See id.*

127. *Id.* (explaining no approach gives students or teachers "clear guidance" (internal quotation marks omitted) (quoting Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 265 (5th Cir. 2019)). The court reasoned that the Fifth Circuit approach provides no definitive test. *See id.* As for the reasonable foreseeability test, the court stated it is difficult to predict how or when off-campus speech will reach on campus. *See id.* Regarding the sufficient nexus test, the court stated that it is unclear to students what types of speech would sufficiently relate to a school's "pedagogical interests." *Id.* (quoting Kowalski v. Berkeley Cty. Sch., 652 F. 3d 565, 573 (4th Cir. 2011)).

128. *See id.* at 188–89 (explaining that approaches "sweep in too much speech and distort *Tinker*'s narrow exception into a vast font of regulatory authority").

129. *Id.* at 189.

130. *See id.* (noting that this approach abides by *Tinker* and provides school officials and students with clarity). The court did acknowledge that the approach "leaves some vulgar, crude, or offensive speech beyond the power of schools to regulate." *Id.* at 191.

131. *Id.* at 194. Although the Third Circuit concluded the *Tinker* exception did not apply, if it did, B.L.'s speech likely would have been protected, as it was not reasonably foreseeable the speech would create a substantial disruption in the school. *See id.* at 195 (Ambro, J., concurring).

132. *Id.* at 194.

133. *Id.* (explaining that in *Layshock*, the Third Circuit declined to "define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because . . . [the student's] conduct did not disrupt the school") (alterations in original) (quoting Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 220 (3d Cir. 2011))). Additionally, Judge Ambro noted that, in *J.S.*, the Third Circuit assumed *Tinker* applied. *Id.*

circuit court has rendered such a broad conclusion.[134] While other courts have declined to apply *Tinker* to off-campus speech based on certain facts, Judge Ambro stated those same courts later chose to apply *Tinker* outside of the geographical school boundary.[135]

Additionally, Judge Ambro argued that the majority based its s holding on simple facts.[136] While Judge Ambro considered the court's decision logical based on these facts, he worried about how the decision could lead to confusion when applied to more complicated facts.[137] For example, Judge Ambro noted that it is unclear whether "a school [can] discipline a student who posts off-campus [s]naps reenacting and mocking the victims of police violence where those [s]naps are not related to school . . . yet provoke significant disruptions within the school."[138]

Finally, Judge Ambro concluded by admonishing the majority's holding that courts must exercise judicial restraint when deciding cases.[139] According to Judge Ambro, the Third Circuit's decision was broader than necessary and "anticipate[d] a question of constitutional law in advance."[140] Judge Ambro emphasized that the majority could have applied the *Tinker* exception to B.L.'s situation and ruled in B.L.'s favor.[141] Thus, it was unnecessary for the majority to go further and analyze whether the *Tinker* exception applies to off-campus student cyberspeech.[142]

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134. *Id.* at 196 ("Instead, ours is the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech.").

135. *Id.* at 196–97 (first citing Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015); then citing Doninger v. Niehoff, 527 F.3d 41, 50–53 (2d Cir. 2008); and then citing Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39–40 (2d Cir. 2007)). Judge Ambro noted that "Circuit Courts facing harder and closer calls have stayed their hand and declined to rule categorically that [the *Tinker* exception] does not apply to off-campus speech." *Id.* at 197.

136. *Id.* at 195, 197 (describing the case as "straightforward" and one that "is not close to the line of student speech that schools may regulate"). B.L.'s speech was nonviolent and did not mention any specific individuals. *See id.* at 195. Although it resulted in a few complaints, the cheerleading coaches testified that "they did not expect the Snap would substantially disrupt any activities in the future." *Id.*

137. *Id.* at 197.

138. *Id.* ("We promulgate a new constitutional rule based on facts that do not require us to entertain hard questions such as these.").

139. *Id.* ("Do not decide today what can be decided tomorrow, for tomorrow it may not need to be decided.").

140. *Id.* at 194 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008)).

141. *Id.* at 197.

142. *Id.* ("We promulgate a new constitutional rule based on facts that do not require us to entertain had questions such as these." (footnote omitted)).

V. PUTTING A FILTER ON SPEECH: WHY IT IS SOMETIMES NECESSARY FOR SCHOOLS TO REGULATE OFF-CAMPUS STUDENT CYBERSPEECH

While the outcome of *B.L.* is just, rejecting the *Tinker* exception in off-campus student speech cases raises concerns moving forward.[143] Under a more extreme, nuanced set of facts, this holding may bar schools from regulating cyberspeech that materially and substantially disrupts the school environment and is harmful to students—solely because it happened off campus.[144] In order to conform with the *Tinker*'s intent and progeny to maintain a safe school environment, the Fourth Circuit's sufficient nexus test offers a solution to the issue that conforms with *Tinker*.[145]

A. *Giving* Tinker *a Much-Needed Update: Why Supreme Court Precedent Supports Extending the* Tinker *Exception to Off-Campus Cyberspeech*

To maintain a safe school environment, the Fourth Circuit's sufficient nexus test provides the best analytical framework.[146] Although the Supreme Court has made clear that students retain their First Amendment rights in school, *Tinker* and its progeny also place a limit on those rights.[147] In those cases, the Supreme Court recognized that under some circumstances, it is appropriate for schools to regulate student speech.[148]

143. *See id.* at 195 (explaining that the majority provided no guidance regarding how to apply its holding in future cases and that "there are no facts before [the court] to draw a clear and administrable line for this new rule").

144. *See* Marcus-Toll, *supra* note 59, at 3419 (arguing limiting school authority over speech that only occurs on campus is illogical given the nature and reach of technology).

145. *See* Jiles, *supra* note 60, at 662–63 (asserting "sufficient nexus test is the most adequate test to use in balancing the student's privacy interests guaranteed *Tinker* and the interest of the school district in deterring any future disruptions on campus").

146. *See* Smith-Butler, *supra* note 13, at 301–02 ("A literal reading of *Tinker* reflects that schools can regulate or discipline student speech that occurs off-campus if it has an on-campus impact that either causes a substantial disruption with the school's work, is reasonably foreseeable that it will cause a substantial disruption with the school's work, or it collides with the rights of others.").

147. *See* Morse v. Frederick, 551 U.S. 393, 408 (2007) (finding schools may regulate student speech promoting illegal drug use given that it conflicts with schools' goal of discouraging illegal drug use); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (noting that school officials may regulate expression associated with academic curriculum in order to tailor it to the maturity of students); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (determining it appropriate for a school district to regulate vulgar student expression); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (holding a school may regulate student speech if the speech creates material and substantial disruption).

148. *See Fraser*, 478 U.S. at 682 (explaining First Amendment rights of public school students are not the same as rights of adults). Additionally, this demonstrates that since *Tinker*, the Supreme Court has been comfortable with adding additional restrictions to student's First Amendment rights given the facts of the situation. *See* Shaver, *supra* note 28, at 1582. Thus, as our society continues to change, it is possible that the Court would be comfortable adding another exception to student speech rights. *See id.*

In *Fraser*, for example, Justice Burger noted that "simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, [it does not follow that] the same latitude must be permitted for children in public school."[149]

Tinker should evolve with the times by extending to off-campus speech because its exceptions promote a safe and orderly environment in school.[150] If speech impedes on the rights of other students, while simultaneously disrupting normal school activity, schools can regulate speech.[151] This comports with the Supreme Court's recognition that students have more limited First Amendment rights while in school.[152] But those cases dealt with issues of school-sponsored speech and did not consider the future impact of electronic communication and the prevalence of social media.[153] As compared to fifty years ago, the rise of electronic communication has led to less emphasis on where the speech occurs; separating off-campus speech from on-campus speech is no longer clear.[154] Online communication is constant, readily accessible, permanent, and quickly circulated.[155] The fast-paced, widespread nature of social media speech enters and impacts the school environment even more easily than traditional forms of expression.[156] Thus, to preserve the intent behind

149. *Fraser*, 478 U.S. at 682 (comparing First Amendment rights of students to the First Amendment rights of general adult citizens); *see* Smith-Butler, *supra* note 13, at 298 (explaining students' First Amendment rights are not absolute).

150. *See Tinker*, 393 U.S. at 507 (acknowledging that schools need authority to "prescribe and control conduct in the schools"); *see also* Shaver, *supra* note 28, at 1589–90 (noting Court's intent that *Tinker* stay relevant).

151. *See Morse*, 551 U.S. at 397 (holding "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"); *Tinker*, 393 U.S. at 513 (explaining schools can regulate speech that causes a material and substantial disruption and collides with the rights of others); *see also* Smith-Butler, *supra* note 13, at 302 (proposing that focusing on whether the off-campus speech collides with the rights of others can help schools determine when it is constitutionally permissible to intervene).

152. *Tinker*, 393 U.S. at 507 (acknowledging that although students have First Amendment rights, schools need to authority to create and enforce rules in order to maintain an appropriate environment).

153. *See* Shaver, *supra* note 28, at 1589 (noting *Tinker* "was decided in an age where students did not harass or bully each other electronically").

154. *See* Marcus-Toll, *supra* note 59, at 3418 ("The increasingly easy transmission and accessibility of digital speech pose significant problems for the territory-based approach to school regulation of student speech under *Tinker*."); *see also* Shaver, *supra* note 28, at 1541 (describing task of creating a geographic boundary as "unworkable given the reach of digital speech").

155. *See* Marcus-Toll, *supra* note 59, at 3419 (describing cyberspeech as "uniquely pervasive and accessible"); *see also* Goodno, *supra* note 29, at 660 (explaining cyberbullying spreads easily being that "[i]nternet links and text messages can easily be forwarded to numerous people with the click of a button").

156. *See* Barry P. McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV 727, 746 (2012) (highlighting that "cyberspace knows no geographic boundaries and cybercommunications are much more pervasive, enduring and easy to engage in than communications in the 'physical' world"). Even though cyberbullying may only occur outside of school, school is so integral to students' lives that the impact

Tinker and ensure a safe, secure school environment, the *Tinker* exception must apply to off-campus student social media speech.[157]

Despite the difficulty in drawing a distinction between on- and off-campus speech, there remains a compelling argument that student social media speech falls within the school's authority.[158] The Supreme Court in *Tinker* noted:

> [C]onduct by the student, in class or *out of it*, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[159]

While schools must respect students' First Amendment rights, they also must have the ability to address off-campus cyberbullying that causes a substantial disruption in the school building or impedes a student's right to school safety.[160]

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is often felt there. *See* Caralee Adams, *Cyberbullying: What Teachers and Schools Can Do*, SCHOLASTIC, https://www.scholastic.com/teachers/articles/teaching-content/cyberbullying-what-teachers-and-schools-can-do/ [https://perma.cc/FC6B-Y67Z] (last visited Sept. 29, 2020) (explaining that even though cyberbullying often occurs off campus, "the fallout is often seen at school and can interfere with the educational environment"). Nancy Willard, Director of the Center for Safe and Responsible Internet Use, explained that "Monday is the new Friday . . . . It used to be that hurtful interactions built up over the week and could blow up on Friday. Now when kids go back to school on Monday, they are upset because of what happened over the weekend." *Id.* (internal quotation marks omitted).

157. *See* Shaver, *supra* note 28, at 1589–90 (recognizing that although *Tinker* was decided before digital age, its intent to protect students from "bullying or harassing speech" extends to cyberspeech).

158. *See* McDonald, *supra* note 156, at 745 (explaining that student cyberbullying typically arises from school relationships). In all likelihood, physical off-campus bullying does not fall within the school's authority. *Id.* What distinguishes off campus cyberbullying from off campus physical bullying is that "cyberspace knows no geographic boundaries . . . . [It] has an 'everywhere' and 'all the time' quality which bullying that occurs in the physical world generally lacks." *Id.* at 746. Additionally, because cyberbullying can occur anonymously, a bully is more likely to be even harsher than they would be face-to-face. *See* Jiles, *supra* note 60, at 646.

159. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (emphasis added) (reading the Constitution to allow regulation of "speech-connected activities in carefully restricted circumstances"). While the "substantial disruption" test often gets significant attention from courts, the "collides with the rights of others" portion is key, as it can assist school officials when they are in situations where the speech is troubling but does not rise to the level of a substantial disruption. *See* Smith-Butler, *supra* note 13, at 302. Speech that is troubling—yet may not rise to the substantial disruption standard—could be speech that is "bullying, harassing, libelous, or threatening" or has to do with "cruelty, racism, sexism." *Id.* at 302, 303.

160. *See* Smith-Butler, *supra* note 13, at 303 ("Schools want to protect student political speech rights yet also allow schools the flexibility to cope with cruelty, racism, sexism, libel, or threats that other types of student speech create."); *see also* Adams, *supra* note 156 (explaining that cyberbullying is now a "school climate and safety issue").

Furthermore, the geographical origin of the cyberspeech means means much less today than it did when the Supreme Court decided *Tinker*.[161] Thus, the majority in *B.L.* may have focused too much on location rather than the speech's effects within the school community.[162] Now, students can constantly contact one another while off campus.[163] The majority of contacts students make are with their peers.[164] In all likelihood, these students follow one another on social media, based on their preexisting relationships from school.[165] What a student posts, messages, or shares online can be viewed or commented on by their peers, extending their interactions beyond the school building.[166] For these reasons, online content easily makes its way into the school building through students who virtually bring it through the school's doors.[167] Forcing schools to abide by the strict geographic location of where the speech began seems immaterial when the speech significantly impacts the school's most important group: the students.[168]

B. Tinker *is a Must Follow: Public Policy Supports Applying the Exception in Cases of Off-Campus Social Media Speech*

In addition to Supreme Court precedent, public policy supports extending the *Tinker* exception to off-campus social media speech. In *B.L.*, the Third Circuit logically found that B.L.'s speech was protected because the snap did not cause harm to anyone.[169] Even if the court applied the *Tinker* exception to the case, it is likely that the First Amendment would have still protected B.L.'s speech because it did not create the requisite

161. *See* Marcus-Toll, *supra* note 59, at 3419 (arguing that today, determining whether speech occurred on or off campus can be an "arbitrary exercise").

162. *See* Shaver, *supra* note 28, at 1541 (asserting that given the pervasiveness of social media, it is "unworkable" for courts to limit school authority based on geography).

163. *See* Anderson & Jiang, *supra* note 5 (finding forty-five percent of teens are online almost constantly).

164. *See* McDonald, *supra* note 156, at 745 (noting that "cyberbullying arises out of relationships or events under the supervision and control of school officials").

165. *See id.* ("[W]hen cyberbullying arises out of relationships or events under the supervision and control of school officials . . . it is occurring because of the students' identities qua students rather than in their role as general citizens . . . .").

166. *See* Anderson & Jiang, *supra* note 5 (noting the internet is one significant way teens communicate and maintain relationships with one another); *see also* Mendola, *supra* note 16, at 158 (explaining students use technology for school-related communication).

167. *See* Marcus-Toll, *supra* note 59, at 3419.

168. *See* McDonald, *supra* note 156, at 732 (noting impossibility of cyberspeech occurring entirely on or off campus). For instance, the bully may send the victim a threatening message via social media while on campus, or the victim may receive the threatening message on campus. *See id.* Moreover, the initial bullying could originate on campus and continue off campus. *See id.*

169. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 190 (3d Cir. 2020).

"substantial disruption."[170] The Third Circuit's majority opinion is concerning not because it chose to protect B.L.'s speech, but rather because of the precedent it sets for future cases, where the cyberspeech is more vulgar or violent.[171]

School officials have a legitimate interest in regulating certain kinds of off-campus online speech for two reasons.[172] First, schools do not merely teach students subjects like math, history, and science.[173] Rather, schools also take on an inherent responsibility to teach social etiquette.[174] To show students how to appropriately engage and communicate with others, it is important for school officials to be able to regulate inappropriate forms of cyberspeech.[175] Doing so sets an example for students by signifying that the school neither tolerates nor ignores inappropriate or harmful speech.[176]

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170. *Id.* at 197 (Ambro, J., concurring) (arguing *Tinker* "no doubt works here to rule in B.L.'s favor").

171. *See id.* at 193–94 (questioning how the majority's holding will apply to a more difficult set of facts, such as an instance of "off-campus racially tinged student speech").

172. *See* McDonald, *supra* note 156, at 745 (explaining connection between off-campus cyberbullying and the school and advocated for school speech rules to address these situations).

> [W]hen cyberbullying arises out of relationships or events under the supervision and control of school officials, and in this sense we can say that it is occurring because of the students' identities qua students rather than in their roles as general citizens, it would seem legitimate for the school to apply appropriate function-sensitive student speech rules to such an incident . . . .

Id.

173. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."); *see also* Smith-Butler, *supra* note 13, at 302–03 ("The school's goal is to teach students civil discourse and debate while protecting their rights to debate contentious issues.").

174. *See Fraser*, 478 U.S. at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."). An important aspect of civil discourse involves being respectful of others. *See id.*

175. *See id.* at 683 (noting that school officials are role models to students and "demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class"). Teachers and coaches are also in positions where they can identify if a child is being bullied or is a bully. *See Effects of Bullying on Mental Health*, *supra* note 16. If these individuals can promptly identify and address bullying and mental health concerns, it "can help prevent harmful negative experiences and keep children and youth moving forward in a positive trajectory. . . ." *Id.*

176. *See Fraser*, 478 U.S. at 683 (reasoning that "schools must teach by example the shared values of a civilized social order "); Smith-Butler, *supra* note 13, at 304 (noting that schools must balance students' First Amendment rights while also "providing a safe school environment that neither permits, condones, or ignores student bullying or harassment.").

Second, cyberbullying and hate speech have a severe impact on students' mental health and the school environment.[177] Whether the speech occurred in person, at school, or online over social media should not be relevant when the ultimate impact is on the student and their educational experience.[178] If schools stand by and say nothing when a student is bullied online, then the bully is less likely to stop, and will continue to subject the victim to this negative behavior.[179] Furthermore, a student might feel distracted in school, or avoid school completely, after being bullied online by peers.[180] While schools must demonstrate respect for students' First Amendment rights, they also must maintain an appropriate and comfortable environment for students.[181] The characteristics of the school environment permit a school to regulate off-campus social media behavior that causes harm to others.[182]

177. *See* Smith-Butler, *supra* note 13, at 291 (explaining bullying has serious physical and psychological health impacts); *see also Facts About Bullying*, STOPBULLYING.GOV, https://www.stopbullying.gov/resources/facts [https://perma.cc/3SXH-8SAM] (last updated Aug. 12, 2020) (stating research indicates bullying can lead to "feelings of isolation, rejection, exclusion, and despair, as well as depression and anxiety, which can contribute to suicidal behavior"). The negative impact of cyberbullying can extend to bystanders and the bullies themselves. *See Effects of Bullying on Mental Health*, *supra* note 16 (noting bystanders may experience increased anxiety and depression while bullies are at higher risk for antisocial behavior).

178. *See* Smith-Butler, *supra* note 13, at 303 ("[T]he schools must also provide a safe environment in which students can thrive and learn without being subjected to harassment, bullying, libel, or threats"); *see also* Sherri Gordon, *The Real-Life Effects of Cyberbullying on Children*, VERYWELLFAMILY (July 10, 2020), https://www.verywellfamily.com/what-are-the-effects-of-cyberbullying-460558 [https://perma.cc/LW8W-PWLW] (noting victims may "experience some unique consequences and negative feelings"). Victims of cyberbullying can "experience anxiety, ... depression, . . . low self-esteem, . . . and struggle academically." *Id.*

179. *See Fraser*, 478 U.S. at 685 (noting First Amendment does not prohibit schools from regulating speech that "would undermine the school's basic educational mission."); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) (noting that school officials serve as "the trustees of the student body's well-being").

180. *See e.g.*, Justin W. Patchin, *Millions of Students Skip School Each Year Because of Bullying*, CYBERBULLYING RES. CTR. (Jan. 3, 2017), https://cyberbullying.org/millions-students-skip-school-year-bullying [https://perma.cc/EP9Q-8M2M] (estimating that 5,400,000 students skip school every year due to bullying). A survey of 2,750,000 students showed that roughly 300,000 stayed home "many times" as a result of online bullying. *Id.* Moreover, of students who are cyberbullied, only 56.8% reported that they felt safe in school. *See id.* Comparatively, of students who are neither bullied in person nor online, 95.4% reported that they felt safe in school. *See id.*

181. *See* Smith-Butler, *supra* note 13, at 303 (emphasizing schools' responsibility to provide students with a safe learning environment). Students' First Amendment rights are important, but the existence of this right does not mean that schools must ignore off-campus bullying or harassment. *See id.* at 304.

182. *See Fraser*, 478 U.S. at 682–83 ("Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."); *see also* Shaver, *supra* note 28, at 1547. While adults have significant latitude when expressing their viewpoints, students are not afforded the same

C. *Precedent and Policy Support Subscribing to the Sufficient Nexus Test*

Overall, the Fourth Circuit's sufficient nexus test best conforms with Supreme Court precedent and public policy.[183] This test strikes an appropriate balance between students' First Amendment rights and the necessity of maintaining an appropriate, safe school environment.[184] Speech such as B.L.'s snap would remain protected, while schools would be permitted to regulate more dangerous forms of cyberspeech.[185]

The sufficient nexus test strikes a balance between First Amendment concerns and protecting student well-being because it considers the school's task to educate, the mental health of students, and whether the speech will cause a substantial disruption in the school.[186] If these factors demonstrate that the cyberspeech is sufficiently connected to these three interests for schools, the *Tinker* exception will apply and allow the school to intervene if the speech is likely to create a substantial disruption.[187] Importantly, the test does not consider where the speech originated, avoiding the impossible task of determining whether the electronic speech occurred on or off campus.[188]

Although the majority in *B.L.* declined to apply the sufficient nexus test, its reasons for failing to do so are unpersuasive.[189] The majority's

freedom while in school. Shaver, *supra* note 28, at 1546 (quoting *Fraser*, 478 U.S. at 682). Rather, schools balance a student's right to express "unpopular and controversial views" with their interest in teaching students how to appropriately engage in public discourse. *Id.*

183. For a discussion of the Fourth Circuit's sufficient nexus test, see *supra* notes 72–79 and accompanying text.

184. *See* Goodno, *supra* note 29, at 697 app. B (explaining under the sufficient nexus test, speech can come into the school's jurisdiction when "there is a sufficient nexus between the electronic communication and the school which includes, but is not limited to, speech that is directed at a school-specific audience, or the speech was brought onto or accessed on the school campus, even if it was not the student in question who did so").

185. *See* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 197 (3d Cir. 2020) (Ambro, J., concurring) (arguing B.L's speech would be upheld under *Tinker*). Although B.L.'s snap offended and concerned some students, it did not rise to the level of a substantial disruption nor did it impede upon the rights of others. *See id.* at 195.

186. *See* Marcus-Toll, *supra* note 59, at 3425–26 (explaining sufficient nexus test focuses on "the school's educational mission and duty to its students").

187. *See* McDonald, *supra* note 156, at 737 (explaining that a sufficient nexus between the speech and these interests "might include the fact that a speaker could foresee that her speech could 'reach the school or impact the school environment'") (quoting Kowalski v. Berkeley Cty. Sch., 62 F.3d 565, 573 (4th Cir. 2011)). One relevant factor to determine if there is a sufficient nexus between the speech and the school's interests is whether a speaker could foresee the speech "reach[ing] or impact[ing] the school environment." *See id.* (internal quotation marks omitted) (quoting *Kowalski*, 62 F.3d at 573).

188. *See Kowalski*, 652 F.3d at 573 (declining to determine whether speech occurred on or off campus because there was a strong nexus between speech and school's interests).

189. For a more detailed summary of the Third Circuit's concerns with the sufficient nexus test, see *supra* notes 123–27 and accompanying text.

first reason for rejection was its concerns over a slippery slope, allowing schools to regulate other less threatening kinds of online speech.[190] But the sufficient nexus test does not give schools an infinite ability to punish students for any kind of speech.[191] Before a school regulates student speech, the test requires that the school to establish a legitimate connection between the speech and school's interest in providing an appropriate learning environment.[192] Also, under the *Tinker* exception, a school must demonstrate the likelihood that the speech would create a substantial disruption in the school.[193]

The majority in *B.L.* also rejected the sufficient nexus test because it felt that the test placed too much speech within the school's authority.[194] It is true that this test gives a school significant authority over speech.[195] However, a major part of a school's role is to maintain a safe learning environment for students.[196] When one student is making another student feel uncomfortable or unsafe, school officials are in one of the best positions to resolve the problem.[197]

Finally, the majority opinion was concerned that the sufficient nexus test fails to provide clarity or predictability in future outcomes.[198] While the sufficient nexus test may not provide a bright-line rule, that is the na-

190. *B.L.*, 964 F.3d at 188 (expressing concern that sufficient nexus test provides school officials with power that can be taken advantage of).

191. *See* Goodno, *supra* note 29, at 666 (noting that by incorporating sufficient nexus language into a school policy, schools are likely protected from challenges that policies are overbroad); *see also* Jiles, *supra* note 60, at 664 (explaining sufficient nexus test is a preliminary test to determine whether the *Tinker* exception applies).

192. *See Kowalski*, 652 F.3d at 573 (noting that the school's "pedagogical interests" must be sufficiently connected to speech to "justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being"). By requiring schools to establish this relationship before moving to the *Tinker* analysis, this step adds an additional burden on schools and ensures they do not have limitless authority. *See* Jiles, *supra* note 60, at 666. It imposes a strict standard that ensures schools are not able to regulate *any* speech that is related to the school and just speech that is "so related to the pedagogical interest of the school, to warrant regulation." *Id.* at 666.

193. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (noting regulation of student speech requires school to identify potential disruptions of activities).

194. *B.L.*, 964 F.3d at 188.

195. *See* Morse v. Frederick, 551 U.S. 393, 419 (2007) (noting "courts [have] routinely deferred to schools' authority to make rules and to discipline students for violating those rules").

196. *See* Smith-Butler, *supra* note 13, at 302–03 (explaining schools have an obligation to guard against forms of bullying, threats, and inter-student discrimination).

197. *See Effects of Bullying on Mental Health*, *supra* note 16 (explaining coaches and teachers can identify and address peer to peer bullying).

198. *B.L.*, 964 F.3d at 188 (stating sufficient nexus test "leav[es] students to wonder what types of speech might implicate a school's 'pedagogical interests'" (quoting Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011))).

ture of the issue at hand.[199] These cases are fact-dependent, and it is counterintuitive to have a clear and rigid rule.[200] Regardless, it is unlikely students will not understand what speech is protected versus what speech is punishable.[201] Thus, the sufficient nexus test provides a flexible approach for complex fact patterns.

Additionally, the majority did not explain how declining to apply the *Tinker* exception in any circumstance created more clarity than the sufficient nexus test.[202] The opinion tells us that schools can never intervene but fails to address what should happen under a set of facts which are less clear-cut than those in *B.L.*[203] A blanket statement that the *Tinker* exception does not extend to off-campus cyberspeech creates more confusion than the sufficient nexus test because it does not allow courts and schools to act logically and flexibly based on the circumstances.[204]

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199. *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (declining to adopt any rigid rule because "such determinations are heavily influenced by the facts in each matter"); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) ("[T]he school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.").

200. *See B.L.*, 964 F.3d at 197 (Ambro, J., concurring) (explaining that fully declining to apply the *Tinker* exception to off-campus speech cases is illogical). Emphasizing the difficulties and highly factual nature of these cases, Judge Ambro wrote, "[t]he bottom line is that Circuit Courts facing harder and closer calls have stayed their hand and declined to rule categorically that *Tinker* does not apply to off-campus speech." *Id.*

201. *See* Jiles, *supra* note 60, at 666 (explaining under sufficient nexus test, cyberbullying between students almost certainly falls under school's authority). For instance, posting online about religious or political beliefs will generally fall under protected speech given that it does not target other students. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (explaining that in order to regulate student speech, school officials "must be able to show . . . more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"). Alternatively, given that cyberbullying directly impacts the victim's academic experience, that speech will typically fall within the school's discretion. *See* Jiles, *supra* note 60, at 666–67.

202. *See B.L.*, 964 F.3d at 197 (Ambro, J., concurring) (expressing concern that categorical rule will create more confusion).

203. *See id.* at 195 (noting majority provides no guidance regarding how the decision will apply to future cases where off-campus cyberspeech threatens or harasses others in school community). The majority recognized that it is not facing a case where the off-campus speech directly harassed or threatened students or teachers. *See id.* at 190. Still, it disagreed with courts that have applied the *Tinker* exception to instances of threatening or harassing off-campus cyberspeech. *Id.* Despite disagreeing, the Third Circuit offered no insight into how its holding in *B.L.* would apply under those circumstances. *See id.* Instead, the court wrote that the "opinion takes no position on schools' bottom-line power to discipline speech in that category" and merely acknowledged that its holding diminishes schools' abilities to regulate some speech. *Id.* at 190–91.

204. *See Kowalski*, 652 F.3d at 575 (illustrating that in order to provide a secure environment, schools need to be able to exercise discretion when it comes to discipling students).

VI. TTYL: THE FUTURE OF OFF-CAMPUS STUDENT CYBERSPEECH AND NEED FOR SUPREME COURT GUIDANCE

With conflicting resolutions among schools and courts alike, it is essential that the Supreme Court address this issue.[205] Currently, both school officials and students are uncertain of how to navigate off-campus social media speech.[206] This lack of clarity opens the door for schools to inconsistently target, discipline, or silence specific groups.[207] For example, in an Alabama school district, twelve out of the fourteen students expelled due to social media posts were students of color, despite the fact that over sixty percent of the town's population is white.[208] If the Supreme Court clarifies the standard for off-campus cyberspeech, this would assist groups like the expelled Alabama students can raise constitutional challenges to schools' application of speech restrictions.

Luckily, there is a chance that the Supreme Court could address this issue.[209] On August 28, 2020, the Mahanoy Area School District filed Petition for a writ of certiorari.[210] Given the increasingly important role that the internet and social media play in students' daily lives, there is hope that the Supreme Court will hear the case.[211] However, in 2016, the de-

205. *See* Calve, *supra* note 22, at 401–04 (warning that without clear guidance, schools may draft policies encroaching upon rights guaranteed by the Constitution); Goodno, *supra* note 29, at 657 ("There is no Supreme Court case squarely on point. The split in the lower courts' decisions shows that the law is ambiguous." (footnote omitted)).

206. *See* Calve, *supra* note 22, at 401 (noting that "[b]ecause 'lower courts have not spoken with a unified voice' on the issue of off-campus speech, schools and students are both left without clues as to how to proceed within the law" (footnote omitted) (quoting Martha McCarthy, *Cyberbullying Laws and First Amendment Rulings: Can They Be Reconciled?*, 83 MISS. L.J. 805, 806 (2014))).

207. *See* Vera Eidelman & Sarah Hinger, *Some Schools Need a Lesson on Students' Free Speech Rights*, ACLU (Sept. 18, 2018, 5:15 PM) [https://perma.cc/4D8U-ENYN] (stating "experience shows that discipline for student expression is not always applied evenhandedly").

208. *See id.* (explaining "one student was expelled for wearing a sweatshirt depicting her murdered father, and another was expelled for posting a photo of himself 'holding too much money'"); Sharada Jambulapati, *Story From the Field: Children of Color Pushed Out of Alabama Schools Over Social Media Posts*, S. POVERTY L. CTR. (July 9, 2015), https://www.splcenter.org/news/2015/07/09/story-field-children-color-pushed-out-alabama-schools-over-social-media-posts-0 (adding that African-American students represent seventy-eight percent of the school district's expulsions). The school district hired a consulting firm to monitor students' social media posts and, in turn, expelled a disproportionate amount of students of color. Eidelman & Hinger, *supra* note 207.

209. *See* Petition for Writ of Certiorari, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 2020 WL 5234951 (2007) (No. 20-255).

210. *Id.*

211. *See* Anderson & Jiang, *supra* note 5 (acknowledging ninety-five percent of teens have or have access to a smartphone); *see also* American Academy of Child and Adolescent Psychiatry, *supra* note 6 (noting seventy-five percent of teens have one or more active social media profiles). Following the COVID-19 pandemic, the internet became more important than ever before. *See* Barack, *supra* note 8. For

fendant in the Fifth Circuit's *Bell* opinion petitioned for a writ of certiorari to the Supreme Court, which was denied.[212]

Until the Court addresses the issue of off-campus cyberspeech speech, schools should tread carefully if punishing students for off-campus cyberspeech in light of the Third Circuit's holding in *B.L.* Because the Third Circuit concluded the *Tinker* exception does not extend to off-campus electronic speech, it is unlikely that a court in its jurisdiction would uphold intervention.[213] Even school policies prohibiting certain kinds of online speech are virtually unenforceable if the speech occurs off campus and is unrelated to a school-sponsored activity.[214]

Despite the inability to punish students for off-campus cyberspeech, cyberbullying and online harassment are still pressing concerns for schools.[215] While *B.L.* greatly limits how schools can retroactively address social media misuse, schools can at least focus on strengthening preventative measures.[216] For instance, integrating lessons about cyberbullying and its effects into the academic curriculum can teach students how to behave appropriately while online.[217] More broadly, schools should ensure they are fostering an inclusive and tolerant environment so students will be encouraged to treat one another with respect while on social media.[218] These proactive measures will not erase all incidents of cyberbully-

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instance, students now rely on the internet to take class and interact with friends. *Id.*

212. *See* Bell v. Itawamba Cty. Sch. Bd., 136 S. Ct. 1166 (2016) (denying certiorari); *see also* Shaver, *supra* note 28, at 1588 (describing Court's denial as missed opportunity that left schools without clear guidance).

213. See B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 186 (3d Cir. 2020) (setting the precedent "that *Tinker* does not apply to off-campus speech").

214. *See id.* at 192–94 (finding that B.L. did not waive free speech rights by signing school and team rules). For a discussion of the school policies B.L. agreed to, see *supra* note 96 and accompanying text.

215. *See* Anderson, *supra* note 3 (emphasizing prevalence of cyberbullying amongst teens); *see also* Barack, *supra* note 8 (noting that in the COVID-19 era, it is "impractical" for parents and schools to reduce cyberbullying by encouraging students to take time away from their devices).

216. *See* Ludmila Battista, *Cyberbullying: What is it and How to Prevent it?*, PURDUE GLOBAL (May 24, 2012), https://www.purdueglobal.edu/blog/psychology/what-is-cyberbullying-how-to-prevent/ [https://perma.cc/MJ7G-B6NL].

217. *See id.* (noting that "[a] lot of kids may not even consider cyberbullying as bullying until they fully understand how it can affect the other person"). Stephen Balkam, Chief Executive Officer of the Family Online Safety Institute in Washington, D.C., suggests that schools recognize that internet is a significant part of students' lives and teach them how to use it appropriately. *See* Adams, *supra* note 156 (urging educators to teach students how to properly use technology). He urged that "[t]eachers should not limit the discussion to computer class or Internet safety day [and that they] should bring it up in any capacity, in any instance, in any classroom." *Id.*

218. *See* Battista, *supra* note 216 ("There are steps that schools can take to address the issue of cyberbullying, and first and foremost is to promote a culture of mutual respect and a tolerance or appreciation for diversity.").

ing, but they can at least reduce the number of occurrences.[219] Absent intervention, these proactive measures are the most effective way for schools to protect students from the dangers of social media misuse.[220]

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219. *See id.* ("Educating children about the possible negative effects of posting personal information online and providing training about how to remove personal information that shouldn't be online can alleviate opportunities for cyberbullying attacks."); *see also id.* (explaining that "[t]aking the time to teach cyber ethics, involving school counselors when necessary, and addressing and resolving reports of cyberbullying quickly and immediately can make it less likely for repeated incidents." (citing Grace Shangkuan Koo, *Bullying Can Ruin Children's Lives*, PHILIPPINE DAILY INQUIRER (Aug. 21, 2011), https://newsinfo.inquirer.net/45425/bullying-can-ruin-children%E2%80%99s-lives [https://perma.cc/FES4-HHMZ])).

220. *See* Adams, *supra* note 156 (noting that educators can be a "powerful force in promoting a climate of respect"); *see also* Battista, *supra* note 216 (concluding that parents and schools must partner to combat cyberbullying incidents).