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CONSTITUTIONAL LAW—STRENGTHENING SCHOOLS’ ABILITIES TO COMBAT CYBERBULLYING IN DENYING STUDENTS’ FIRST AMENDMENT CHALLENGE—DOE V. HOPKINTON PUB. SCHS., 19 F.4TH 493 (1ST CIR. 2021).

The First Amendment to the United States Constitution, along with its Massachusetts statutory counterpart, Massachusetts General Laws Annotated ch. 71, § 82, guarantees students the right to freedom of speech. \(^1\) Within the educational setting, First Amendment claims typically arise when school administrators discipline students for what they consider to be offensive speech or conduct. \(^2\) In Doe v. Hopkinton Public Schools, \(^3\) the United States Court of Appeals for the First Circuit considered whether Hopkinton High School violated students’ First Amendment freedom of speech rights when school administrators suspended two students for bullying their teammate via Snapchat. \(^4\) The First Circuit ultimately rejected these students’ claims, holding that their speech and conduct in encouraging bullying was not protected under the First Amendment. \(^5\) In affirming the district court’s decision in favor of the school district, the First Circuit upheld the

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\(^1\) See U.S. CONST. amend. I (guaranteeing constitutional freedoms of speech, religion, press, assembly, and right to petition); MASS. GEN. LAWS ANN. ch. 71, § 82 (West 2022) (providing that “[t]he right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school.”).

\(^2\) See Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 514 (1969) (determining school violated students’ First Amendment rights when they disciplined students for anti-war protest); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (maintaining “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse”). Since Tinker, the Supreme Court has emphasized that deference must be given to school administrators to discipline students and minimize disruption. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (holding schools can regulate and restrict speech wholly inconsistent with “fundamental values” of educational mission) (quoting Fraser, 478 U.S. at 683).

\(^3\) 19 F.4th 493 (1st Cir. 2021).

\(^4\) See id. at 504-05 (outlining plaintiffs’ First Amendment claims). Plaintiffs argued that their Snapchat messages were “private messages” and that their suspensions violated their First Amendment rights to speech and association. See id.

\(^5\) See id. at 509 (summarizing court’s holding regarding First Amendment claims). The court held that speech and conduct that actively and pervasively encourages bullying or “fosters an environment in which bullying is acceptable and actually occurs” is not protected under the First Amendment. Id.
constitutionality of Massachusetts’ anti-bullying statute’s inclusion of “emotional harm.”

Hopkinton High School ("School"), a Massachusetts public high school, investigated claims of bullying on their boys’ varsity ice hockey team and ultimately suspended eight students after determining that they had bullied their fellow teammate, Robert Roe ("Roe"). In December 2018, the eight students formed a Snapchat group, deliberately excluding Roe, and used it to share nonconsensual photos and videos of Roe and his family, along with disparaging and abusive messages. In addition to the Snapchat cyberbullying, the eight students harassed and bullied Roe in the locker

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6 See id. at 511 (determining that plaintiffs’ void-for-vagueness challenge to Massachusetts’ anti-bullying statute was “moot” following their graduation). Plaintiffs challenged the Massachusetts anti-bullying statute as overbroad and vague for its inclusion of “emotional harm” as part of its statutory definition for “bullying.” See id. at 509-10 (referencing MASS. GEN. LAWS ANN. ch. 71, § 37O(a)).

7 See id. at 497 (providing summary of school’s investigation and outcome). The district court allowed the students to proceed under pseudonyms throughout the course of litigation. See id. at 497 n.1.

8 See Hopkinton Pub. Schs., 19 F.4th at 499-501 (discussing creation of Snapchat group and content shared amongst eight students). The Snapchat group, titled “Geoff Da Man” and named after the other student excluded from the group, was actively used by the eight students to share pictures and videos of Roe and his family without his consent. See id. at 500. School officials were only able to retrieve access to the Snapchat group’s pictures and messages that had been “saved” in the group chat, as other non-saved content disappears after it has been viewed. See id. at 500 n.4. Despite only having access to the preserved messages—which the school determined was likely only a fraction of the content that was actually sent—officials found “demeaning and expletive-laced comments regarding Roe’s appearance, voice, intimate anatomy, parents, and grandmother.” Id. at 500. Examples of these messages include the following:

Bloggs: “Was [Roe]’s grandma in the third row”
Student 2: “They tied her to the hood”
Bloggs: “With bungee cords?”

Bloggs: “Are [Roe]’s parents ugly too [o]r did he just get bad genes”

In response, Student 3 found photos of Roe’s parents and shared those photos with the Snapchat group. Bloggs then responded to the photos:

Bloggs: “A family of absolute beauties”

Student 5 also posted a different photo of Roe that had been surreptitiously taken without his consent. In response to that photo, Doe and Bloggs both messaged the group:

Doe: “[Student 5] and [Roe] were made on the same day[,] [Student 5] was the starting product and [Roe] is what it turned into[,] kinda like a game of telephone in 1st grade” Bloggs: “[Roe]’s leather shampoo makes up for the looks though”

Bloggs, in addition, disclosed to the group without Roe’s authorization one of Roe’s online usernames.

Id.
room, on the bus to games, and in the classroom. After Roe’s parents filed complaints with the School, administrators investigated the conduct and ultimately determined the eight students had in fact bullied Roe, as his parents alleged. The School suspended all eight students from the hockey team for the remainder of the 2018-19 season, held individualized disciplinary hearings, and suspended John Doe (“Doe”) and Ben Bloggs (“Bloggs”) (collectively, “plaintiffs”) for three and five days respectively from school. After the bullying, Roe obtained school counseling, declined to try out for the lacrosse team in the spring, entered formal mental health treatment, and eventually transferred to a school in Quebec, Canada.

9 See id. at 506 n.11 (observing bullying and harassment occurred on-campus, off-campus, and during school-affiliated events). The court noted that “[t]he students admitted to taking videos and photos while in the locker room, on bus rides to school hockey games, and at team gatherings.” Id. In Roe’s parents’ complaint to the School, they requested that Roe be removed from his physics class that he shared with two of these bullies, reflecting this was a “pattern of repeated bullying” present in all of his school-related environments. See id. at 498.

10 See id. at 498 (stating Roe’s father submitted bullying complaint to School on February 4, 2019). The complaint alleged that Roe had noticed students were video recording him and sending it to other students, presumably through Snapchat. See id. The complaint also stated that Roe’s parents had previously reported one of these students to the hockey coach in December 2018 for taking photos of Roe without his consent in the locker room. See id. The School promptly investigated the allegations by conducting interviews with the hockey team and coach, reviewing the Snapchat group, and meeting with law enforcement. See id. at 499. School officials finished their investigation on February 8, 2019, and their Bullying Report concluded the following:

The Bullying Report found that each of the eight students “was an active participant in the SnapChat group” and that the “[s]tudents admitted that [Roe] was excluded from SnapChat.” The Bullying Report detailed other activities by group members when it stated:

4. The SnapChat group included:
   a. Photos of [Roe] taken without his consent
   b. Videos of [Roe] taken and posted without his consent
   c. Photos of [Roe’s] parents with disparaging comments on their appearance
   d. Disparaging comments regarding [Roe’s] appearance, voice, and anatomy
   e. Attempts to get [Roe] to say inappropriate statements and record him doing this.

Id. at 501. As an example of 4(e) of the Bullying Report, the group members attempted to force Roe to say “I am gay” and “dick” while audio and video-recording him. See id. at 499. In the investigation interviews, Doe stated he “understood the conduct was harassment.” Id. at 501. Bloggs acknowledged that Roe was shy “so some people take pictures and make fun of him.” Id. After his interview, Bloggs sent an e-mail apologizing to the hockey coach and stated, “I should have taken more of a serious role in preventing anything else from happening.” Id.

11 See id. at 501-02 (discussing School’s disciplinary process and suspensions). The School offered individualized suspension hearings with the principal to give the eight students an “opportunity to provide [their] side of the story and to dispute the allegations,” and extended an invitation to their parents to attend as well. See id.

12 See id. at 502 (explaining Roe suffered mentally from the bullying, resulting in school transfer). Roe told investigators he was aware of the Snapchat group and his teammates taking pictures
Doe and Bloggs each filed a 42 U.S.C. § 1983 action in the United States District Court for the District of Massachusetts challenging the constitutionality of their suspensions on First Amendment grounds. Doe and Bloggs sought declaratory and injunctive relief, alleging the School violated their freedoms of speech and association. Additionally, they argued that Massachusetts’ inclusion of “emotional harm” in its anti-bullying statute was overbroad and vague, thus “chilling” their speech, and that their suspensions violated the Massachusetts student speech statute.

During the course of litigation at the district court level, both parties cross-moved for summary judgment and post-hearing agreed to proceed on a case stated basis, where the district court ultimately granted judgment in favor of the School. The court found that the School did not violate the plaintiffs’ First Amendment rights, as schools have the right to regulate speech if it interferes with or infringes on the rights of others. Moreover, the court was not persuaded by the plaintiffs’ “guilt by association” causation arguments, as they found that even if the plaintiffs were not the primary

and videos of him, and that he felt alone on the hockey team bus, at team-bonding events, at games, and at practice. See id. at 499.

See Hopkinton Pub. Schs., 19 F.4th at 497, 502 (discussing plaintiffs’ suspensions leading to onset of § 1983 litigation against School). Doe and Bloggs, by and through their mothers, filed separate federal court actions that were eventually consolidated. See id. at 502.


See Amended Complaint, supra note 14, at 2 (challenging inclusion of “emotional harm” in school’s anti-bullying policy); Hopkinton Pub. Schs., 490 F. Supp. 3d at 452-53 (outlining Doe’s and Bloggs’ claims at district court level); see also Brief of Plaintiffs-Appellants, supra note 14, at 43 (arguing statute’s “emotional harm” inclusion “chill[s]” expressive activity). The plaintiffs challenged the anti-bullying statute, MASS. GEN. LAWS ANN. ch. 71, §§ 37H and 37O, as unconstitutionally vague and overbroad, and they asserted that Massachusetts’ freedom of speech statute, MASS. GEN. LAWS ANN. ch. 71, § 82, protected their speech. See Hopkinton Pub. Schs., 490 F. Supp. 3d at 452-53.

See Hopkinton Pub. Schs., 490 F. Supp. 3d at 453, 456 (summarizing procedural history and granting judgment in favor of the school district). The district court noted the School’s bullying evidence was “well-supported” in the record but disagreed with the determination that the Snapchat’s “purpose” was only to target Roe; rather, they found the Snapchat was used for a variety of purposes and that the bullying of Roe began after its creation. See id. at 456.

See id. at 461-62 (determining students’ bullying actions not protected by First Amendment). Agreeing with the school district, the court asserted that “[t]his bullying therefore constituted an infringement of Roe’s rights and is not protected by Tinker whether or not it caused a substantial disruption.” Id. at 461; see also Brief of Appellee at 2-3, Doe v. Hopkinton Pub. Schs., 19 F.4th 493 (1st Cir. 2021) (No. 20-1950) (relying on Tinker’s “invasion of the rights of others” prong); cases cited supra note 2 and accompanying text (referencing post-Tinker cases in favor of school districts’ regulatory rights).
perpetrators, they still actively engaged in, and encouraged, the group bullying of Roe.18 Lastly, the court held that the “emotional harm” prong of the Massachusetts anti-bullying statute was not overly broad nor vague.19 The district court entered judgment in favor of the School, and Doe and Bloggs timely appealed to the First Circuit.20 On appeal, the First Circuit affirmed the district court’s decision, holding that (1) the students’ speech was not protected under the First Amendment nor the Massachusetts student speech statute, (2) the students’ vagueness arguments were moot, and (3) Massachusetts’ inclusion of “emotional harm” within its anti-bullying statute was constitutional.21

The Supreme Court of the United States has long struggled to balance students’ First Amendment rights in conjunction with protecting school officials’ rights to maintain order within the educational setting.22 Over five decades ago, the Court issued their seminal decision in *Tinker v. Des Moines Independent Community School District*,23 which has continued to shape the contours of educators’ abilities to regulate student speech to present day.24 In *Tinker*, the Court held that the school wrongfully disciplined high school students for wearing black armbands to protest the Vietnam War, and robustly defended the students’ First Amendment rights.25 However, the Court

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18 See *Hopkinton Pub. Schs.*, 490 F. Supp. 3d at 463 (noting “guilt by association” precedents not applicable to Doe’s and Bloggs’ actions). The district court noted, “[t]hese precedents do not require school officials to ignore the group context in which Doe’s and Bloggs’ comments were made, however, because they did not merely ‘associate’ in the Snapchat but were active—albeit minor—participants in the group targeting of Roe.” Id.

19 See id. at 467 (determining “the ‘emotional harm’ prong in the statute is not so substantially overbroad that it must be struck down on its face”). The court rejected the void-for-vagueness statutory challenge to “emotional harm,” concluding that the risk of arbitrary enforcement was insignificant and citing studies that found school children are readily capable of determining when their conduct causes emotional harm. See id. at 468-69.

20 See id. at 470 (issuing judgment in favor of school district). The court determined that the School appropriately disciplined Doe and Bloggs and that a reasonable official could have found that the Snapchat group members violated Roe’s rights through collective bullying, which is not constitutionally protected speech. See id.


25 See *Tinker*, 393 U.S. at 508, 514 (protecting both teachers’ and students’ freedom of expression at school). “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or
also laid out two exceptions where educators may regulate student speech: when the speech (1) “materially disrupts classwork or involves substantial disorder,” or (2) “coll[ides] with the rights of other students to be secure and to be let alone.”

Since Tinker, the Court has continued to expand the two-prong test in restricting students’ speech in three central categories: (1) vulgar or lewd speech, (2) school-sponsored activities speech, and (3) speech that promotes illegal drug use. Even with these notable exceptions carved out, the advent of the Internet Age has complicated school officials’ abilities to regulate student speech online. Without concrete guidance from the Supreme Court,

teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Id. at 506.

See id. at 508, 513 (defining two exceptions when schools can regulate student speech); see also Bonnie A. Kellman, Note, Tinkering with Tinker: Protecting the First Amendment in Public Schools, 85 Notre Dame L. Rev. 367, 367-68 (2009) (highlighting significance of Tinker student speech exceptions); Negrón, supra note 24, at 371 (noting how Tinker’s prongs are typically referred to within scholarly community); Norris v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 32-33 (1st Cir. 2020) (recognizing example of school discipline under Tinker’s second “invasion of the rights of others” prong). Tinker’s two exceptions are commonly referred to as the “substantial disruption” and “rights of others” prongs. Kellman, supra, at 367-68. “[B]ullying is the type of conduct that implicates the governmental interest in protecting against the invasion of the rights of others, as described in Tinker.” Norris, 969 F.3d at 29. However, schools must demonstrate a causal connection before restricting the speech—namely by showing a reasonable basis to conclude the bullying targeted a specific student and that it invaded that student’s rights. See id. 

See Tinker, 393 U.S. at 506 (discussing unique school environment in context of First Amendment); see also Jon G. Crawford, When Student Off-Campus Cyberspeech Permeates the Schoolhouse Gate: Are There Limits to Tinker’s Reach?, 45 URB. LAW. 235, 239 (2013) (noting that while Tinker “suggests an absolute quality for student and teacher speech rights,” the decision “also contained language to limit the speech rights, suggest[ing] broad reach”); Kellman, supra note 26, at 370 (“The Tinker Court recognized that students’ freedom of speech must be balanced with school officials’ ability to control student conduct in schools.”).

See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (noting schools may prohibit “the use of vulgar and offensive terms in public discourse”); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (holding educators can discipline school-sponsored speech, including speech appearing in school newspaper); Morse v. Frederick, 551 U.S. 393, 403 (2007) (finding school may regulate speech that promotes “illegal drug use” during school-sponsored events off-campus); Clay Calvert, Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing, 58 Am. U. L. Rev. 1167, 1175 (2009) (“In summary, the trio of Supreme Court student-speech cases subsequent to Tinker [Fraser, Hazelwood, Morse] have all whittled away at Tinker’s free-expression triumph . . .”). By repeatedly holding in favor of school officials, the Court has chipped away at Tinker’s protections for student speech and strengthened educators’ regulatory abilities in these three main categories. See Calvert, supra, at 1175.

See Crawford, supra note 27, at 250 (“The internet’s ubiquitous nature makes it difficult for both school officials and courts to determine when student cyberspeech created from an off-campus location may be considered to have permeated the schoolhouse gate and thereby become subject to
concerning off-campus speech, lower courts have struggled to apply *Tinker* and its progeny to off-campus internet speech, leading to variation among the circuits.\(^{30}\) Moreover, school officials have been ill-equipped to monitor and discipline online bullying specifically, as courts have inconsistently drawn the line between harassment and protected speech.\(^{31}\) Online bullying and harassment, also known as “cyberbullying,” has become an epidemic in schools.\(^{32}\)

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\(^{31}\) See Negrón, *supra* note 24, at 364-65 (discussing courts’ inability to help schools discipline online bullying without infringing on freedom of speech). “At a time when federal courts disagree on how the tensions should be resolved, and without such a resolution from the Supreme Court, school leaders are left to make on-the-ground choices that at best recognize only one interest, and at worst result in litigation from the offended side.” *Id.*; see also Kathleen Conn, *T.K. and J.C.: Guidance for Schools Dealing with Bullying and Cyberbullying*, 5 *Nev. U. L.J.* 77, 77-78 (2013) (summarizing challenges for educators to discipline cyberbullying). School administrators have been placed in an untenable position: those who discipline cyberbullies may face legal challenges from the bullies’ parents, but on the other hand, should they fail to address a bullying claim, they may also face a deliberate indifference claim from the victim’s parents. *See Conn, supra, at 77-78.* “Recent litigation has put [school administrators] in a damned if you do, damned if you don’t ‘DDDD’ situation.” *Id.* at 77 (alteration in original) (internal quotation marks omitted).

\(^{32}\) See *What Is Cyberbullying, STOPBULLYING.GOV* (last reviewed Nov. 5, 2021), https://perma.cc/UY9B-XM9V (defining cyberbullying and reporting frequency of cyberbullying at federal level). The U.S. Department of Health and Human Services has defined “cyberbullying” as:

*Cyberbullying that takes place over digital devices like cell phones, computers, and tablets. Cyberbullying can occur through SMS, Text, and apps, or online in social media, forums, or gaming, where people can view, participate in, or share content. Cyberbullying includes sending, posting, or sharing negative, harmful, false, or mean content about someone else. It can include sharing personal or private information about someone else causing embarrassment or humiliation. Some cyberbullying crosses the line into unlawful or criminal behavior.*

The most common places where cyberbullying occurs are:

- Social Media, such as Facebook, Instagram, Snapchat, and Tik Tok
- Text messaging and messaging apps on mobile or tablet devices
- Instant messaging, direct messaging, and online chatting over the internet
- Online forums, chat rooms, and message boards, such as Reddit
- Email
- Online gaming communities.

*Id.*; see also *Fast Fact: Preventing Bullying, CTRS. FOR DISEASE CONTROL AND PREVENTION* (last reviewed Sept. 2, 2021), https://perma.cc/K73V-VT3K (detailing how more than one in six high school students reported being cyberbullied in 2021); Emily A. Vogels, *The State of Online
In response to national outrage over cyberbullying and concern about teen suicides in the early 2010s, state legislatures across the country began adopting more stringent anti-bullying statutes.\(^{33}\) State and local laws govern enforcement of anti-bullying measures, as no federal statute addresses bullying specifically.\(^{34}\) Massachusetts enacted its anti-bullying statute in 2010 and adopted language from *Tinker*, defining “bullying” as conduct directed at a victim that:

(i) causes physical or emotional harm to the victim or damage to the victim’s property;
(ii) places the victim in reasonable fear of harm to himself or of damage to his property;
(iii) creates a hostile environment at school for the victim;
(iv) infringes on the rights of the victim at school;

Harassment, PEW RSC. CTR. (Jan. 31, 2021), https://perma.cc/Y2BV-Y77K (reporting 41% of adult Americans have experienced online harassment); Araujo, *supra* note 30, at 332 (observing internet makes it easier for bullies to harass victims); Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 787-88 (2008) (analyzing how internet anonymity invites harassment because cyberbullies have no fear of punishment). “Reports of cyberbullying are highest in middle schools (33%) followed by high schools (30%), combined schools (20%), and primary schools (5%).” *Fast Fact: Preventing Bullying, supra*. The internet allows cyberbullies to effectively operate under “an apparent cloak of anonymity” by avoiding face-to-face confrontation, thus emboldening bullies. Araujo, *supra* note 30, at 332. Because cyberbullies do not have to personally face their victims, they are less likely to experience empathy or shame from their conduct. *Id.* Moreover, cyberbullying is easily facilitated through text messages and social media platforms like Instagram, Facebook, or Snapchat, making it particularly convenient for a cyberbully “to remain anonymous or elicit the help of their friends to create a group-bullying scenario.” Chaffin, *supra*, at 787.

33 See Negron, *supra* note 24, at 365 (describing how state legislatures enacted anti-bullying statutes in response to cyberbullying and teen suicide); see also Lisa C. Connolly, Note, *Anti-Gay Bullying in Schools--Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248, 249 (2012) (analyzing legislative pressure to enact more protective anti-bullying statutes because of bullying-related suicides); Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL’Y 53, 69 (2005) (stating experts contend states’ anti-bullying statutes effective in reducing bullying rates); Laws, Policies & Regulations, STOPBULLYING.GOV (last reviewed Jan. 7, 2022), https://perma.cc/5RSC-2BKV (reporting national trends on anti-bullying statutes and laws). All fifty states have enacted some measure of anti-bullying legislation “aimed at strengthening school district policies to address and ameliorate bullying behavior.” Connolly, *supra*, at 249 (discussing legislative intent behind bullying regulation); see also Laws, Policies & Regulations, *supra* (noting all fifty states address bullying through a variety of state laws and regulations). Studies show that effective, strict anti-bullying statutes can have dramatic impacts on reducing bullying rates. See Kosse & Wright, *supra*, at 69.

34 See Laws, Policies & Regulations, *supra* note 33 (noting lack of federal law expressly prohibiting bullying). Although no federal anti-bullying statute exists, when bullying overlaps with equal protection claims or civil rights violations—such as discrimination based on race, ethnicity, or sexual orientation—federal law may provide a remedy. See id.
Massachusetts’ anti-bullying statute reflects the state legislature’s intent to strongarm school officials to discipline bullies and regulate their speech, setting up predictable First Amendment challenges.36

The circuit split regarding off-campus speech regulation and intensive legislative anti-bullying concerns culminated in Mahanoy Area School District v. B.L. ex rel. Levy,37 where the Supreme Court sought to clarify the constitutionality of school discipline for off-campus speech.38 In Mahanoy, a student’s high school junior varsity cheerleading squad suspended her for criticizing both the school and team with profanity on her Snapchat story, which she had posted to her account while off-campus.39 The Third Circuit held that the school violated the student’s First Amendment rights, determining that Tinker “did ‘not apply to off-campus speech,’” which triggered the school district to petition the Supreme Court.40 The Supreme Court ultimately agreed with the Third Circuit’s outcome but not with its reasoning, holding that school officials may discipline off-campus speech if the school has a regulatory interest, which includes instances of cyberbullying.41

35 See MASS. GEN. LAWS ANN. ch. 71, § 37O(a) (West 2022) (outlining statutory definition of illegal bullying conduct). Massachusetts’ anti-bullying statute expressly provides that bullying includes cyberbullying. See id.

36 See Negrón, supra note 24, at 365 (discussing states’ legislative intent to adopt anti-bullying measures); see also Connolly, supra note 33, at 262 (describing how state anti-bullying statutes’ “restrictions on bullying speech—particularly restrictions singling out specific categories of speech—are seemingly in tension with the First Amendment”).


38 See id. at 2044 (noting Court’s central legal question was whether Tinker applied to students’ off-campus speech).

39 See id. at 2042-43 (recounting events leading to student’s suspension). The student, upset that she did not make the varsity cheerleading team, posted a Snapchat story with her middle finger raised and the caption, “[f]uck school fuck softball fuck cheer fuck everything.” Id. at 2043. Teammates showed screenshots of the post to the cheerleading coaches, who along with the school principal, chose to suspend the student from the team for the upcoming year. See id.

40 See id. at 2044 (summarizing lower court’s holding and primary issue on appeal).

41 See id. at 2045 (disagreeing with Third Circuit that Tinker does not apply to off-campus speech). “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. The Court noted schools’ regulatory interests include off-campus behavior such as:

[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 breaches of school security devices, including material maintained within school computers.}
However, the Court declined to explicitly establish a bright-line rule for off-campus speech, thus setting the stage for future First Amendment litigation regarding schools disciplining off-campus cyberbullying. This tension came to a head in *Doe v. Hopkinton Public Schools*: the students contended that their Snapchats were off-campus, constitutionally-protected “private messages” not causally connected to Roe’s harm, while the school district argued it had the right to discipline off-campus bullying that “invaded the rights of others” under *Tinker*.

In *Doe v. Hopkinton Public Schools*, the First Circuit first sought to reconcile the Court’s holding in *Mahanoy* with Doe’s and Bloggs’ off-campus Snapchat bullying conduct. In doing so, the court emphasized deference to the school administrators’ ability to regulate student speech that “invades the rights of others,” applying *Tinker’s* second prong to the off-campus cyberbullying of Roe. The First Circuit strongly rejected Doe’s and Bloggs’ arguments.

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42 See *Mahanoy*, 141 S. Ct. at 2046 (“We leave for future cases to decide where, when, and how these features mean the speaker’s off-campus location will make the critical difference”); see also Ronald K.L. Collins & David L. Hudson, Jr., *The Roberts Court: Its First Amendment Free Expression Jurisprudence: 2005-2021*, 87 BROOK. L. REV. 5, 65-66 (2021) (discussing *Mahanoy’s* shortcomings in addressing off-campus speech). Crucially, the *Mahanoy* Court did not explain when student speech might invade or infringe on the rights of others—*Tinker’s* second prong—which “remains an unsettled area of student speech in the K-12 setting.” Collins & Hudson, supra, at 66.

43 Compare Brief of Plaintiffs-Appellants, *supra* note 14, at 3 (arguing “private” Snapchat messages not causally linked to Roe’s harm), with Brief of Appellee, *supra* note 18, at 2-3 (arguing students’ Snapchats targeted and infringed on Roe’s rights, thus not constitutionally protected speech).

44 See *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 505-06 (1st Cir. 2021) (applying *Mahanoy* to Doe’s and Bloggs’ bullying conduct); *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2045 (emphasizing deference to school officials to regulate bullying on and off-campus). The court distinguished Doe’s and Bloggs’ bullying conduct as vastly more targeted and severe than the cheerleader’s Snapchat stories in *Mahanoy*, as “[a] general statement of discontent is vastly and qualitatively different from bullying that targets and invades the rights of an individual student.” *Hopkinton Pub. Schs.*, 19 F.4th at 506.

45 See *Hopkinton Pub. Schs.*, 19 F.4th at 505-06 (discussing analysis of *Tinker* “invasion of the rights of others” prong); *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 508, 513 (1969) (outlining two-prong exceptions for school administrators to regulate student speech); Norris v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 29 (1st Cir. 2020) (emphasizing “necessary discretion” to school officials’ regulatory abilities); Morse v. Frederick, 551 U.S. 393, 403 (2007) (stating school officials can regulate student speech if it substantially disrupts school environment under *Tinker*); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (deferring to school officials to determine whether conduct is inappropriate and subject to discipline). The First Circuit cited language from *Mahanoy* and *Tinker* that schools have a significant interest in disciplining “serious or severe bullying or harassment” that “invades the rights of others.” *Hopkinton Pub. Schs.*, 19 F.4th at 506. The court emphasized that this remains true even with off-campus online conduct, such as posting Snapchat stories. See id. The First Circuit reiterated the *Tinker* line of cases’ deference to school officials’ abilities to regulate inappropriate student conduct, such as bullying. *See id.* at 505 (citing *Fraser*, 478 U.S. at 675). The First Circuit also relied on its own precedent
Bloggs’ off-campus versus on-campus distinctions, citing Mahanoy’s dismissal of this Third Circuit argument. Additionally, the court rejected Doe’s and Bloggs’ arguments that their conduct was not causally connected to the bullying that invaded Roe’s rights, determining that their speech constituted group bullying and was thus not protected by the First Amendment.

Secondly, the First Circuit addressed Doe’s and Bloggs’ facial overbreadth and vagueness challenges to the inclusion of “emotional harm” within the Massachusetts’ anti-bullying statute, which Doe and Bloggs alleged had “chilled their speech.” The court noted that this argument could potentially be legally significant in other First Amendment cases, however it rejected Doe’s and Bloggs’ claims here, reasoning the claims were rendered moot as a result of their graduation. The First Circuit accordingly affirmed the lower court’s ruling that off-campus cyberbullying is not protected in Norris, as “school administrators must be permitted to exercise discretion in determining when certain speech crosses the line from merely offensive to more severe or pervasive bullying or harassment.”

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speech, and in doing so upheld the inclusion of “emotional harm” within the Massachusetts anti-bullying statute.\(^{50}\)

The First Circuit’s decision in *Doe v. Hopkinton Public Schools* is significant for serving as the first federal appellate decision in the nation to explicitly apply the Supreme Court’s *Mahanoy* holding to off-campus student speech.\(^{51}\) The First Circuit offers necessary clarification to *Mahanoy*, confirming that schools can restrict off-campus cyberbullying that violates *Tinker*’s “invasion of the rights of others” prong.\(^{52}\) As courts continue to grapple with the tension between advancing technology, social media, and the First Amendment, *Hopkinton Public Schools* strengthens schools’ abilities to discipline cyberbullies and protect victims using *Tinker*’s “invasion of the rights of others” exception.\(^{53}\) The First Circuit’s lowering of the causality bar to show an invasion of the rights of others will better equip schools in combatting group bullying, even if the individuals in question are not the primary perpetrators.\(^{54}\) The court’s reasoning reflects the decades-long

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\(^{50}\) See id. at 498 (affirming lower court’s holdings). The court reasoned that to remove “emotional harm” from the anti-bullying statute would “render much of the anti-bullying statute meaningless.” Id. at 512.

\(^{51}\) See *Hopkinton Pub. Schs.*, 19 F.4th at 506 n.11 (determining students’ off-campus bullying reflects exact kind of regulatory interest outlined in *Mahanoy*); see also sources cited supra note 45 (highlighting *Mahanoy’s* ambiguity in defining off-campus regulatory conduct); Crawford, supra note 27, at 239 (noting *Tinker*’s historical lack of guidance for school discipline of off-campus speech).

\(^{52}\) See *Collins & Hudson*, supra note 42, at 66 (noting Supreme Court failed to outline when student speech infringes on rights of others). The First Circuit filled this void by determining that cyberbullying, operating through Doe’s and Bloggs’ targeted, expletive-laced, demeaning Snapchat messages, infringed on Roe’s rights even if posted off-campus. *Hopkinton Pub. Schs.*, 19 F.4th at 506. With this determination, the First Circuit provided the “future case” answer the Supreme Court left unanswered in *Mahanoy*: “[w]e leave for future cases to decide where, when, and how these features mean the speaker’s off-campus location will make the critical difference.” Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy, 141 S. Ct. 2038, 2046 (2021).

\(^{53}\) See Negrón, supra note 24, at 371-73 (noting schools’ interests in regulating “derogatory and injurious remarks” for “goal of creating a safe educational environment free of harassment”); Sweeney, supra note 22, at 426 (analyzing *Tinker*’s holes in addressing off-campus online speech).

In the digital age, *Tinker*’s “substantial disruption” clause has proven insufficient to combat off-campus cyberbullying, but its “invasion of the rights of others” prong offers a meaningful mechanism to protect students. Sweeney, supra note 22, at 415.

A victim of cyberbullying should not suffer in silence because the bully’s off-campus online speech was not sufficiently disruptive of the school environment for the school to intervene . . . . A court should instead be able to find that a school is authorized to punish cyberbullying as conflicting with the rights of other students to be let alone.

Sweeney, supra note 22, at 415.

\(^{54}\) See Chaffin, supra note 32, at 776, 781 (analyzing group cyberbullying’s harmful effects); see also Araujo, supra note 30, at 371 (noting courts previously “grant[ed] unjustified protection to off-campus cyberbullies”). Even if not the primary perpetrators, “in the circumstances of cyberbullying, when a group of online friends begins harassing an individual in the ‘out-group,’ their
judicial trend of ruling in favor of school administrators in regulating student speech.55

In addition, the First Circuit’s preservation of “emotional harm” in the Massachusetts’ anti-bullying statute will provide cyberbullying victims a concrete statutory mechanism to hold their abusers accountable.56 Both Hopkinton Public Schools and Mahanoy in tandem have added “teeth” for student victims and their parents to report non-physical emotional abuse, and provided necessary guidance for schools unsure how to appropriately discipline cyberbullying.57 The court’s upholding of “emotional harm” appropriately considers non-physical, psychological injuries that have devastating consequences on students and are typically inflicted through cyberbullying.58

actions will become increasingly more negative and hurtful.” Chaffin, supra note 32, at 792. The First Circuit thus appropriately declines to grant constitutional protection to group bullying and places special emphasis in recognizing the harm of such conduct, stating “[c]hildren often bully as a group. The children who stand on the sidewalk and cheer as one of their friends shakes down a smaller student for his lunch money may not be as culpable, but they are not entirely blameless.” Hopkinton Pub. Schs., 19 F.4th at 507. The onset and prevalence of social media’s group chats, such as Doc’s and Bloggs’ Snapchat group, has facilitated online group bullying and “mob behavior” that had previously remained unchecked by both schools and the courts. Chaffin, supra note 32, at 790.

55 See sources cited supra note 28 and accompanying text (overviewing Tinker lineage of cases ruling in favor of school districts); see also Calvert, supra note 28, at 1175-76 (analyzing Supreme Court trend in permitting educators to regulate student speech). The Supreme Court has continued its trend in ruling against students in First Amendment cases, strengthening school officials’ abilities to minimize disruption. See Calvert, supra note 28, at 1175.

56 See Connolly, supra note 33, at 260-61 (showing decreased bullying rates resulting from states’ anti-bullying statutes). Studies show that students enrolled in schools with enumerated anti-bullying policies and “emotional harm” statutes experience less bullying, feel safer overall, and report that school officials are significantly more likely to intervene in bullying situations. See id. at 261. Moreover, a highly protective state anti-bullying statute “can be valuable precisely for the normative message it sends,” namely, that non-physical, emotional abuse should not be tolerated. Id. at 250. Crucially, courts and the legislature recognize that non-physical abuse can often manifest in more extreme outcomes than physical abuse: students who fall victim to cyberbullying often face severe psychological anguish, resulting in depression, anxiety, loss of sleep, loss of appetite, loss of self-esteem, decreased performance, lower grades, and at its most extreme, suicide. See Araujo, supra note 30, at 326-27, 327 n.10.

57 See Conn, supra note 31, at 77-78 (noting schools officials’ prior difficulty in addressing cyberbullying due to lack of judicial guidance); see also Kosse & Wright, supra note 33, at 69-70, 80 (asserting comprehensive anti-bullying statutes with “teeth” will reduce bullying incidents).

... it is absolutely vital that state anti-bullying statutes be bolstered and used. Requiring schools to adopt, disseminate and enforce strict anti-bullying policies will deter harassment incidents and serve as a clear indicator that the school will not tolerate or condone harassment. Experts contend that bullying can be reduced by up to fifty percent if a school-wide commitment to end bullying is adopted.

Kosse & Wright, supra note 33, at 69.

58 See Araujo, supra note 30, at 332 (discussing cyberbullying’s mental and physical toll on students). In comparison to traditional, in-school physical bullying, victims of cyberbullying find no reprieve when they leave the schoolhouse gate and return home. See id. at 333.
Moreover, the decision will result in increased protections for LGBTQ+ youth and other stigmatized groups, who are disproportionately targeted in emotionally abusive bullying.\(^{59}\) The court noted that a facial overbreadth challenge to “emotional harm” could be legally significant operating under a different set of facts, namely with plaintiffs who are actually in a class of persons “potentially chilled.”\(^{60}\) However, for the time being, the First Circuit has signaled its preference for the inclusion of “emotional harm” within the statute.\(^{61}\) Ultimately, *Hopkinton Public Schools* reflects the court’s growing concern over cyberbullying, offers clarity to *Mahanoy*’s ambiguities regarding off-campus conduct, and strengthens schools’ abilities to regulate such conduct under *Tinker*’s “invasion of the rights of others” prong without violating the First Amendment.\(^{62}\)

In *Doe v. Hopkinton Public Schools*, the First Circuit considered whether a school violated two students’ First Amendment rights when school officials suspended them for bullying their hockey teammate in a Snapchat group chat. The court determined that the students engaged in group bullying that infringed on the victim’s rights, and thus the students’ speech

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Texts and posts can be sent at all hours of the day. Cyberbullies invade our bedrooms, vibrate in our pockets, and ruin a dinner we’ve been looking forward to for weeks. Plus, unlike a rude word shouted across a crowded gym, texts and postings don’t fade into the air. They last forever, and can be endlessly shared.

\[^{59}\] See Connolly, *supra* note 33, at 254 (summarizing studies showing LGBTQ+ youth particularly targeted as bullying victims). Anti-bullying statutes that include “emotional harm” and/or enumerate attacks based on sexual orientation “send the unambiguous, norm-enunciative message to children, parents, and society that anti-gay bullying is unacceptable.” Connolly, *supra* note 33, at 250.

\[^{60}\] See Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 510-11 (1st Cir. 2021) (noting students’ void-for-vagueness challenge moot because not within “class of persons potentially chilled”). “[A] chill on speech sometimes may be a cognizable injury,” but “in order to have standing, the plaintiff must be within the class of persons potentially chilled.” Id. at 511.

\[^{61}\] See id. at 511-12 (rejecting Doe and Bloggs’ interpretation of anti-bullying statute and upholding “emotional harm” inclusion). The First Circuit appropriately defers to the state legislature’s “focus on victims of bullying” by upholding the statute, noting that siding with Doe and Bloggs “would render much of the anti-bullying statute meaningless.” Id. at 512.

\[^{62}\] See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy, 141 S. Ct. 2038, 2045 (2021) (highlighting Court’s concern regarding severe bullying and targeted harassment through cyberbullying); Collins & Hudson, *supra* note 42, at 65-66 (observing *Mahanoy*’s shortcomings regarding when schools can discipline off-campus conduct that invades the “rights of others”); Negrón, *supra* note 24, at 373 (noting schools have not commonly used *Tinker*’s “invasion of the rights of others” prong historically); Sweeney, *supra* note 22, at 415-16 (arguing school discipline under “invasion of the rights of others” prong would effectively combat cyberbullying without violating First Amendment). The court’s decision in *Hopkinton Public Schools* empowers schools to regulate off-campus cyberbullying conduct using *Tinker*’s “invasion of the rights of others” prong, filling in the gap left by *Mahanoy*. Collins & Hudson, *supra* note 42, at 65-66 (noting *Mahanoy*’s ambiguities).
violated the Massachusetts anti-bullying statute and was not constitutionally protected. Additionally, the First Circuit upheld the inclusion of “emotional harm” in the anti-bullying statute and offered necessary clarity to schools’ abilities to regulate off-campus cyberbullying. The court’s decision will strengthen school officials’ abilities to combat cyberbullying and will result in increased protection for all students, particularly those that are most vulnerable. In light of the COVID-19 pandemic and the onset of remote learning, the need to protect students from cyberbullying has never been greater, and Doe v. Hopkinton Public Schools has appropriately provided school officials the tools to do so. As technology advances and students engage in increasing levels of screen time, courts will continue to grapple with the reach of school administrators beyond the schoolhouse gate.

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