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Constitutional Law—Tightening the Locks to the Schoolhouse Gate—*Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021)

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**CONSTITUTIONAL LAW—TIGHTENING THE
LOCKS TO THE SCHOOLHOUSE GATE—
MAHANOEY AREA SCH. DIST. V. B.L., 141 S. CT. 2038
(2021)**

The First Amendment protects an individual's contribution of speech and expression in America's marketplace of ideas.¹ In its seminal case regarding student speech, *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that students do not shed their constitutional right to freedom of speech at the schoolhouse gate, and that public school officials may only regulate student speech that "materially and substantially interfere[s] with the requirements of appropriate discipline."² In *Mahanoe Area Sch. Dist. v. B.L.*,³ the Supreme Court considered, as an issue of first impression, the constitutionality of school discipline of off-campus student speech.⁴ Although the Supreme Court affirmed the Third Circuit's recognition of First Amendment infringement in the discipline of off-campus speech, the Court ruled that public schools have an interest in regulating specific instances of off-campus speech that implicate the school's regulatory authority.⁵

In May 2017, Brandi Levy, a freshman student at Mahanoe Area High School in Mahanoe City, Pennsylvania, tried out for the school's varsity cheerleading team.⁶ After she was rejected from the varsity cheerleading team, Levy begrudgingly accepted an offer to join the junior varsity

¹ See U.S. CONST. amend. I (stating persons constitutionally protected in freedom of speech and expression); *Cohen v. California*, 403 U.S. 15, 25 (1971) (describing fundamental values in expression of ideas to American democracy); see also Heather K. Lloyd, *Injustice in Our Schools: Students' Free Speech Rights Are Not Being Vigilantly Protected*, 21 N. III. U. L. REV. 265, 318 (2001) (highlighting classrooms as vital to exchange of ideas); Mike Douse & Philip Uys, *Covid-19 and Transformation of 'The School'*, NORRAG BLOG (Sept. 2, 2020), <https://perma.cc/WXS5-PFS3> ("Education is undergoing a fundamental transformation consequent upon the challenges and possibilities of the Digital Age and responding to the tangible/virtual duality of contemporary consciousness.")

² See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (outlining school officials' authority when actual disruption or forecast of disruption to school activities).

³ 141 S. Ct. 2038 (2021).

⁴ See *id.* at 2043 (addressing whether school officials have authority to regulate off-campus speech).

⁵ See *id.* (holding high school violated First Amendment rights by suspending Levy from cheerleading team). Although the school's regulatory interests remained significant in some off-campus circumstances, certain features of off-campus speech diminish the strength of First Amendment leeway granted to school officials. *Id.*

⁶ See *id.* (providing background context to incident).

cheerleading team.⁷ The following weekend, while visiting a local convenience store, Levy used her personal smartphone to broadcast two photos to her Snapchat followers for a period of twenty-four hours.⁸ The first photo displayed Levy raising her middle finger with the caption, “Fuck school fuck softball fuck cheer fuck everything.”⁹ Levy’s cheerleading coaches became aware of her posts after several of Levy’s Snapchat friends distributed screenshots of these posts.¹⁰ After determining that the profanity used in the posts violated team and school rules, the coaches suspended Levy from the junior varsity cheerleading team for the upcoming year.¹¹

When the school refused to reverse the suspension, Levy and her parents sought relief in the United States District Court for the Middle District of Pennsylvania, arguing that such punishment violated Levy’s First Amendment right to freedom of speech.¹² The district court granted a temporary restraining order and a preliminary injunction ordering the school to reinstate Levy to the cheerleading team.¹³ In a subsequent decision, the district court granted Levy’s motion for summary judgment, finding that Levy’s punishment violated the First Amendment.¹⁴ The school district later appealed, arguing that Levy was appropriately disciplined given the standard applied in *Tinker v. Des Moines Independent Community School District*.¹⁵ The Court of Appeals for the Third Circuit affirmed the district court’s

⁷ See *id.* at 2043 (describing Levy’s frustration). Levy was particularly unsatisfied with the coach’s decision when she learned the cheerleading squad coaches had placed an entering freshman on the varsity team. *Id.*

⁸ See *B.L.*, 141 S. Ct. at 2043 (detailing off-campus incident). Snapchat allows its users to post photos and videos that disappear after a set period of time. *Id.* Levy posted her two photos on Snapchat via the “story” feature of the application, which allowed any person in her “friend” group to view the images for a twenty-four-hour period. *Id.*

⁹ See *id.* (providing context of profanity via personal social media platform).

¹⁰ See *id.* (describing connection back to school campus and officials). One of Levy’s Snapchat “friends” belonging to the cheerleading squad used a separate cellphone to take pictures of Levy’s posts before sharing them with other members of the cheerleading team. *Id.* That week, several cheerleaders and other students approached the cheerleading coaches. *Id.* The coaches were then able to view a copy of Levy’s speech via screenshots produced by other students. *Id.*

¹¹ See *id.* at 2043 (detailing punishment taken by school officials). The cheerleading coaches discussed the matter with the principal to reach a joint conclusion of school violation. *Id.* The school’s athletic director, principal, superintendent, and school board all later affirmed Levy’s suspension from the team on grounds that the post used profanity in connection with a school extra-curricular activity. *Id.*

¹² See *B.L. ex. rel. Levy v. Mahanoy Area Sch. Dist.*, 289 F. Supp. 3d 607, 611 (M.D. Pa. 2017) (explaining family’s effort to seek relief).

¹³ See *id.* at 609 (outlining District Court’s disagreement with school’s punishment).

¹⁴ See *B.L. ex. rel. Levy v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 432 (M.D. Pa. 2019) (stating District Court final judgment on the merits), *aff’d*, 964 F.3d 170 (3d Cir. 2020), *aff’d but criticized*, 141 S. Ct. 2038 (2021).

¹⁵ See *B.L. v. Mahanoy Area Sch. Dist.* 964 F.3d 170, 182-83 (3d Cir. 2020) (outlining school district’s argument).

decision, holding that the school district's actions could not be justified using the *Tinker* standard because *Tinker* does not apply to off-campus speech.¹⁶ After accepting the school district's petition for certiorari, the Supreme Court affirmed the Third Circuit's holding as to the violation of Levy's First Amendment rights, but noted that the First Amendment does not entirely prohibit regulation of off-campus speech.¹⁷

The right to express opinions without government interference is a democratic ideal that dates back to ancient Greece.¹⁸ The Framers codified this ideal when drafting the First Amendment as part of the Bill of Rights, providing constitutional protection for speech and expression.¹⁹ While the bounds of First Amendment have evolved over time, the Supreme Court has always recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."²⁰ In *Tinker v. Des Moines Independent School District*, the Supreme Court set the standard for free speech in one area of ambiguity—public schools.²¹ For

¹⁶ See *id.* at 175, 189 (affirming lower court's application of First Amendment principles). The court defined "off-campus" speech as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." *Id.* at 189. Because Levy's speech took place off campus and failed to cause an actual or foreseeable substantial disruption of the school environment, the Third Circuit reasoned that *Tinker* did not apply. *Id.* at 185-86.

¹⁷ See *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2044 (identifying question for certiorari review); *Id.* at 2048 (affirming violation of First Amendment rights as found by lower courts). Although the Court agreed with the Third Circuit's conclusion that the school's discipline violated the First Amendment, the Court did not agree with the Third Circuit's reasoning. *Id.* "Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus." *Id.* at 2045.

¹⁸ See Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2009 SUP. CT. REV. 293, 296 (2009) (outlining freedom of speech as fundamental element of democracies). Although Athens and America are different, their democratic structures have created a close connection in the principles of freedom of speech practiced in Athens and now protected in America. *Id.*; see also *Freedom of Speech*, HISTORY, <https://perma.cc/7WAR-F2SY> (last visited Oct. 13, 2021) (providing timeline of freedom of speech within democratic framework).

¹⁹ See U.S. CONST. amend. I (guaranteeing freedom of speech, press, redress, religion, and assembly).

²⁰ *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding First Amendment rights must be carefully protected against infringement).

²¹ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (ruling in favor of students' right to wear armbands as form of free speech). In *Tinker*, public high school students engaged in a silent protest against the Vietnam War by wearing armbands to school. *Id.* at 504. The students were suspended from school on the grounds that the armbands were a distraction and could possibly lead to danger for other students. *Id.* at 504-05; see also HISTORY, *supra* note 18 (outlining first instance of Court ruling in favor of students). Such protections extend only to public schools because private schools are not government actors. See Philip A. Dynia, *Rights of Students*, FIRST AMENDMENT ENCYCLOPEDIA, <https://perma.cc/5MEC-ENLG> (last visited Oct. 14, 2021) (differentiating lack of constitutional limits on private school institutions compared to public schools).

the first time, the Supreme Court recognized that public school students do not “shed their constitutional rights to free speech at the schoolhouse gate.”²² Despite this recognition, the Court noted that school officials’ restriction of speech is justified when (1) actual disturbances on school premises in fact occur, or (2) substantial disruption or material interference with school activities are reasonably foreseeable by school officials.²³

In the decades following *Tinker*, the Supreme Court has carved out broad exceptions to shield school officials from First Amendment violations when regulating on-campus speech.²⁴ These exceptions include the regulation of speech (1) during extracurricular activities, (2) involving the use of school-sponsored forums, and (3) reasonably believed to be in the promotion of illegal drug use.²⁵ However, the Court had not explicitly applied *Tinker*

Constitutional provisions safeguarding individual rights place limits on the government and its agents, but not on private institutions or individuals. Thus, to speak of the First Amendment rights of students is to speak of students in public elementary, secondary, and higher education institutions. Private schools are not government actors and thus there is no state action trigger.

Id.

²² See *Tinker*, 393 U.S. at 506 (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); see also Dynia, *supra* note 21 (explaining lessening of school authority in regulating off-campus speech).

²³ See *Tinker*, 393 U.S. at 514 (highlighting absence of facts to show foreseeable substantial disruption). “As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.” *Id.*; see also *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011) (holding regulation permissible because speech “was ‘created for the purpose of inviting others to indulge in disruptive and hateful conduct,’ which caused an ‘in-school disruption.’”) In *Kowalski*, a high school senior student alleged a First Amendment violation after her school suspended her for creating a MySpace.com webpage largely dedicated to ridiculing a fellow student. *Id.* at 570. While the student alleged that school officials were not justified in regulating speech that did not occur during a “school-related activity,” the Fourth Circuit affirmed that the school officials’ actions were permissible given the circumstances of the speech. *Id.* at 576. The court recognized the manner of the speech was “sufficiently connected to the school environment” due to it “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” *Id.* (quoting *Tinker*, 393 U.S. at 513).

²⁴ See Dynia, *supra* note 21 (outlining evolving jurisprudence on school regulation of student speech); see also Katherine A. Ferry, Comment, *Reviewing the Impact of the Supreme Court’s Interpretation of “Social Media” as Applied to Off-Campus Student Speech*, 49 LOY. U. CHI. L.J. 717, 721 (2018) (“However, all of these issues and subsequent restrictions on speech were enacted to regulate speech occurring *inside* the schoolhouse, leaving the protection of speech made outside school grounds open to debate.”)

²⁵ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684-85 (1986) (holding regulation of vulgar speech undermining educational mission does not violate First Amendment). In *Fraser*, a public high school student delivered a speech as part of a school-sponsored educational program to nominate a fellow student for a student office. See *id.* at 677. Because the student used a graphic and explicit sexual metaphor as part of his speech, the Court held that the school district acted

to off-campus speech, creating a circuit split as to the correct approach for determining the school's authority in regulating off-campus student speech.²⁶ The Second Circuit has justified the regulation of off-campus speech when such speech creates a foreseeable risk of substantial disruption within the school environment.²⁷ The Fourth Circuit also addressed the issue, holding that where the "nexus" of off-campus speech is "sufficiently strong" to the school's teaching interests, school officials are permitted to take disciplinary action.²⁸ The Ninth Circuit combines the approaches of the Second and Fourth Circuits, permitting regulation of off-campus speech when it is "reasonably foreseeable the speech will reach the school

within its permissible authority in sanctioning the student for the speech. *Id.* at 685; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (permitting student speech regulation in school-sponsored activities). In *Kuhlmeier*, public high school students asserted a First Amendment violation after school officials removed their article submissions from the school's newspaper. *See Hazelwood Sch. Dist.*, 484 U.S. at 262. The Court ultimately held that school officials were permitted to exercise control over school-sponsored expressive activities. *Id.* at 276; *see also* *Morse v. Frederick*, 551 U.S. 393, 397 (2007) ("[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."). In *Morse*, at a school-supervised event, students unfurled a banner conveying a message that the principal reasonably regarded as promoting illegal drug use. *See Morse*, 551 U.S. at 396-98. The Court held that because such a display took place "at school," school officials acted within their authority when confiscating the banner and suspending students. *Id.* at 401; *see also* FIRE, *Free Speech in High School*, <https://perma.cc/TDD9-M9KN> (last visited Oct. 16, 2021) ("Taken together, these four cases [*Tinker*, *Bethel Sch. Dist. No. 403*, *Hazelwood Sch. Dist.*, *Morse*] give public high school officials more leeway to regulate speech than public college administrators, although some states have passed laws to provide additional protection for high school students.")

²⁶ *See* Dennis O'Brien & Christie R. Jacobson, *Split among circuit courts raises questions on regulating disruptive off-campus speech*, N.Y. STATE ASS'N OF SCHOOL ATT'YS, <https://perma.cc/6XLF-YVU6> (last visited Oct. 14, 2021) (discussing circuit court discrepancies regarding off-campus speech); Frank D. Lomonte, *The Supreme Court's Cheerleader Decision Has Something to Frustrate and Disappoint Everyone*, FUTURE TENSE (June 25, 2021, 12:07 PM), <https://perma.cc/GZ7P-PVVK> (highlighting school speech disputes among jurisdictions); Ferry, *supra* note 24, at 722 ("Because of this inconsistency, there is currently an unequal application of the First Amendment to students' rights, which results in students' geographical location having a large impact on whether their speech will be protected."); *see also* *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 619-20 (5th Cir. 2004) (surveying differing conclusions as to legality of restrictions on off-campus speech). "Frustrated by these inconsistencies, commentators have begun calling for courts to more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation." *See Porter*, 393 F.3d at 619-20.

²⁷ *See* *Doninger v. Niehoff*, 642 F.3d 334, 349 (2d Cir. 2011) (detailing type of activities considered substantially disruptive); *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36-37 (2d Cir. 2007) (providing superintendent's definition of substantial disruption as creating disorder to school activities). The Second Circuit agreed with the Ninth Circuit that "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue." *Doninger*, 642 F.3d at 349, (quoting *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)).

²⁸ *See Kowalski*, 652 F.3d at 573 (holding nexus of speech to school's pedagogical interests strong enough to justify school's disciplinary action).

community,” and such regulation has a “sufficient nexus” to the school’s pedagogical interests.²⁹

In contrast, the Third Circuit maintains that off-campus speech is protected speech not subject to school regulation.³⁰ The Third Circuit has also held that a public school’s authority to regulate disruptive speech under *Tinker* only applies when substantial disruption is reasonably foreseeable.³¹ The Fifth Circuit has similarly held that school officials cannot infringe on students’ constitutional rights where the exercise of such rights does not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”³² Such sharp conflict among the circuits suggested a need for the Supreme Court to provide clarity to both students and school officials in the regulation of off-campus speech.³³

²⁹ See *McNeil ex rel. CLM v. Sherwood Sch. Dist.* 88J, 918 F.3d 700, 707-08 (9th Cir. 2019) (combining reasonable foreseeability and “sufficient nexus” requirements to justify speech regulation).

We now clarify that courts considering whether a school district may constitutionally regulate off-campus speech must determine, based on the totality of circumstances, whether the speech bears a sufficient nexus to the school. This test is flexible and fact-specific, but the relevant considerations will include (1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school. There is always a sufficient nexus between the speech and the school when the school district reasonably concludes that it faces a credible, identifiable threat of school violence.

Id. (citations omitted).

³⁰ See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (rejecting argument off-campus speech was subject to punishment); *J.S. ex rel. Snyder v. Blue Mt. Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011) (holding schools cannot punish off-campus online speech even if vulgar, lewd, or offensive).

³¹ See *J.S.*, 650 F.3d at 930-31 (holding no forecast of substantial disruption where student did not intend speech to reach school); see also *Layshock*, 650 F.3d at 216 (holding school violated student’s constitutional rights in regulating off-campus speech). “It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.” *Layshock*, 650 F.3d at 216; see also Erica Goldberg, *In Third Circuit, Landmark Victories for Student Speech Limit Schools’ Ability To Censor Students Online*, FIRE: NEWSDESK (June 14, 2011), <https://perma.cc/WG4K-UTM4> (explaining Third Circuit’s respect for students’ off-campus speech).

³² *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (ruling that students who protested racial discrimination had no interference with school operations); cf. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 397 (5th Cir. 2015) (permitting disciplinary action against student due to forecasted substantial disruption with school operations). The school board’s disciplinary action against the student for a rap song recorded off-campus was justified on grounds that the rap song recording described violent acts against two named coaches and intended to reach the school community. *Id.* at 384-85.

³³ See Mark Strasser, *Tinker Remorse: On Threats, Boobies, Bullying, and Parodies*, 15 FIRST AMEND. L. REV. 1, 1 (2016) (highlighting difficulty in applying consistent First Amendment

In *Mahanoy Area Sch. Dist. v. B.L.*, the Supreme Court affirmed the Third Circuit’s ruling that the school district’s disciplinary action violated the First Amendment.³⁴ The Court acknowledged that, under *Tinker*, students do not “shed their constitutional rights to freedom of speech or expression” upon entering the schoolhouse gate.³⁵ While school officials’ authority is heightened when regulating speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” the Court found no evidence of such “substantial disruption” of a school activity nor a threatened harm to the rights of others.³⁶ Instead, the Court emphasized that the strength of the school’s anti-vulgarity interest and apprehension of disturbance was substantially weakened because Levy transmitted speech outside of the school’s location and hours, and the speech neither identified the school nor targeted members of its community.³⁷ Thus, the Court reasoned that the school’s regulatory interests in disciplining Levy were insufficient to overcome her First Amendment rights, holding that a school’s regulatory interests are lessened when a student engages in off-campus social media speech.³⁸

doctrine in public schools). “Until the United States Supreme Court offers a coherent analysis of the existing jurisprudence that offers guidance on several issues on which there is a split, lower courts will continue to offer increasingly incompatible interpretations of the jurisprudence” *Id.*; see also Ferry, *supra* note 24, at 765 (explaining student confusion due to lack of judicial clarity). “These overbroad policies leave students confused and give administrators too much power to decide what constitutes permissible expression and what should be subject to discipline.” Ferry, *supra* note 24, at 765.

³⁴ See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021) (“Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus.”)

³⁵ See *id.* at 2044 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). The Court noted the First Amendment serves as a significant measure of protection granted to minors, especially when schools act *in loco parentis*. *Id.* at 2044-45.

³⁶ See *id.* at 2047-48 (citing *Tinker*, 393 U.S. at 513) (outlining elements of record that oppose disruption of school activity). The record showed that the content of Levy’s Snapchats had only temporarily upset some of her cheerleading teammates. *Id.* at 2047-48. Moreover, the discussion of the matter occupied less than ten minutes of an Algebra class. *Id.* When one of Levy’s coaches was questioned about whether she had any reason to think this incident would disrupt school activities, she responded, “No.” *Id.* at 2048.

³⁷ See *B.L.*, 141 S. Ct. at 2047 (“[T]hese facts convince us that the school’s interest in teaching good manners is not sufficient, in this case, to overcome B.L.’s interest in free expression.”); *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (noting student’s same speech would have been protected in public forum outside of school context); see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) (“If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate”)

³⁸ See *B.L.*, 141 S. Ct. at 2046 (distinguishing school’s efforts regulating off-campus speech from efforts regulating on-campus speech). The Court expressed concerns that “[R]egulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day.” *Id.*

In justifying its decision, the Court identified three features of off-campus speech that dictate a regulatory limitation on school officials.³⁹ First, a student's off-campus speech likely falls under the responsibility of the student's parents, as school officials are not acting *in loco parentis*.⁴⁰ The Court then noted that Levy spoke in circumstances where her parents had the responsibility in deciding whether to discipline her off-campus speech.⁴¹ Second, courts must be particularly skeptical of school efforts to restrict off-campus speech to avoid covering all speech that a student engages in throughout the day.⁴² Lastly, schools have a special interest in protecting a student's unpopular expressions, especially when off-campus, to maintain their role as "nurs[er] of democracy."⁴³ Although the Court did not go as far as the Third Circuit in ruling that school officials have no regulatory interest in off-campus student speech, it recognized that certain features of off-campus speech limit the school's regulatory authority, and the school district's cited interests in punishing Levy's speech were insufficient to overcome her First Amendment rights.⁴⁴

³⁹ See *id.* at 2045 ("[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off-campus' speech . . ."). The Court outlined that, taken together, these three features of off-campus speech—schools not standing *in loco parentis*, 24-hour regulation, and protecting democracy—diminish the leeway the First Amendment usually grants to schools. *Id.* at 2046.

⁴⁰ See *id.* (stating off-campus speech normally within parental responsibility zone). "The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them." *Id.*

⁴¹ See *id.* at 2047 (concluding that school did not stand *in loco parentis* for B.L.). "[T]he liberty of parents and guardians to direct the upbringing and education of children [is] under their control." *Id.* at 2053. (Alito, J., concurring) (alteration in original) (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925)); see also *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (reflecting on Western Civilization's history and culture of parental concern for upbringing of children).

⁴² See B.L., 141 S. Ct. at 2046 (demanding courts increase skepticism of school efforts to regulate off-campus speech). The Court considered the perspective of the student speaker and recognized that extending a school's authority to off-campus speech provides no leeway for students to be free from school intervention at all. *Id.*

⁴³ See *id.* (acknowledging representative democracy only works where "marketplace of ideas" exists). "That protection must include the protection of unpopular ideas, for popular ideas have less need for protection." *Id.* The Court emphasized that schools have a strong interest in ensuring future generations understand the value of freedom of speech and the right to express their opinion, even if that opinion is debated. *Id.*

⁴⁴ See *id.* at 2045 (stating school's regulatory interests significant in some off-campus circumstances). The Court lists several types of off-campus behavior which may call for school regulation including:

serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and

Despite the division among circuit courts surrounding the application of the *Tinker* standard to off-campus student speech, the Court properly held that the school district's disciplinary action against Levy violated her First Amendment rights.⁴⁵ While public schools may regulate student speech in certain circumstances, students nevertheless enjoy robust First Amendment rights, particularly when speech occurs off-campus and is directed to a private audience via a personal cell phone.⁴⁶ In such circumstances, it is the parents, not the school, who are in the best position to protect, guide, and discipline the students if desired.⁴⁷ Therefore, the Court appropriately recognized in-school and certain off-campus restrictions that are essential to the operation of a public school.⁴⁸ An argument in favor of expansive regulation that encompasses off-campus speech will not only infringe on parental rights, but it will also challenge the fundamental free-speech principles under the First Amendment.⁴⁹

Although the Court sought to resolve the circuit split regarding off-campus speech regulation, it ultimately failed to establish a bright line rule and instead set forth a vague three-feature test to determine whether schools may regulate off-campus speech.⁵⁰ By neglecting to provide a First

breaches of school security devices, including material maintained within school computers.

Id. (itemizing situations in which regulation may be appropriate).

⁴⁵ See O'Brien & Jacobson, *supra* note 26 (finding disparate application of *Tinker* standard to off-campus speech). See *B.L.*, 141 S. Ct. at 2048 (holding disciplinary action violated B.L.'s First Amendment rights).

⁴⁶ See *B.L.*, 141 S. Ct. at 2045 (outlining instances of off-campus behavior permitting school regulation); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (emphasizing students' entitlement to comprehensive First Amendment rights).

⁴⁷ See *B.L.*, 141 S. Ct. at 2046 (outlining *in loco parentis* doctrine that treats school administrators as standing in place of parents). "In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children." *Id.* at 2053 (Alito, J., concurring) (stressing parents do not "implicitly relinquish" authority when they enroll their children in public school).

⁴⁸ See *id.* at 2050 (Alito, J., concurring) (explaining schools cannot operate effectively without authority over in-school speech). The Court expanded schools' regulatory interests in certain off-campus circumstances that allow for effective authority, including threats aimed at the school community, severe bullying or harassment, and breaches of school security devices. See *id.* at 2045, 2050 (majority opinion) (rationalizing use of authority over off-campus speech with school safety).

⁴⁹ See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (stating loss of First Amendment rights constitutes irreparable harm); see also *B.L.*, 141 S. Ct. at 2053 (Alito, J., concurring) (discussing parents' liberty to direct upbringing and education of children under their control). "While the in-school restrictions discussed above are essential to the operation of a public school system, any argument in favor of expansive regulation of off-premises speech must contend with this fundamental free-speech principle." *B.L.*, 141 S. Ct. at 2054 (Alito, J., concurring) (balancing schools' interest in regulating speech against students' constitutional protections).

⁵⁰ See *B.L.*, 141 S. Ct. at 2059 (Thomas, J., dissenting) (arguing majority's three-feature test is vague and neglects historical precedent). The dissent considers the narrowness of the Court's

Amendment rule explicitly defining what constitutes “off-campus” speech, the Court engendered further uncertainty by recommending a case-by-case determination of permissible regulation.⁵¹ Instead, the Court should have adopted a two-step framework that provides parents with discretion to discipline students when the speech in question occurs outside the school environment.⁵² As parents maintain a fundamental privacy right to act in the best interest of their child, parents should be the first deciders of student disciplinary action when the conduct is beyond school bounds.⁵³ Where parental disciplinary action does not go as far as to prevent a “material and substantial disruption” to school operations, the Court should then adopt the Fourth Circuit’s “nexus” approach and look to factors such as whether the speech directly names the school or targets specific members of the school community.⁵⁴ Utilizing the “sufficiently strong” nexus approach between off-campus speech and the school environment would justify disciplinary action by school officials should the parental actions fail to remedy the disruption.⁵⁵

holding by noting questions remain about how to apply the doctrine of *in loco parentis*. See *id.* at 2059, 2061-62 (Thomas, J., dissenting) (“How much less authority do schools have over off-campus speech and conduct? And how does a court decide if speech is on or off campus?”)

⁵¹ See *id.* at 2045 (majority opinion) (acknowledging persistent discrepancy in First Amendment standards).

Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as “off campus” speech and whether or how ordinary First Amendment standards must give way off campus to a school’s special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.

Id. (recognizing unresolved tensions in determining what qualifies as “off campus” speech for regulatory purposes).

⁵² See *id.* at 2053 (Alito, J., concurring) (“While the decision to enroll a student in a public school may be regarded as conferring the authority to regulate *some* off-premises speech . . . enrollment cannot be treated as a complete transfer of parental authority over a student’s speech.”)

⁵³ See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); see also *Pierce v. Soc’y of Sisters of Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (emphasizing parents’ liberty to guide and control child upbringing). The Court emphasized that “[t]he child is not the mere creature of the state,” and those who care for him and “direct his destiny” have the right and obligation to choose how to care for him. *Id.* (making distinction between parents’ authority and state’s authority).

⁵⁴ See *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011) (applying “nexus” approach in upholding discipline of direct verbal attacks towards specifically named classmate). The Fourth Circuit asserted that such a direct, public target on a named classmate rose to a level of harassment and bullying which would be expected “to reach the school or impact the school environment” and that therefore, the school had the ability to discipline the student. *Id.* at 573-74.

⁵⁵ See *id.* at 577 (“Suffice it to hold here that, where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrator’s good faith efforts to address the problem.”)

As technology continues to evolve and more young people gain access to social media, online speech will only expand the ways in which students engage and communicate.⁵⁶ As a result of the COVID-19 pandemic, the dividing line between off-campus and on-campus speech is even more blurred with the onset of remote learning.⁵⁷ Although the educational system has partially transitioned into the private home, once a student enters the virtual “schoolhouse gate” via a school-sponsored forum, the student’s speech should nevertheless be considered on-campus speech subject to discipline by school authority.⁵⁸ By properly drawing a clear boundary line, courts would possess the necessary clarity for determining when and where a student engages in off-campus speech.⁵⁹ While the Supreme Court’s decision marked a victory for Levy and students’ free speech rights, the Court’s decision failed to answer the desperate pleas for clarity by jurisdictions and school administrators nationwide.⁶⁰

The right to be free in one’s expressions is guaranteed by the First Amendment of the Constitution. By limiting the ability of school officials to police students’ expressions outside of school, the Court has demonstrated

⁵⁶ See Ferry, *supra* note 24, at 719 (discussing social media’s influence on secondary school setting due to teenagers’ usage). “While the Internet is widely used and available to all age groups, teenagers report using the Internet the most, facilitated by the convenience and efficiency of smartphones.” *Id.*

⁵⁷ See Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 619 (5th Cir. 2004) (“The line dividing fully protected “off-campus” speech from less protected “on-campus” speech is unclear . . .”); see also Lomonte, *supra* note 26 (“Most have simply adapted *Tinker* in refereeing school disciplinary disputes, as if there were no legal difference between speaking inside a classroom and speaking at home on a Saturday.”)

⁵⁸ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding public school officials may regulate speech that would “materially and substantially disrupt the work and discipline of the school”); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (permitting regulation of lewd and vulgar speech within school activity). While upholding First Amendment protections, the law has developed to integrate circumstances where the absolute exercise of free speech rights would interfere with the pedagogical interests of the school. *Fraser*, 478 U.S. at 684 (finding regulatory powers applicable at assembly due to it being a school-sponsored forum).

⁵⁹ See *B.L.*, 141 S. Ct. at 2063 (Thomas, J., dissenting) (“In effect, it [the Court] states just one rule: Schools can regulate speech less often when that speech occurs off campus. It then identifies this case as an ‘example’ and ‘leav[es] for future cases’ the job of developing this new common-law doctrine.”) (alteration in original).

⁶⁰ See Lomonte, *supra* note 26 (explaining great disappointment in Court’s lack of guidance to future cases). The Supreme Court takes cases like *Mahanoy Area School District v. B.L.* to “make enduring, broad statements of principle—legal rules, tests, and standards—that can guide future courts in similar cases and enable the rest of us to predict whether our behavior will be grounds for arrest, firing, or a year off from JV cheerleading.” *Id.* However, the Court did just the opposite in leaving unanswered many pivotal questions regarding the contours of off-campus speech that will likely arise in future scenarios of online student speech. *Id.* (“Here is what we know to a certainty after Wednesday [date of Court’s decision]: It’s OK to flip off your school on Snapchat. And here is what we do not know to a certainty: everything else.”)

its firm commitment to protecting free speech and recognizing its importance in our democracy. However, in failing to set forth a bright line rule that explicitly defines off-campus speech, the Court inadvertently authorized school districts to implement their own specific discipline policies as to such speech, ultimately allowing for further inconsistencies to arise. School districts, and the jurisdictions in which they reside, will continue to struggle with students' First Amendment rights and its interplay with social media and beyond.

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