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What Happens at the Cocoa Hut Doesn't Stay at the Cocoa Hut: Assessing K–12 Student Speech Rights After *Mahanoy Area School District v. B.L.*

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WHAT HAPPENS AT THE COCOA HUT DOESN'T STAY AT THE COCOA HUT: ASSESSING K–12 STUDENT SPEECH RIGHTS AFTER *MAHANOY AREA SCHOOL DISTRICT V. B.L.*

Will Creeley†

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INTRODUCTION

Fifty-two years is a long time.

Fifty-two years passed between *Tinker v. Des Moines Independent Community School District*,[1] the Supreme Court's landmark 1969 ruling for grade school student speech rights, and *Mahanoy Area School*

† Legal Director, Foundation for Individual Rights and Expression (FIRE). This Article is adapted in significant part from two amicus curiae briefs I authored for FIRE, filed in *Mahanoy Area School District v. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021), and *Doe ex rel. Doe v. Hopkinton Public Schools*, 19 F.4th 493 (1st Cir. 2021), as well as from the presentation I delivered for the *Case Western Reserve Law Review* symposium, "America's Classrooms: Frontlines of the First Amendment," on October 28, 2022. I am grateful to my colleagues Ronnie London and Talia Barnes for their helpful review of this Article.

1. 393 U.S. 503 (1969).

District v. B.L. ex rel. Levy,[2] its 2021 decision revisiting *Tinker*'s framework in the context of off-campus, online student expression. And in that time, the world changed. A half century later, *Tinker*'s axiomatic declaration—public grade school students do not shed their First Amendment rights at the schoolhouse gate—had become almost anachronistic, a well-worn truism from a time before the internet swallowed the world whole.[3] Of course, the *Tinker* Court can hardly be faulted for failing to anticipate the immediacy and ubiquity of online communication. When the Court issued its decision on February 24, 1969, the Apollo 11 moon landing was still five months away. In contrast, the cellular phone used by Mahanoy Area High School student Brandi Levy to express her profound displeasure with her failure to make the varsity cheerleading squad boasted roughly 100,000 times the processing power of the then-state-of-the-art Apollo Guidance Computer that safely navigated Neil Armstrong, Buzz Aldrin, and Michael Collins to and from the moon.[4]

The *Tinker* Court could not have known that twenty-first-century American students would possess the power to instantaneously communicate with their peers, their communities, and indeed the whole world via wireless devices small enough to fit in their pockets. But the federal judges tasked in recent years with applying *Tinker*'s holding to a changed world are all too aware of this fact of modern life—and have struggled mightily with it. In ruling after ruling, federal appellate courts failed to strike a workable, speech-protective balance between the First Amendment rights of public grade school students, so memorably enshrined in *Tinker*, and the concomitant authority of public grade school administrators to address the "substantial disruption of or material interference with school activities," whether actual or reasonably forecast.[5] By the time Brandi Levy sent out her profane missive—"Fuck school fuck softball fuck cheer fuck everything"—during a Saturday visit with a friend to the Cocoa Hut, a nearby convenience store, the jurisprudence surrounding online, off-campus student expression was a tangled mess.[6]

Students like Brandi have been routinely punished for expressing themselves on digital platforms, from MySpace to Snapchat, for nearly

2. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2044 (2021).

3. The *Tinker* Court proclaimed this principle to have *already* been well established in 1969, declaring it "the unmistakable holding of this Court for almost 50 years." *Tinker*, 393 U.S. at 506. (discussing Meyer v. Nebraska, 262 U.S. 390 (1923) and Bartels v. Iowa, 262 U.S. 404 (1923)).

4. Graham Kendall, *Would Your Mobile Phone Be Powerful Enough to Get You to the Moon?*, THE CONVERSATION (July 1, 2019, 12:51 AM), https://theconversation.com/would-your-mobile-phone-be-powerful-enough-to-get-you-to-the-moon-1159 [https://perma.cc/36WR-NTAF].

5. *Tinker*, 393 U.S. at 514.

6. *Mahanoy*, 141 S. Ct. at 2043.

two decades—and federal courts have routinely denied ensuing First Amendment challenges to their discipline. "School officials do not possess absolute authority over their students," warned the *Tinker* Court.[7] But following the migration of student expression to social media, courts found no First Amendment protection for a stunning range of speech: a student government member's criticism of administrative decisions, for example, or a student's rap lyrics decrying alleged sexual harassment of female students by physical education teachers.[8] And as the federal courts found themselves wandering in a jurisprudential desert, searching in vain for *Tinker*'s old-school clarity in today's online cacophony, students like Brandi were punished for jokes, political statements, administrative critiques, and plain old peer-to-peer conversation.

In deciding Brandi's case, the United States Court of Appeals for the Third Circuit sought to restore *Tinker*'s doctrinal coherence, imposing a bright-line rule to delineate the limits of schools' jurisdiction over online student speech: when students speak off campus and outside of a school's control, *Tinker* does not apply. But the Third Circuit's simple solution went untested and didn't last long. The Supreme Court explicitly rejected it, offering in its place a hazy set of general observations to guide the lower courts moving forward.

While the Court's ruling in Brandi's favor represented the first student speech victory since *Tinker*, ending decades of erosion of student First Amendment rights, the utility of its decision is yet to be seen. How will lower courts interpret *Mahanoy*—and how *should* they interpret it? What threats to student speech rights may still lurk?

In this Article, I will briefly review the morass of student online speech cases pre-*Mahanoy*, offer observations about the value of the Third Circuit's now-exiled *Mahanoy* rule, analyze the Court's decision in *Mahanoy*, and canvass a few early cases applying it that may suggest the contours of *Mahanoy*'s eventual legacy. I will conclude by offering brief suggestions as to how courts might best protect student speech rights in our online panopticon—and explain why prioritizing student expressive rights will ultimately benefit us all, not simply students punished for speaking their minds.

I. Wandering in the Desert: The Judicial Response to Off-Campus, Online Student Speech Before *Mahanoy Area School District v. B.L.*

Tinker is rightly celebrated. The case is a cultural and doctrinal landmark for student expressive rights, and the black armbands worn by thirteen-year-old Mary Beth Tinker, her older brother John, and

7. *Tinker*, 393 U.S. at 511.

8. *See infra* notes 35–42 and accompanying text.

their friend Christopher Eckhardt are iconic. The Court's ringing recognition of student rights—making clear "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate"[9]—is a staple of grade school textbooks, undergraduate pre-law classes, and constitutional law treatises. But while *Tinker* is famous, it now appears to have served as the high-water mark for student First Amendment rights in the K–12 context. Moreover, as courts have grappled with challenges to student discipline for off-campus, online speech, *Tinker*'s grounding focus on "the special characteristics of the school environment" has been set aside.[10]

Per *Tinker*, public grade school administrators may regulate and discipline student expression otherwise protected by the First Amendment only when (1) facts in the record "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," (2) "disturbances or disorders on the school premises in fact occur[]," or (3) the speech constitutes an "invasion of the rights of others."[11] But in the five decades between *Tinker* and *Mahanoy*, the Court steadily expanded *Tinker*'s limited exceptions, holding that schools may regulate student expression in other circumstances, too.

In *Bethel School District v. Fraser*,[12] the Court found no First Amendment violation after a student was punished for what it deemed "vulgar and lewd speech"—a student government nomination during a school assembly laced with sexual innuendo and double entendres.[13] In *Hazelwood School District v. Kuhlmeier*,[14] the Court held that a principal's censorship of a student newspaper prior to publication did not violate the First Amendment, finding no constitutional harm in the administrative regulation "of student speech in school-sponsored expressive activities" when such regulation is "reasonably related to legitimate pedagogical concerns."[15] And in *Morse v. Frederick*,[16] the Court again chipped away at the expressive rights of public grade school students, finding that a student's punishment for unfurling a banner reading "BONG HiTS 4 JESUS" across the street from school did not offend the First Amendment, as the expression could "reasonably be regarded as encouraging illegal drug use."[17]

9. *Id.*

10. *Id.* at 506.

11. *Id.* at 513–14.

12. 478 U.S. 675 (1986).

13. *Id.* at 685.

14. 484 U.S. 260 (1988).

15. *Id.* at 273.

16. 551 U.S. 393 (2007).

17. *Id.* at 397.

Taken in total, the breadth and simplicity of *Tinker*'s protection—primarily contingent upon evidence of actual campus disruption, or the reasonable forecast thereof—had been considerably eroded by the time district and appellate courts began to consider cases involving online, off-campus speech.

While admitting that the Court's analytical approach in cases like *Fraser* is "not entirely clear," Chief Justice John Roberts emphasized that *Fraser* and the Court's other post-*Tinker* decisions establish that "the mode of analysis set forth in *Tinker* is not absolute."[18] And whereas *Tinker* declared, "[S]tate-operated schools may not be enclaves of totalitarianism,"[19] *Fraser*, *Kuhlmeier*, and *Morse* pulled in the opposite direction, driven by the *Fraser* Court's flat declaration that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."[20] As Chief Justice Roberts put it: "School principals have a difficult job, and a vitally important one."[21] By issuing a series of decisions affirming and expanding schools' authority to regulate student speech, the Court gave administrators—and the courts reviewing the First Amendment suits filed against them—permission to reach far past the schoolhouse gate to punish students for off-campus, online expression.

For example, in *Doninger ex rel. Doninger v. Niehoff*,[22] the United States Court of Appeals for the Second Circuit considered a First Amendment claim brought by a public high school student challenging her punishment for off-campus, online expression.[23] The student, a member of the student council, was prohibited from running for student council again because of a blog post she wrote criticizing school officials for allegedly cancelling "Jamfest," an annual student concert. Despite the fact that she wrote and published the blog entry off campus, the Second Circuit held the student's punishment was properly analyzed under *Tinker* because it was "reasonably foreseeable that [the student's] posting would reach school property."[24] Characterizing the volume of calls and emails received by two school officials in response to the student's blog post as sufficient evidence of "a foreseeable risk of substantial disruption" to satisfy *Tinker*, the Second Circuit held the student's punishment did not violate the First Amendment.[25] In sum, the student was punished for her effective advocacy.

18. *Id.* at 404–05.

19. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

20. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

21. *Morse*, 551 U.S. at 409.

22. 527 F.3d 41 (2d Cir. 2008).

23. *Id.* at 43.

24. *Id.* at 44–46, 50.

25. *Id.* at 53.

The Second Circuit purported to recognize the importance of judicial clarity, claiming to be "acutely attentive in this context to the need to draw a clear line between student activity that 'affects matter of legitimate concern to the school community,' and activity that does not."[26] The court noted pointedly that it was "not called upon . . . to decide whether the school officials in this case exercised their discretion wisely," charitably conceding that "[e]ducators will inevitably make mistakes."[27] The Second Circuit further understood the ubiquity of online communication, recognizing that "students both on and off campus routinely participate in . . . expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication."[28]

Nevertheless, the rule that the Second Circuit affirmed in *Doninger* effectively provided would-be student speakers with no protection at all from the long arm of school authorities. Today, *all* off-campus student speech posted online might "foreseeably" reach administrators in school; more than 70 percent of all Americans, including students and administrators, use social media.[29] When speech that might "reach school property" is subject to *Tinker*, all online speech posted off campus is subject to *Tinker*.[30] Under this broad rule, speakers like the student council member in *Doninger* learn an illiberal lesson about the risk of peacefully protesting decisions made by governmental authorities.

Other circuits failed to improve on the Second Circuit's rule, offering no greater clarity as to when public school administrators may lawfully punish students' off-campus speech. For example, the Eighth Circuit followed the lead of the Second Circuit, declaring in *S.J.W. ex rel. Wilson v. Lee's Summit R–7 School District*[31] that "*Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting."[32] The Fourth Circuit's test is a close variant, analyzing off-campus speech under *Tinker* when the "nexus" of the student speech to the school's "pedagogical interests" is

26. *Id.* at 48. (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring)).

27. *Id.* at 54.

28. *Id.* at 49.

29. *See Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media [https://perma.cc/U272-KUTW] (finding that "72% of the public uses some type of social media").

30. *Doninger*, 527 F.3d at 50.

31. 696 F.3d 771 (8th Cir. 2012).

32. *Id.* at 777.

"sufficiently strong" to "justify the action taken" by school officials.[33] And the Ninth Circuit has declined to choose between the two, instead "applying both the nexus and reasonable foreseeability tests."[34] Regardless of phrasing, the practical impact of each rule is the same: when students speak online or off campus, they do so at their own risk.

Another circuit epitomized the confusion by choosing not to adopt a cognizable rule at all. In *Bell v. Itawamba County School Board*,[35] the Fifth Circuit found that a public high school's punishment of a student for a rap song he had recorded and posted on YouTube outside school grounds did not violate the student's First Amendment rights.[36] The song criticized school gym instructors for allegedly sexually harassing female students. Because it held the student had "intended his rap recording to reach the school community," the court determined that *Tinker* governed its consideration of the student's speech.[37]

In its analysis, the Fifth Circuit majority expressed concern about the "differing standards applied to off-campus speech across circuits," remarking that the confusion had "drawn into question the scope of school officials' authority."[38] But the court nevertheless expressly declined to adopt "a specific rule" about the limits of public grade school administrators' authority, finding instead only that "*Tinker* applies to off-campus speech in *certain situations*."[39] Despite its stated concern about the unclear limits of schools' disciplinary authority, the Fifth Circuit effectively committed itself to ad hoc determinations about *Tinker*'s off-campus reach moving forward, proclaiming that "because such determinations are heavily influenced by the facts in each matter, we decline: to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other circuits."[40]

The Fifth Circuit's ad hoc approach is worse than no rule at all. As the dissent correctly recognized, it "fails to provide constitutionally adequate notice of when student speech crosses the line between permissible and punishable off-campus expression."[41] Without a bright line, school authorities may pick and choose which off-campus student speech is subject to discipline—an unchecked power that "encourage[s] school officials to silence student speakers . . . solely because they

33. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011).

34. C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016).

35. 799 F.3d 379 (5th Cir. 2015) (en banc).

36. *Id.* at 383.

37. *Id.* at 396, 408.

38. *Id.* at 392.

39. *Id.* at 394 (emphasis added).

40. *Id.* at 396.

41. *Id.* at 405 (Dennis, J., dissenting).

disagree with the content and form of their speech, particularly when such off-campus speech criticizes school personnel."[42] In other words, "I know it when I see it" does not work in the student speech context, either.

The dissenting Fifth Circuit judges in *Bell* were right to express concern about the impact of granting broad authority over student speech to school administrators, and their warning proved apt. Judicial uncertainty about the limits of a public school's jurisdiction over off-campus speech empowered school administrators to monitor and punish off-campus and online student speech nationwide.

For example, in an echo of *Tinker*'s black armbands, a group of students at Houston's Tomball High School chose to wear black on a "dress 'American'" theme day to signify their support for the Black Lives Matter movement.[43] After some students dressed in black posted a picture of themselves on Twitter, administrators threatened them with suspension "unless they deleted their tweets of the image."[44] Forced to choose between expressing their views on social media or being suspended, the students decided to self-censor and deleted the image.

Likewise, the student cheerleading team at North Carolina's North Stanly High School was placed on season-long probation after a photograph of team members posing in front of a "Make America Great Again" sign, supporting former President Donald Trump and former Vice President Michael Pence's reelection campaign, was posted on Facebook.[45] Both the Houston students and the North Carolina cheerleaders engaged in plainly protected political expression; the fact they expressed themselves online should not itself render their speech subject to the oversight and approval of public school administrators.[46]

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42. *Id.* at 405–06.

43. Shelby Webb, *Tomball High Students Clash Over Black Lives Matter*, HOUSTON CHRON. (Nov. 4, 2016, 8:12 PM), https://www.chron.com/neighborhood/tomball/news/article/Tomball-High-students-clash-over-Black-Lives-10593249.php [https://perma.cc/XRH8-7QXE].

44. *Id.* The background of the photograph captured a separate group of students wearing T-shirts that spelled out "T-R-U-M-P." The students wearing black reportedly "took the photo to show the ideological divide that exists at the school, not to criticize the Trump-supporting students or the candidate himself." *Id.*

45. Lateshia Beachum, *How a MAGA Sign and a High School Cheer Squad Ignited a Debate About Free Speech*, WASH. POST (Sept. 17, 2019, 4:53 PM), https://www.washingtonpost.com/education/2019/09/17/how-maga-sign-high-school-cheer-squad-ignited-debate-about-free-speech [https://perma.cc/2BAY-KEC8].

46. The punishment of public grade school students for protected online expression mirrors the punishment of students for wearing clothing expressing viewpoints from across the ideological spectrum. Such

The speech at issue did not cause, and was unlikely to cause, the type of material and substantial disruption or invasion of the rights of others subject to regulation per *Tinker*.

Students expressing their views on political issues are not the only ones targeted by public school administrators for investigation and punishment. Students who dare to expose, embarrass, or criticize school administrators often face the threat of discipline as well. For example, John Glenn High School in Westland, Michigan, suspended a senior for posting to Facebook and Twitter a picture of dirty, yellow-tinged water running from a school bathroom sink.[47] The student was charged with "inappropriate use of electronics" and suspended for three days.[48] Despite the fact that the post had not caused any disruption or invaded the rights of others, and that students routinely post "selfies" taken in school on social media without punishment, the school rescinded the student's punishment only after national media attention.[49]

Tinker's analysis is rooted in the physical features of the grade school context and its explicit recognition "of the special characteristics

punishment occurs regularly, despite the lack of material or substantial disruption or the reasonable forecast of such. *See, e.g.*, Deanna Paul, *A Teen Was Told Her MAGA Hat Violates School Code. She's Fighting Back.*, WASH. POST (Feb. 22, 2019, 10:40 AM), https://www.washingtonpost.com/education/2019/02/22/teen-was-told-her-maga-hat-violates-school-code-shes-fighting-back [https://perma.cc/Z323-2WWT]; William Cummings, *Oregon High School Student Punished for Pro-Trump T-Shirt Settles Lawsuit for $25,000*, USA TODAY (Jul. 26, 2018, 8:04 AM), https://www.usatoday.com/story/news/politics/onpolitics/2018/07/25/addison-barnes-oregon-high-school-student-trump-tshirt-settlement/838992002 [https://perma.cc/2ZCH-BZYX]; Austin Prickett, *ACLU: Deer Creek High School Student Forced to Take Off "Black Lives Matter" Shirt*, FOX 25 (May 3, 2017), https://okcfox.com/news/local/aclu-deer-creek-high-school-student-forced-to-take-off-black-lives-matter-shirt [https://perma.cc/S73N-YDYG]; Tasneem Nashrulla, *Students Walk Out of High School After a Girl Had to Remove Her Black Lives Matter T-Shirt*, BUZZFEED NEWS (Aug. 29, 2016, 5:24 PM), https://www.buzzfeednews.com/article/tasneemnashrulla/buckeye-high-school-black-lives-matter-protest [https://perma.cc/SLW3-SK3C]; Melanie Potter, *High School Student Suspended for Wearing "Nobody Knows I'm a Lesbian" T-Shirt*, YAHOO! (Sept. 14, 2015), https://www.yahoo.com/entertainment/2015-09-14-high-school-student-suspended-for-wearing-this-t-shirt-21235467.html [https://perma.cc/Q5SP-EAAZ].

47. Rolando Zenteno, *Student Suspended After She Takes Photo of School's Dirty Water*, CNN (Sept. 26, 2016, 2:23 PM), https://www.cnn.com/2016/09/26/health/school-dirty-water-post-teen-trnd [https://perma.cc/DV7L-NCK8].

48. *Id.*

49. Jessica Chasmar, *Michigan High School Student Suspended After Posting Photo of School's Dirty Water*, WASH. TIMES (Sept. 26, 2016), https://web.archive.org/web/20161014031607/http://www.washingtontimes.com/news/2016/sep/26/hazel-juco-michigan-high-school-student-suspended-/ [https://perma.cc/4HUA-WSNF].

of the school environment."[50] Permitting expansive government control of off-campus student speech therefore looses *Tinker* from its moorings. The appellate courts' doctrinal confusion and the resulting punishment of students nationwide for off-campus and online speech revealed the limits of *Tinker*'s utility in protecting new forms of student expression that the *Tinker* Court could not have foreseen. Simply put, *Tinker* was not meant for these times; it was formulated to protect students' First Amendment rights once they walked through the schoolhouse gates, not to grant administrators omnipresent authority over their speech outside school. In deciding *Mahanoy*, the Third Circuit seized an opportunity to reassess *Tinker* and recalibrate the judicial approach to online and off-campus student expression. But the Third Circuit's bright-line clarity would be short lived, replaced by the Supreme Court's hazy guidance.

II. *MAHANOY*: TRADING THE THIRD CIRCUIT'S CLEAR RULE FOR THE SUPREME COURT'S HAZY GUIDANCE

When Brandi Levy fired off her Snapchat post from the Cocoa Hut on a Saturday—with her middle finger raised in the photo, and four uses of the word "fuck" spicing up the eight-word caption that accompanied it—she was indeed "frustrated," as the Third Circuit put it.[51] She hadn't made the varsity cheerleading team, she didn't like what was going on with her softball team, and she had exams looming.[52] Anyone who's ever been a teenager can empathize. But Brandi's frustration didn't stay within the four walls of the Cocoa Hut, as it might have had she been speaking twenty years earlier. Instead, her frustrated outburst was captured in a screenshot by a peer, which was then sent to her coaches and resulted in her being kicked off the junior varsity cheerleading team.[53] Brandi couldn't have known it on May 28, 2017, but her snap that Saturday would precipitate a federal lawsuit,[54] a four-year legal saga, and the Supreme Court's first ruling in favor of grade school student First Amendment speech rights in decades.[55]

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

51. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021); *Mahanoy*, 141 S. Ct. at 2043.

52. *Mahanoy*, 964 F.3d at 175.

53. *Id.*

54. *Id.*

55. *See* Mary-Rose Papandrea, *The Future of the First Amendment Foretold*, 57 WAKE FOREST L. REV. 897, 907–08 (2022) (describing the K–12 student speech cases before *Mahanoy*, which "gave little weight to the students' expressive interests and afforded great deference to school authorities as they chipped away at the First Amendment protections of *Tinker*").

A. The Third Circuit's Ruling

The Third Circuit did not arrive at Brandi's case unfamiliar with the practical and doctrinal challenges her punishment presented. "Thankfully," observed the Third Circuit panel, "significant groundwork has been laid."[56] Prior to *Mahanoy*, the Third Circuit had issued its own decisions regarding online student expression, and in doing so had recognized the new difficulties—and jurisdictional limitations—inherent in applying the Supreme Court's student speech precedent to online student expression. Indeed, the court's prior rulings set it apart from its fellow circuits, as they evinced a concern for student First Amendment rights lacking in many other circuits' rulings.

In 2011's *J.S. ex rel. Snyder v. Blue Mountain School District*,[57] the Third Circuit, sitting en banc, confronted a case involving the ten-day suspension of an eighth-grade honor roll student who had created a parody MySpace profile mocking her principal.[58] The Third Circuit recognized that the profile was deliberately "outrageous," and resulted in the "unfortunate humiliation" of the school's principal.[59] But, applying *Tinker*, the court nevertheless concluded that because "no one could have taken it seriously, and no one did[,] . . . it was clearly not reasonably foreseeable that J.S.'s speech would create a substantial disruption or material interference in school."[60]

Notably, the Third Circuit emphatically rejected the school district's argument that it could punish the profile under *Fraser*'s exception for lewd student speech, concluding that *Fraser* does not apply to student expression outside of school. To hold otherwise, reasoned the court, would mean that "two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school authorities find the remark 'offensive.'"[61] The Third Circuit recognized the threat to free expression that detaching *Fraser* from the boundaries of the school environment would present. Indeed, while it analyzed the fake profile under *Tinker*, the court emphasized that the profile was "off-campus speech that is not school-sponsored or at a school-sponsored event."[62] Granting administrators free rein to suspend students for such expression "would significantly broaden school districts' authority over student speech and

56. *Id.* at 180.

57. 650 F.3d 915 (3d Cir. 2011) (en banc).

58. *Id.* at 915, 920, 922.

59. *Id.* at 930.

60. *Id.*

61. *Id.* at 933.

62. *Id.*

would vest school officials with dangerously overbroad censorship discretion."[63]

In a companion ruling issued the same day as *Blue Mountain*, involving remarkably similar facts, the full Third Circuit held in *Layshock ex rel. Layshock v. Hermitage School District*[64] that punishing a public high school student for a parody MySpace profile of his own principal outside of school likewise violated the First Amendment.[65] The student—whom the school suspended, reassigned to an alternative education program, and banned from both extracurricular activities and his graduation ceremony—had created the profile on his grandmother's computer. Before the Third Circuit, the school district did not dispute the district court's finding that the profile had not resulted in disruption to the school, and the Third Circuit again rejected the application of *Fraser* to student speech outside of school.[66] "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities," wrote the en banc majority, "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."[67]

Nine years later, the Third Circuit extended its *Blue Mountain* and *Layshock* reasoning in *Mahanoy*, holding that "*Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[68]

The Third Circuit's ruling recognized that virtually limitless jurisdiction cannot be reconciled with *Tinker*, and correctly restored *Tinker*'s jurisdictional boundary: when a student like Brandi speaks "away from campus, over the weekend, and without school resources, and . . . on a social media platform unaffiliated with the school," *Tinker* does not apply.[69] This holding restored *Tinker*'s bright line and served as a comprehensive and necessary response to the troubling willingness of other circuits to stretch *Tinker* past its breaking point and render off-campus student speech subject to punishment simply because it occurs online.[70] By demarcating the limits of a school's authority, the Third Circuit recognized that "*Tinker*'s focus on disruption makes sense when a student stands in the school context"—but not when a student

63. *Id.*

64. 650 F.3d 205 (3d Cir. 2011) (en banc).

65. *Id.* at 207–08.

66. *Id.* at 207, 210, 219.

67. *Id.* at 216.

68. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021).

69. *Id.* at 180.

70. *Id.* at 187–88.

like Brandi is off campus at the Cocoa Hut, where her speech's "effect on the school environment will depend on others' choices and reactions."[71]

When public grade school students express themselves off campus and outside the "*in loco parentis*" control of school administrators, the "special characteristics of the school environment" are not implicated.[72] But the Third Circuit's ruling didn't require public school administrators to ignore student speech beyond the school's walls. Rather, it made clear that off-campus, online student speech receives the same First Amendment protections afforded all citizens and specified that *Tinker*'s school-specific test for regulation does not apply. Because "[s]tudents in school *as well as out of school* are 'persons' under our Constitution,"[73] off-campus student expression that does not fall into any recognized exception to the First Amendment is presumptively protected. Accordingly, the Third Circuit properly reserved the question of "the First Amendment implications of off-campus student speech that threatens violence or harasses others."[74] Speech that constitutes a true threat is not protected by the First Amendment either on or off campus. Likewise, discriminatory harassment, properly defined, is conduct that lies beyond the First Amendment's protection and may be subject to punishment.[75]

The clarity of the Third Circuit's holding would have benefited students and administrators. The decision's clear delineation properly respected expressive rights, and equipped students like Brandi to exercise them: "To enjoy the free speech rights to which they are entitled, students must be able to determine when they are subject to schools' authority and when not."[76] But it was not to be. The school district sought the Supreme Court's review, and the Court granted certiorari.[77]

B. The Supreme Court's Ruling

The Supreme Court affirmed—but on different reasoning, with significant ramifications. Writing for an eight-Justice majority, Justice

71. *Id.* at 189.

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

73. *Id.* at 511 (emphasis added).

74. *Mahanoy*, 964 F.3d at 186.

75. In the context of peer-on-peer sexual harassment, for example, the Supreme Court has made clear that for liability to attach under the federal antidiscrimination statute Title IX, "the harassment must take place in a context subject to the school district's control." Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 639, 645 (1999).

76. *Mahanoy*, 964 F.3d at 189.

77. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 976, 976 (2021) (granting certiorari).

Breyer quickly dispatched with the Third Circuit's bright-line rule: "Unlike the Third Circuit," wrote Justice Breyer, "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."[78] Rejecting the Third Circuit's holding, the majority concluded a public grade school's interests in exercising control over student speech "remain significant in some off-campus circumstances," 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 breaches of school security devices, including material maintained within school computers.[79]

The majority overread the Third Circuit's decision. Again, the Third Circuit explicitly reserved the question of harassment and threats directed toward classmates or school officials, noting that a future case "involving speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers, would no doubt raise different concerns and require consideration of other lines of First Amendment law."[80] Indeed, the Third Circuit panel took care to note, "[W]hile we disagree with the *Tinker*-based theoretical approach that many of our sister circuits have taken in cases involving students who threaten violence or harass others, our opinion takes no position on schools' bottom-line power to discipline speech in that category."[81]

The majority's concern with academic misconduct and school security was similarly misplaced. Nodding to the Supreme Court's decision in *Morse*, the Third Circuit pointed out that the existing grade school student–speech jurisprudence already makes clear "that a sufficiently weighty interest on the part of educators can justify a narrow exception to students' broader speech rights."[82] Given that the primary interest of public grade schools is to educate the students in their charge, the Third Circuit's rule would not prevent regulating student speech, either on or off campus, that subverts or violates academic rules prohibiting cheating, for example, or unauthorized access to school computers or security systems. The Third Circuit was

78. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy 141 S. Ct. 2038, 2045 (2021).

79. *Id.*

80. *Mahanoy*, 964 F.3d at 190.

81. *Id.*

82. *Id.* at 191 (citing Morse v. Frederick, 551 U.S. 393, 407–08 (2007)).

careful to "hold only that off-campus speech *not* implicating that class of interests lies beyond the school's regulatory authority."[83]

Nevertheless, the Court dismissed the Third Circuit's cabining of *Tinker* and declined to adopt "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" interests in preventing disruption or protecting students and faculty.[84] Instead, Justice Breyer opted to simply identify what he deemed "three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech."[85]

First, the majority emphasized that a school's responsibility to act *in loco parentis* generally ends when students are off campus. "Geographically speaking," observed the Court, "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[86] On this "feature," the Court's conclusion echoed Justice Alito's concurrence in *Morse*, which warned that "any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting."[87]

The similar result is noteworthy, insofar as Justice Alito rejected altogether the notion that schools act *in loco parentis* with regard to student speech, calling it a "dangerous fiction."[88] Instead, Justice Alito argued that a public school's power to regulate student speech is derived not from delegated parental authority, but rather from the "special characteristic[s] of the school setting," including any "threat to . . . physical safety" students may face outside their parents' care.[89] When students are at school, reasoned Justice Alito, it is the state's responsibility to ensure they are protected from physical harm—so *Tinker*'s substantial disruption rule recognizes "school officials must have greater authority to intervene before speech leads to violence"

83. *Id.*

84. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy 141 S. Ct. 2038, 2045 (2021).

85. *Id.* at 2046.

86. *Id.*

87. *Morse*, 551 U.S. at 424 (Alito, J., concurring).

88. *Id.* Joined by Justice Kennedy, Justice Alito wrote separately to make clear that *Morse*'s holding did not rest on the view that the message on the students' banner was contrary to the school's "educational mission," as the school had argued. *Id.* at 423. Justice Alito expressed concern that an "educational mission" exception might "easily be manipulated in dangerous ways," giving "public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Id.*

89. *Id.* at 424.

than public officials would otherwise possess.[90] But outside of school, the school's responsibility to protect students recedes as students return to their parents' supervision, and so too does the school's authority to regulate student speech. Traveling a slightly different route, Justice Breyer's *Mahanoy* majority arrived at the same conclusion: "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"—and thus "a school, in relation to off-campus speech, will rarely stand *in loco parentis*."[91] In other words, any punishment of Brandi Levy for her Snapchat post should have come from her parents, not her school.

Justice Breyer next identified the second "feature" that diminishes school authority over off-campus student speech: the fact that "from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day."[92] Here, the *Mahanoy* majority recognized the oppressive reality experienced by students punished for off-campus speech. As a New Jersey student punished for an off-campus "zombie apocalypse" joke put it, "When I was pulled into the principal's office for something I shared with my friends privately, outside of school, over a weekend, it felt like I had no place where I could truly speak freely."[93] To remedy this looming threat, wrote Justice Breyer, "courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all."[94] This skepticism is welcome; to hold otherwise would have denied students the space to actually exercise their First Amendment rights.

Interestingly, the majority specifically singled out certain content—"political or religious speech that occurs outside school or a school program or activity"—as requiring "a heavy burden to justify

90. *See id.* at 424–25. Justice Alito cast the Court's holding in *Morse*—"that the public schools may ban speech advocating illegal drug use"—as "standing at the far reaches of what the First Amendment permits." *Id.* at 425.

91. *Mahanoy*, 141 S. Ct. at 2046.

92. *Id.*

93. Amanda Oglesby & Hartriono B. Sastrowardoyo, *ACLU Sues Lacey Schools for Students' Gun Rights*, ASBURY PARK PRESS, https://www.app.com/story/news/education/2019/04/10/aclu-sues-lacey-schools-students-gun-rights/3427480002 [https://perma.cc/N8P5-6LL8] (Apr. 11, 2019, 7:13 PM) (explaining that two students were suspended for posting an image on Snapchat of "legally owned guns on a table with a caption that read, 'hot stuff' and 'If there's ever a zombie apocalypse, you know where to go'"); Joe Strupp, *Should NJ Schools Punish Students Over Social Media Posts?*, ASBURY PARK PRESS, https://www.app.com/story/news/2019/06/20/should-nj-schools-punish-students-over-social-media-posts/1476727001 [https://perma.cc/2USP-R9Z6] (June 21, 2019, 11:45 AM).

94. *Mahanoy*, 141 S. Ct. at 2046.

intervention."[95] To the extent future courts read the majority's explicit identification of these two discrete topics as meaning schools may more readily regulate *non*-political, *non*-religious off-campus student speech, the Court's choice will have resulted in a regrettable error. All punishment of off-campus student speech should warrant the same heavy burden, no matter whether the speech addressed zombies, Jesus, or the President of the United States. While "religious" and "political" speech are doubtlessly important, and at the core of the First Amendment's protection, public school officials should have no more purchase on student speech about other topics: Why should one student's off-campus artwork be afforded less protection than another's efforts to get out the vote or lead a prayer group? Affording some but not all topics special protection would constitute content discrimination.[96] And as the Court has noted elsewhere, ascertaining what is and is not content discrimination is not always a simple task.[97]

Finally, the *Mahanoy* Court identified the third "feature" of off-campus speech: the school's own "interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[98] The majority emphasized the importance of protecting student speech even—and especially—when it earns the ire of others in the community.

Because students learn not only from what they are taught in their classrooms, but also from how school administrators themselves govern

95. *Id.* In his concurrence, Justice Alito goes farther still, arguing that "student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern" is "almost always beyond the regulatory authority of a public school." *Id.* at 2055 (Alito, J., concurring). Justice Alito's view—that when a student engages in "off-premises speech on a matter of public concern," that "student enjoys the same First Amendment protection against government regulation as all other members of the public"—appears closer to the Third Circuit's bright-line rule than the majority's holding, insofar as it is more definitive in its protection and scope. *Id.* at 2056. Accordingly, it might have provided future courts with more clarity. But the Court's majority did not endorse Justice Alito's view, nor state its "features" as plainly.

96. *See, e.g.*, Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

97. For example, determining what constitutes a "religious" viewpoint has proved a complex endeavor. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995) (rejecting argument that prohibition on "religious" speech is viewpoint-neutral because it also bars "antireligious speech" and noting "[o]ur understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas").

98. *Mahanoy*, 141 S. Ct. at 2046.

their institutions and those within them, the majority reasoned that administrators must set an example in dealing with controversial, dissenting, offensive, or unpopular student speech. "America's public schools are the nurseries of democracy," wrote Justice Breyer, and our nation's "representative democracy only works if we protect the 'marketplace of ideas.'"[99] Because that marketplace depends on the "free exchange" of both popular and unpopular ideas to "facilitate[] an informed public opinion," the majority concluded that "schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"[100]

In sum, *Mahanoy*'s three "features" only provide general guidance; in identifying them, the Court eschewed the kind of bright-line rule advanced by the Third Circuit in favor of a deliberately broad analytical framework. Due to "the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway," the Court could muster "little more" than a generality: "Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished."[101]

In other words, the Court's holding functionally established a kind of rebuttable presumption regarding the First Amendment's protection of off-campus student speech: when students speak outside of the school's control, the school's authority over that speech is *diminished*, but not categorically eliminated. If school administrators believe particular circumstances justify the long-arm regulation of student speech beyond their schoolhouse's gate, nothing in the Court's opinion bars them from taking action. If challenged by a student in court, a school would have to establish that its authority, while perhaps diminished, was still extant and was rightfully exercised. Making the case might require meeting a "heavy burden," as the Court suggested with regard to political and religious speech. But it would not be impossible.

Because a school's "leeway" to discipline off-campus student speech is only diminished, not eliminated outright, contextual considerations become more important, not less. The Third Circuit's bright-line rule—"a test based on whether the speech occurs in a context owned, controlled, or sponsored by the school"—barred public grade schools from regulating most off-campus student speech altogether, lessening

99. *Id.*

100. *Id.*

101. *Id.*

the relevance of certain contextual facts.[102] What Brandi said wasn't necessarily as determinative as where and when she said it. But *Mahanoy*'s "features" will likely have the opposite effect, requiring courts to engage in a detailed review of both the speech itself and the circumstances in which the student spoke.

Indeed, such was the case in *Mahanoy* itself. Having set forth its guidelines, the Supreme Court weighed the school's asserted interests—in "teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community," for example—against Brandi's "interest in free expression."[103] Doing so necessitated a close judicial look at Brandi's choice of words ("criticism of the rules of a community of which B. L. forms a part," as the majority put it), her location, and the alleged impact of her speech.[104] While the Court held Brandi's First Amendment rights won out, it did so only after engaging in a nebulous balancing test. "The strength of [the school's] anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time," observed the Court.[105] But what if the speech at issue had not "encompassed a message," as the Court found Brandi's post did?[106] What if the school had mounted "any general effort to prevent students from using vulgarity outside the classroom"?[107] What if the school had been able to present evidence of a decline in team morale or other disruption?

Per the Court's rule and accompanying analysis, these and other factual considerations are highly relevant—limiting the usefulness of this ruling both to students speaking in the future and to administrators deciding whether to punish them for doing so. While the decision vindicated Brandi's rights, the Court's fact-specific balancing test fails to ensure that other students will be similarly protected. Because *Mahanoy* offers little practical guidance, it is unlikely to conclusively resolve the confusion about *Tinker*'s applicability to off-campus speech that has marked two decades of K–12 student speech jurisprudence. The Court's majority effectively admitted that *Mahanoy* left substantial questions unanswered: "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."[108]

102. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 190 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021).

103. *Mahanoy*, 141 S. Ct. at 2047.

104. *Id.* at 2046–47.

105. *Id.* at 2047.

106. *Id.*

107. *Id.*

108. *Id.* at 2046.

III. POST-*MAHANOY*: EARLY RETURNS

Mahanoy's impact on student First Amendment rights has yet to fully materialize. It will take time for courts adjudicating student speech disputes to apply the case's "three features," and longer still for those decisions to be appealed, reviewed, cited, distinguished, and followed. Because *Mahanoy* announces general considerations rather than a categorical rule, its utility and ultimate impact may prove to be transitory or limited at best. But because students will not stop talking anytime soon—to each other, to their communities, and to the larger world—the case's reasoning will be called upon often. Indeed, in the short time since the Court issued its decision, lower courts have already begun grappling with *Mahanoy*'s guideposts, applying its analytical framework to the facts of the student speech cases on their dockets. Early returns may not prove to be representative of the case's eventual reception, but the recent decisions send mixed signals.

A. The Thrift Store Photo Caption: C1.G. v. Siegfried

An early decision from the United States Court of Appeals for the Tenth Circuit offers some reason to believe that while *Mahanoy* may not offer courts the clarity of the Third Circuit's rule, it might still provide significant new protection to student off-campus expression.

Visiting a thrift store on a Friday after school seems like an unlikely way to precipitate one's expulsion from high school. But that's exactly how it all started for C.G., a student at Cherry Creek High School in Greenwood Village, Colorado. On a Friday evening in September 2019, C.G. found himself at a thrift store with his friends, trying on wigs and hats. One of the hats his friends donned "resembled a foreign military hat from the World War II period," as a federal district court put it later, and C.G. took a picture.[109] He posted the shot on Snapchat, uploading it with a caption that "referenced an internet meme and was intended to be humorous": "Me and the boys bout to exterminate the Jews."[110]

After a few hours, C.G. deleted the post. In its place, he posted a new message: "I'm sorry for that picture it was ment [sic] to be a joke."[111] But as Brandi Levy could have told him, Snapchat moves fast. Even though C.G. had not sent the photo to anyone in particular and it was visible only to his Snapchat "friends," one of those "friends" took a screenshot of the post prior to its deletion and showed it to her father. He called the police, who visited C.G.'s house a few hours later. The officers quickly determined "there was no threat against anyone."[112]

109. C1.G. *ex rel.* C.G. v. Siegfried, 477 F. Supp. 3d 1194, 1200 (D. Colo. 2020).

110. *Id.*

111. *Id.* at 1200–01.

112. *Id.* at 1201.

Nevertheless, the post circulated throughout the local Jewish community, and another student's mother wrote school officials that Sunday. She said the picture had caused "fear, anger, and sadness" for her family and her son, who was classmates with at least one of the students in the photo, and asked for "the school to use this incident to address the rise in hate speech and hate crimes in the Cherry Creek community."[113] Cherry Creek High's principal responded to the mother's email, telling her the students involved would be escorted out of class first thing Monday morning. In an illustration of the difficult position public school administrators occupy because of judicial confusion over *Tinker*'s applicability to off-campus student speech, the principal explained his understanding of his school's jurisdiction:

> When an incident happens off campus, we have to make sure there is a nexus to school. This is the case because our primary function is not to police the community. If we can make a case that there is a nexus to school, we can address a situation that happened away from school. In this case, I feel the learning environment has been impacted.[114]

The school suspended C.G. for five days for violating a policy prohibiting "verbal abuse by a student 'while in school buildings, on school grounds, in school vehicles, or during a school-sponsored activity.'"[115] School officials extended C.G.'s suspension for an additional five days, then an additional eleven days, before finally expelling him after an October hearing.[116] During the expulsion proceeding, an assistant principal testified that "the post caused 'extreme outcry of concerned community members and students . . . over fear to come to school' and 'fear to access education.'"[117] He did not, however, provide "specific support for this comment."[118]

C.G. argued the First Amendment protected his speech, but to no avail. He received a year-long expulsion for violating policies prohibiting "verbal abuse"; "'behavior on or off school property which is detrimental to the welfare, safety or morals of other students or school personnel'"; "intimidation, harassment, or hazing by directing an obscene comment or gesture at another person or insulting or challenging another person or by threatening another person"; and "behavior on or off school property that is detrimental to the welfare or safety of other pupils or of school personnel including behavior that

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1202.

117. *Id.* at 1203 (citation omitted).

118. *Id.*

creates a threat of physical harm."[119] In response, his father filed suit against the school, the district, and various administrators on his son's behalf that November, alleging violations of his son's rights to both freedom of expression and procedural due process.[120]

The District of Colorado rejected C.G.'s claims in August 2020, granting the defendants' motion to dismiss in full.[121] "The modern reality of social media," wrote U.S. District Judge Jackson, "is that off-campus electronic speech regularly finds its way into schools and can disrupt the learning environment."[122] As Judge Jackson continued, extending *Tinker* into the digital ether,

> Failing to adapt to this reality would be inconsistent with the Supreme Court's recognition that "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." Applying *Tinker* to off-campus speech properly protects both students' constitutional rights and the evolving nature of "the school environment." Social media has become part of that environment, whether its engagement is on- or off-campus.[123]

Judge Jackson's reasoning neatly captures the threat to expressive rights presented by granting public school administrators the power to reach far beyond the schoolhouse gate to police student expression. The district court found no problem with a public school expelling a student for a joke told off campus on a Friday evening—a joke that, however unfunny some or even most would find it, the First Amendment fully protects. The joke (which, after its deletion, was quickly followed by an apology) could not reasonably be interpreted as an unprotected true threat on its face.[124] (In any event, law enforcement quickly determined C.G. was harmless.) And contrary to the principal's initial analysis, the joke lacked any nexus to the educational environment. Only after a parent wrote the school did school officials even become aware of the (since deleted) post. But because the district court held that "social media use in today's world must generally be expected to reach the

119. *Id.* at 1202–03.

120. *Id.* at 1203.

121. *Id.* at 1200.

122. *Id.* at 1206.

123. *Id.* (citation omitted) (quoting West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000)).

124. A true threat is a statement in which "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359 (2003).

school," school administrators were free to exercise jurisdiction over student speech in a context entirely outside of their control.[125]

C.G. would fare better before the United States Court of Appeals for the Tenth Circuit—due in substantial part to the Supreme Court's decision in *Mahanoy*, issued nearly a year after the district court's August 2020 decision. The Tenth Circuit panel quickly affirmed "that Mahanoy's framework for assessing school regulation of off-campus speech on social media control[led] [its] analysis," noting at the outset that—contra the district court's ruling—"*Mahanoy* clarified that risk of transmission to the school does not inherently change the off-campus nature of all speech on social media."[126]

Indeed, the Tenth Circuit found C.G.'s case to be "materially similar" to the facts at issue in *Mahanoy*:

> Like B.L.'s speech, C.G.'s speech would generally receive First Amendment protection because it does not constitute a true threat, fighting words, or obscenity. Defendants argue that C.G.'s post is uniquely regulable because it is "hate speech targeting the Jewish community" and "not just a crude attempt at a joke about the Holocaust." But offensive, controversial speech can still be protected.
>
> Like B.L., C.G.: (1) spoke "outside of school hours from a location outside the school"; (2) "did not identify the school in [his] post[] or target any member of the school community with vulgar or abusive language"; and (3) "transmitted [his] speech through a personal cellphone, to an audience consisting of [his] private circle of Snapchat friends." These characteristics of C.G.'s speech, "while risking transmission to the school itself, nonetheless . . . diminish the school's interest in punishing [his] utterance."[127]

Weighing Cherry Creek High's asserted interest in protecting students from harassment, the Tenth Circuit again invoked *Mahanoy*. Because this interest was grounded in the school's responsibilities when standing *in loco parentis*—that is, in situations "where the children's actual parents cannot protect, guide, and discipline them"—it was simply inapplicable off campus.[128] Likewise, the panel found the school's arguments regarding the allegedly disruptive impact of C.G.'s post "unconvincing": an in-school discussion, four emails from parents, and

125. *Siegfried*, 477 F. Supp. 3d at 1209–10.

126. C1.G *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1277 (10th Cir. 2022).

127. *Id.* at 1277–78 (citations omitted).

128. *Id.* at 1278 (quoting Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021)).

news reports did not constitute "substantial disruption."[129] As for fears about future trouble, the "[d]efendants cannot claim a reasonable forecast of substantial disruption to regulate C.G.'s off-campus speech," wrote the court, "by simply invoking the words 'harass' and 'hate' when C.G.'s speech does not constitute harassment and its hateful nature is not regulable in this context."[130]

The Tenth Circuit's reliance on *Mahanoy*'s framework propelled the court to a speech-protective result: because C.G. spoke off-campus, beyond his school's control, and because his speech would otherwise have been fully protected, his expulsion for a joke—however unfunny—violated the First Amendment. The fact that some found the speech offensive and controversial did not bring it within Cherry Creek's authority, nor did the fact that it prompted others—here, parents—to contact the school to express concern. Without *Mahanoy*, C.G.'s punishment might well have passed constitutional muster. On that score, it is worth noting the Tenth Circuit remanded the case to the district court to consider, among other questions, the defendant administrators' argument that they were entitled to qualified immunity from paying damages to C.G. on grounds the law regarding off-campus student expression was not clearly established at the time of their actions.[131] But the appellate court's invocation of *Mahanoy* to draw a boundary delimiting a public high school's authority over off-campus, online speech is nevertheless a welcome step toward clarity and certainty for student expressive rights.

B. Other Early Applications of Mahanoy

Whether other courts will follow suit remains an open question. An August 2022 ruling from the Northern District of New York suggests at least some will. In *Wang v. Bethlehem Central School District*,[132] a federal district court considered a suit filed by Juneau Wang, a Bethlehem Central High School senior removed as graduation speaker for "a computer-generated, tournament-style bracket" he had devised two years earlier as a sophomore to determine, with input from friends, "'the two most liked or admired girls.'"[133]

The bracket had been "created off-campus at [Juneau's] home using software available through the internet," and Juneau and his friends "intended that the bracket and opinions expressed therein would remain private and would not be disclosed to others or publicly

129. *Id.* at 1279.

130. *Id.*

131. *Id.* at 1279–80.

132. No. 21-CV-1023, 2022 WL 3154142 (N.D.N.Y. Aug. 8, 2022).

133. *Id.* at *1–2.

disseminated."[134] A female classmate eventually found the bracket online months later. After controversy ensued, the principal directed Juneau to issue a written apology. The following year, Juneau—now a junior—wrote a book about his experience in which he stated, "[I]f girls made a bracket of guys, guys would laugh it off."[135] As a senior, Juneau was selected as graduation speaker. But female classmates complained, citing the bracket and book. The superintendent of the school district intervened and, following an appeal, the district ultimately denied Juneau the opportunity to deliver the graduation speech.

Juneau filed suit against the district and the superintendent, arguing (among other claims) that his punishment constituted retaliation for the exercise of his First Amendment rights. In turn, the defendants claimed they reasonably believed that Juneau's "past speech would cause material disruption of classwork and invade the rights of others if he were to be allowed to participate at the graduation ceremony."[136]

Noting that "[t]he contours of what constitutes a sufficiently material disruption under *Tinker* are not firmly defined," the district court cited *Mahanoy* for the proposition that the "mere offense of a group of students is generally not viewed as sufficiently disruptive" to justify punishment of student speech—"especially where that speech occurs off-campus."[137] Indeed, the court reasoned that *Mahanoy*'s guidance regarding off-campus speech applied directly to the facts at hand. "The fact that the Bracket was communicated off-campus to a small circle of friends beyond which it was not intended to spread, and did not target any member of the school community with abusive language," concluded the district court, "further diminishes the school's interest in removing Plaintiff from an extracurricular activity as punishment for such speech."[138] The court concluded that both the bracket and book enjoyed First Amendment protection, and thus could not justify the decision to prevent Juneau from delivering his speech.

As in *C1.G.*, *Mahanoy*'s framework provided decisive direction to a court tasked with evaluating a public grade school's discipline of off-campus, online expression, and, again, delivered a speech-protective result. But it is too soon to tell whether the outcome of these two cases augurs well for K–12 students' First Amendment rights more generally. For one, these may represent "easy" cases. The facts in each are relatively straightforward: Despite Cherry Creek administrators' argument to the contrary, C.G.'s joke does not approach an unprotected true threat or discriminatory harassment, and Juneau's

134. *Id.* at *2.

135. *Id.* at *2–3.

136. *Id.* at *45.

137. *Id.* at *45–46, *48.

138. *Id.* at *47 (citation omitted).

bracket and book, while undoubtedly offensive to some of his classmates, are likewise plainly protected. And like Brandi's exasperated Snapchat, neither C.G.'s joke nor Juneau's bracket and book was specifically targeted at other students, nor can they reasonably be said to constitute actionable discriminatory harassment, properly defined.[139]

Other cases will pose different questions, depending on the speech at issue, and some courts have already found *Mahanoy* readily distinguishable. In *Cheadle v. North Platte R-1 School District*,[140] for example, a federal district court deemed a seventh grader's video of herself drinking alcohol, posted to Snapchat, materially different than Brandi's profanity.[141] Though both Snapchat posts resulted in suspension from a school team, the district court in *Cheadle* found the similarities ended there. "At best, the video depicted ill-fated drunken revelry to an audience of impressionable minors," wrote the Court, and "[student] N.C.'s intended message lacks the same level of First Amendment value as B.L.'s criticism in *Mahanoy* because N.C. was engaged in illegal conduct, not pure speech, and was not engaged in criticism of her community, which is normally afforded strong protection."[142] Had N.C. been advocating against her school's policy on drinking, the result would presumably have been different. But "[w]hen a minor consumes alcohol, she is engaging in an illegal act, not pure speech"—and the court concluded that she was suspended "for her conduct, not for her speech."[143]

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139. In the context of peer-on-peer sexual harassment, for example, the Supreme Court has made clear that for liability to attach under the federal antidiscrimination statute Title IX, "the harassment must take place in a context subject to the school district's control" and must be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645, 652 (1999). Courts have adopted the *Davis* standard to evaluate claims under other federal antidiscrimination statutes, such as Title VI. *See, e.g.*, Doe v. Galster, 768 F.3d 611, 613–614 (7th Cir. 2014) (applying *Davis*'s "demanding standard" to Title VI discriminatory harassment claim); Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 934 (10th Cir. 2003) (holding that "[t]he Court's reasoning in *Davis* guides our resolution of the instant case because Congress based Title IX on Title VI; therefore, the Court's analysis of what constitutes intentional sexual discrimination under Title IX directly informs our analysis of what constitutes intentional racial discrimination under Title VI (and vice versa)"). For further discussion of the *Davis* standard, see Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385 (2009).

140. 555 F. Supp. 3d 726 (W.D. Mo. 2021).

141. *Id.* at 733.

142. *Id.*

143. *Id.*

Posts depicting illegal activity are unlikely to be the only grounds upon which courts set *Mahanoy* aside. The *Mahanoy* Court itself identified certain "off-campus circumstances" in which a school's "regulatory interests remain significant," perhaps most significantly matters involving "serious or severe bullying or harassment targeting particular individuals."[144] Two recent decisions from federal appellate courts illustrate the early judicial response to such cases—and the threat a broad "bullying" exception may pose to student expressive and associational rights.

C. Mahanoy *and "Bullying":* Chen v. Albany Unified School District

Students can be mean, vindictive, and cruel to one another. But their First Amendment rights may not be abrogated simply because others take offense. So schools must patrol an uncertain border. In establishing the contours of students' First Amendment rights while under school supervision, the *Tinker* Court recognized "the rights of other students to be secure and to be let alone."[145] Because "children may regularly interact in a manner that would be unacceptable among adults," however, the Court has also fashioned an exacting, speech-protective definition of peer-on-peer discriminatory harassment in the educational context, understanding that "in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it," and that imposing broad institutional liability for such everyday interactions would be untenable.[146]

Schools therefore must both protect the students in their care and honor their First Amendment right to freedom of expression—and these twin obligations collide in cases involving nasty speech about peers. In his *Mahanoy* concurrence, Justice Alito identified "criticism or hurtful remarks about other students" as "[p]erhaps the most difficult category" of cases involving off-campus student speech. "Bullying and severe harassment are serious (and age-old) problems," he wrote, "but these concepts are not easy to define with the precision required for a regulation of speech."[147] Indeed, as the Third Circuit noted in its

144. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

145. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

146. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651–52 (1999); *see also* Wang v. Bethlehem Cent. Sch. Dist., No. 21-CV-1023, 2022 WL 3154142, at *47 (N.D.N.Y. Aug. 8, 2022).

147. *Mahanoy*, 141 S. Ct. at 2057 (Alito, J., concurring). Justice Alito buttressed his observation by citing *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), an opinion he authored while a Circuit Judge on the Third Circuit. In *Saxe*, the Third Circuit struck down a public school's harassment policy on First Amendment grounds, finding that its terms functionally prohibited "much 'core' political and religious speech," including "'negative' or 'derogatory' speech about such

Mahanoy decision, much of the confused tangle of precedent applying *Tinker* to off-campus, online student expression stemmed from "cases involving sexual or racial harassment," as some circuits stretched *Tinker*'s "'reasonable foreseeability' standard . . . far and wide" to justify punishing mean-spirited speech that took place in a context otherwise beyond their control.[148]

But while refusing to apply *Tinker* to off-campus speech that harasses others, the Third Circuit took "no position on schools' bottom-line power to discipline speech in that category" and did not extend its holding to "speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers," which "would no doubt raise different concerns and require consideration of other lines of First Amendment law."[149] The Supreme Court, likewise, reserved the question. So: After *Mahanoy*, when may a school punish a student's expression about another when they voice that expression in a context beyond the school's control?

In *Chen ex rel. Chen v. Albany Unified School District*,[150] the United States Court of Appeals for the Ninth Circuit arrived at its own answer in confronting a public high school student's racist posts on a private Instagram account.[151] The student, Cedric Epple of Albany High School (AHS) in Albany, California, created the account for "'close friends' that he thought he 'could trust to keep the material private,'" and used it to share a range of objectionable content, from "immature posts making fun of a student's braces, glasses, or weight to much more disturbing posts that targeted vicious invective with racist and violent themes against specific Black classmates."[152]

Specifically, the Ninth Circuit noted that Epple posted a picture "in which a Black member of the AHS girls' basketball team was standing next to the team coach, who was also Black, and Epple drew nooses around both their necks and added the caption 'twinning is winning'"; a "screen shot of a particular Black student's Instagram post in which she stated 'I wanna go back to the old way,'" which Epple

contentious issues as 'racial customs,' 'religious tradition,' 'language,' 'sexual orientation,' and 'values.'" *Saxe*, 240 F.3d at 217. Writing for the panel, Justice Alito held that "[s]uch speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights." *Id.*

148. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 186 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021) (citing C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1146, 1151 (9th Cir. 2016); S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 773, 777–78 (8th Cir. 2012)).

149. *Mahanoy*, 964 F.3d at 190.

150. 56 F.4th 708 (9th Cir. 2022).

151. *Id.* at 711.

152. *Id.*

combined with "the statement 'Do you really tho?', accompanied by a historical drawing that appears to depict a slave master paddling a naked Black man who is strung up by rope around his hands"; and "a screenshot of texts in which he and a Black classmate were arguing, and he added the caption 'Holy shit I'm on the edge of bringing my rope to school on Monday.'"[153] In addition to posts "either depicting, or making light of, Ku Klux Klan violence against Black people," Epple also "aimed highly offensive racist insults at identifiable Black classmates," including the use of racial slurs and comparing classmates to gorillas.[154] Kevin Chen, a classmate of Epple and a follower of his Instagram account, sent a photo to Epple via Snapchat that Epple posted on the account and signaled his apparent endorsement of Epple's posts by approving comments and "liking" a particular post.[155]

Epple's account was eventually discovered by other students who, along with their parents, reacted with serious alarm and distress. Students left school early, missed days of classes, required assistance from school counselors, expressed fear about attending classes with the students who had followed the account, and "reported that they felt 'devastated,' 'scared,' and 'bullied,' and that their grades suffered."[156] Faculty reported that their students' shock required them to alter lesson plans to instead address the impact of the account's discovery. Upon being shown posts from the account containing images of lynchings and nooses, an assistant principal contacted the police. After police and school administrators interviewed the students in the presence of their parents, Epple and Chen were suspended for five days. Administrators later extended the suspension for the duration of the expulsion process. A "restorative justice session" organized by AHS for students who had followed Epple's account was met with a protest of over 100 people, and a student protestor punched two of the followers in the face as they attempted to leave the school, breaking one's nose.[157]

Epple, Chen, and other students who had followed Epple's account filed various federal suits, later combined, alleging, among other claims, that the district violated their First Amendment right to freedom of expression. Relying on the Ninth Circuit's ruling in *C.R. ex rel. Rainville v. Eugene School District 4J*,[158] the federal district court held that because "(1) the speech had a sufficient nexus to the school; and (2) it was reasonably foreseeable that the speech would reach the school and create a risk of a substantial disruption," the speech was subject to

153. *Id.* at 711–12.

154. *Id.* at 712.

155. *Id.*

156. *Id.* at 712–13.

157. *Id.* at 713–14.

158. 835 F.3d 1142 (9th Cir. 2016).

regulation by AHS.[159] The district court further held that the punishment did not violate six of the student-plaintiffs' rights, because "their speech caused or contributed to a substantial disruption at AHS and 'clearly interfered with "the rights of other students to be secure and to be let alone."'"[160]

On appeal, Epple and Chen argued the school could not constitutionally discipline their speech because it took place off campus and was thus outside of the school's jurisdiction. But the Ninth Circuit resoundingly affirmed the district court's ruling.[161]

The court first concluded the speech would be readily punishable if it had taken place on school grounds. Describing the Instagram posts as "vicious invective that was targeted at specific individuals and that employed deeply offensive and insulting words and images that, as used here, contribute nothing to the 'marketplace of ideas,'" the Ninth Circuit concluded that "the First Amendment would not prevent a school from punishing the sort of speech at issue here had it 'occur[red] under [the school's] supervision.'"[162] To underscore its holding, the court contended that had the posts instead been printed on physical flyers and left anonymously around school before administrators discovered them, the "'collision with the rights of [the targeted] students to be secure and to be let alone' would be obvious."[163] While positing that the categorical exceptions to the First Amendment "may have a broader sweep in the context of minors," the court did not see a need to determine whether the posts qualified as such.[164] "Even assuming *arguendo* that the posts at issue did not amount to unprotected true threats or fighting words," wrote the unanimous panel, "nothing in the First Amendment would even remotely require schools to tolerate such behavior or speech that occurs under its auspices."[165]

Having dispensed with the hypothetical, the primary consideration for the court remained how much, if at all, *Mahanoy* should impact its analysis of the off-campus speech before it. The answer: very little. The court concluded that because the *Mahanoy* Court had explicitly rejected adopting "'a broad, highly general First Amendment rule stating just what counts as "off campus" speech' or identifying when 'a school's special need[s]' as recognized in *Tinker* might justify regulating such

159. *Chen*, 56 F.4th at 715 (discussing the district court's application of *C.R.*).

160. *Id.* (quoting Shen v. Albany Unified Sch. Dist., No. 17-cv-02478, 2017 WL 5890089, at *9 (N.D. Cal. Nov. 29, 2017) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969))).

161. *Id.* at 716.

162. *Id.* at 717–18 (quoting Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045, 2046 (2021)).

163. *Id.* at 718 (quoting *Tinker*, 393 U.S. at 508).

164. *Id.* at 717.

165. *Id.* at 718.

speech," the Ninth Circuit was free to use its own precedent addressing that question.[166] In other words, in the absence of a specific *Mahanoy* test, the Ninth Circuit did not believe itself constrained by the Court's opinion—and thus opted to continue with the "sufficient-nexus test" it had formulated prior to *Mahanoy*:

> 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.[167]

The Court's *Mahanoy* analysis "considered many of the same factors" as its own test, concluded the Ninth Circuit, and the "three features" the *Mahanoy* Court identified "all fit comfortably" within it, "avoid[ing] the concerns that the Court identified about school regulation of off-campus speech."[168]

Having subsumed *Mahanoy* into its own circuit precedent, the panel made quick work of Epple's First Amendment arguments. Epple's speech had a "sufficient nexus" to his high school to justify discipline, because regardless of his intent to keep the account private, "it was plainly foreseeable that Epple's posts would ultimately hit their targets, with resulting significant impacts to those individual students and to the school as a whole."[169] Nodding to *Mahanoy*—in which the Court rejected Brandi's discipline, despite the high probability that her post would eventually make its way to school authorities—the Ninth Circuit granted that the fact Epple's posts would one day be seen by others wasn't enough to render them subject to discipline. But the panel determined that the other prongs of the test, which gauge the harm to the school and "the content and context of the speech and the school," weighed in favor of punishment, suggesting the school had a statutory obligation to respond to the account once it became aware of it, lest liability attach for failing to respond to a racially hostile environment.[170]

Beyond raising the possibility of liability and declaring without explanation that "the relevant speech at issue constituted harassment," the panel did not engage in any further analysis of whether Epple's posts created a hostile environment under Title VI.[171] Doing so may

166. *Id.* at 719–20 (quoting *Mahanoy*, 141 S. Ct. at 2045).

167. *Id.* at 720 (quoting McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 707 (9th Cir. 2019) (internal citations omitted)).

168. *Id.* at 719–20.

169. *Id.* at 720.

170. *Id.* at 721–22.

171. *Id.* at 724.

have required the panel to address whether off-campus speech not addressed, or even visible, to another student can be said to have sufficiently "targeted" them to constitute actionable harassment, and whether the speech at issue was so severe, pervasive, and objectively offensive that it denied its targets access to an educational opportunity or benefit. The court could have made an argument on these points. Its failure to do so was a missed opportunity insofar as it denied future students, administrators, and courts a clearer sense of where jurisdictional lines may fairly be drawn, and what actionable harassment consisting solely of expressive activity might look like.

As *Mahanoy* did not address allegedly harassing speech, more judicial engagement with the question—rather than flat conclusions—would have been clarifying. However repulsive Epple's posts may have been to all but a very few of his classmates, the court's reasoning suggests that such highly offensive speech simply may not be voiced at all, even off campus. Relatedly, the panel's assumption of foreseeability suggests no student's online speech can ever really be private—leaving the Ninth Circuit's analysis in some tension with the second *Mahanoy* "feature" regarding omnipresent school surveillance.

The panel also distinguished Epple's posts from the "unpopular" speech the *Mahanoy* Court identified as particularly important to protect.[172] Because he had argued his posts were jokes, Epple could not simultaneously claim that "he was actually espousing and communicating the view that Black people are supposedly inferior" as a political statement.[173] While nothing in *Mahanoy* suggested that a student's unpopular speech must be sincere or even explicitly political to favor protection, the Ninth Circuit effectively read in just such a requirement. Epple was "free to express offensive and other unpopular viewpoints," perhaps, but he did not have a First Amendment right to "disseminate severely harassing invective targeted at particular classmates in a manner that is readily and foreseeably transmissible to those students."[174] Again, the Ninth Circuit's test and accompanying analysis assume that a student's online speech, even if intended to be private, will inevitably become public. In the panel's words, Epple's private posts were "a ticking bomb of vicious targeted abuse that could be readily detonated by anyone following the account"—and thus he could "hardly be surprised that his school did not look the other way when that shrapnel began to hit its targets at the school."[175]

Though he was not the account's owner or author, the Ninth Circuit had little problem extending its analysis to Kevin Chen and finding him just as culpable as Epple. Characterizing Chen as "akin to

172. *Id.* at 721.

173. *Id.* at 722.

174. *Id.* at 722–23.

175. *Id.* at 723.

a student who eggs on a bully who torments classmates," the court cited Chen's comments and "likes" as "affirmative participation in what ended up, after the account became known, as abusive harassment targeted at particular students."[176] It is reasonable to question whether "liking" a post on a private Instagram account constitutes an actionable contribution to a hostile environment, or whether leaving a comment on that same account creates a "sufficient nexus" to school to justify the court's conclusion that Chen's speech, "under *Tinker*, was properly subject to discipline."[177] Again, the court's conclusion relies on the assumption that Epple's posts and Chen's reactions would inevitably become public knowledge. The panel's reasoning prompts the question: Can speech be characterized as "abusive harassment targeted at particular students" if those targeted aren't actually aware of it? To use the court's analogy, if a "bully" is raging in racist, vitriolic ways about other students in the privacy of his bedroom, and a friend agrees with him, are the students they are discussing actually "tormented"?

Epple's speech was indisputably racist. But as the Third Circuit warned in its *Mahanoy* opinion, "bad facts make bad law."[178] The Ninth Circuit's opinion—including a sweeping concurrence from Circuit Judge Gould that urged reconsideration of longstanding First Amendment precedent so "school officials, and government officials more broadly, should not be unduly constrained in their attempts to regulate hate speech"[179]—sets aside *Mahanoy*'s animating concerns in a rush to justify Epple's and Chen's punishment. Instead of grappling substantively with the bounds of a school's authority over allegedly harassing off-campus, online speech, the central question left unanswered by *Mahanoy*, the Ninth Circuit simply deemed the speech at issue harassment without further explanation. In so doing, it raised further questions, and left students and administrators alike with no further certainty as to when a student's off-campus expression may truly be beyond the authority of schools to regulate and discipline.

D. Mahanoy *and the "Invasion of the Rights of Others":* Doe v. Hopkinton Public Schools

The Ninth Circuit is not the only federal appellate court to uphold the punishment of public grade school students for off-campus, online comments made about peers without their knowledge. In *Doe ex rel. Doe v. Hopkinton Public Schools*,[180] the United States Court of Appeals

176. *Id.*

177. *Id.*

178. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 187 (3d Cir. 2020) (quoting United States v. Joseph, 730 F.3d 336, 337 (3d Cir. 2013)), *aff'd*, 141 S. Ct. 2038 (2021).

179. *Chen*, 56 F.4th at 730 (Gould, J., concurring).

180. 490 F. Supp. 3d 448 (D. Mass. 2020), *aff'd*, 19 F.4th 493 (1st Cir. 2021).

for the First Circuit upheld the suspension of high school students Ben Bloggs and John Doe for posting mean-spirited comments about another student in a private group discussion on Snapchat—despite the fact that the student discussed was unaware of the comments' existence. The district court recounted the entirety of the students' Snapchat discussion:

> Bloggs asked "Was Dylan's grandma in the third row," prompting M.B.'s response that "They tied her to the hood," and J.C.'s reply: "With bungee cord?" Bloggs then says, "Are [Robert Roe]'s parents ugly too [o]r did he just get bad genes," and after T.M. shares a photo of Mr. and Mrs. Roe, Bloggs responds with "A family of absolute beauties." In a separate conversation, Doe says, "[A.W.] and [Roe] were made on the same day[.] [A.W.] was the starting product and [Roe] is what it turned into kinda like a game of telephone in 1st grade," to which Bloggs responds, "[Roe]'s leather shampoo makes up for the looks though." The only other message in evidence from either of them is on a thread where Bloggs identifies one of Roe's online usernames.[181]

The record contains only these four comments by Bloggs and Doe, shared privately with friends. They were only "minor" participants in the private group Snapchat, and nothing in the record indicates the students' comments caused any disturbance on school premises.[182] There is no evidence Bloggs and Doe posted their comments while at school or in a school-controlled environment, and Roe complained about *other* students' actions, not Bloggs's and Doe's speech. Indeed, Roe was unaware of Bloggs's and Doe's messages until after the school investigated the other students' alleged misconduct. Not only was Roe unaware (and thus unbothered) by Bloggs and Doe's speech, but Roe "had no problems with Bloggs and Doe; for example he socialized with Bloggs outside of school and they played Xbox together."[183]

The record contained no evidence the students' speech caused any disruption, nor could school administrators have reasonably forecast such. As the district court found, the school "reckoned with minimally-disruptive, untargeted speech."[184] Indeed, there was "no evidence in the record of any non-speech conduct by Bloggs or Doe directed at Roe, except for their failure to intervene when other students mistreated him, which is certainly insufficient alone to constitute bullying."[185]

The First Circuit nevertheless upheld the students' punishment on appeal. Under *Tinker*, the court reasoned, "schools have a special

181. *Id.* at 454–55 (citations omitted).

182. *Id.* at 463.

183. *Id.* at 454–55.

184. *Id.* at 462.

185. *Id.* at 461.

interest in regulating speech that involves the 'invasion of the rights of others'"—and the sum of the student conduct at issue here, beyond just Doe's and Bloggs's limited participation, constituted an invasion of Roe's rights, sufficient to justify the punishment of all associated with it.[186] In so doing, the court converted Doe's and Bloggs's fleeting comments into something they were not. The students were not, the panel declared, simply trading private jokes with friends, but rather were "foster[ing] an environment that emboldened the bullies and encouraged others in the invasion of Roe's rights."[187] The students did not simply speak unkindly about a peer behind his back; they "actively and extensively encouraged bullying and fostered an atmosphere where bullying was accepted."[188]

The First Circuit considered *Mahanoy*, but—because its analysis relied on the "invasion of the rights of others" prong—deemed it easily distinguishable.[189] Brandi's Snapchat posts "were not directed at any individual," wrote the panel, and her "general statement of discontent is vastly and qualitatively different from bullying that targets and invades the rights of an individual student."[190] Like the Ninth Circuit in *Chen*, the First Circuit was troublingly comfortable with declaring speech about which the "targeted" student is unaware "bullying" that invades another's rights.[191] This determination is in sharp tension with Justice Alito's warning in *Mahanoy* that a "school may suppress the disruption, but it may not punish the off-campus speech that prompted other students to engage in misconduct."[192]

Like the Ninth Circuit in *Chen*, the First Circuit broke dangerous new ground in declaring that "speech that actively encourages such direct or face-to-face bullying conduct is not constitutionally protected."[193] As a practical matter, under the panel's holding, school administrators may police and punish any student expression that may "encourage" *other* students' on-campus misconduct, no matter when and where it occurs. Students who do nothing more than express their dislike of a peer may face punishment for bullying committed *by others* if a school official concludes their speech signaled "encouragement" of

186. Doe *ex rel.* Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 505, 508–09 (1st Cir. 2021) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

187. *Id.* at 507–08.

188. *Id.* at 508.

189. *Id.* at 505–06.

190. *Id.* at 506.

191. *Id.* at 508–09.

192. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2056 (2021) (Alito, J., concurring).

193. *Doe*, 19 F.4th at 508.

someone else's eventual misconduct. Here, for example, the students' speech "was sent to a third party and there is no indication they had knowledge or intent it would go beyond that third party."[194] The panel's ruling effectively imposes a form of strict liability on student speakers.

Administrators may not engage in this kind of "contact tracing" among acquaintances; one student's misconduct does not justify the punishment of their friends. Such a result conflates one student's protected speech with another's prohibited action. It also threatens freedom of association: the First Amendment "restricts the ability of the State to impose liability on an individual solely because of his association with another."[195] Freedom of association prohibits imposition of collective liability on such an attenuated basis, and "'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights."[196]

CONCLUSION

Given *Mahanoy*'s broad, generalized framework and the early judicial response to its "three features," the boundaries of public grade school student speech rights remain uncertain. When students speak off campus, they still risk punishment for speech otherwise protected by the First Amendment. Time will tell the extent of the divergence between the Tenth Circuit's approach to post-*Mahanoy* cases and the reasoning of the First and Ninth Circuits, and which gains broader acceptance and traction. But those concerned with keeping the promise of the First Amendment alive for all Americans have work to do.

The First Amendment must not allow our public schools to become panopticons. Students who come of age with the ever-present threat of government discipline simply for expressing their thoughts on their own time will learn a debilitating lesson about their rights. With their every statement away from campus monitored and potentially subject to punishment, students will be denied an opportunity to explore, to make mistakes, to evolve, and to learn the full power of the First Amendment's protection against government overreach. Having grown up in a surveillance state, they may come to replicate and reinforce its methods, reporting other students to government authorities for

194. Doe *ex rel.* Doe v. Hopkinton Pub. Schs., 490 F. Supp. 3d 448, 461, 464 (D. Mass. 2020).

195. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918–19 (1982).

196. Healy v. James, 408 U.S. 169, 186 (1972) (quoting United States v. Robel, 389 U.S. 258, 265 (1967)).

unpopular, dissenting, or simply offensive speech, even speech uttered years ago.[197]

Further, the First Amendment requires school administrators and courts alike to be as clear as possible about the contours and boundaries of schools' jurisdiction over student expression. In regulating harassment and bullying, schools must maintain constitutionally sound policies that properly balance their twin obligations to protect student First Amendment rights and address misconduct. And when analyzing allegedly harassing student expression, courts should rely on the existing jurisprudential frameworks for Title VI and Title IX claims. The Ninth Circuit's failure to do so will likely generate further confusion. Likewise, both school officials and courts must recognize the constitutionally significant difference between comments to friends and targeted bullying of another student. The First Circuit's ban on "encouraging" bullying empowers administrators to police private speech and punish students for the conduct of others; such a result will encourage students to emulate such surveillance when they reach the adult world.

If public grade school administrators may surveil and punish off-campus student expression far beyond the schoolhouse gate, a generation of Americans will be taught a corrosive, illiberal lesson about the illusory value of their constitutional freedoms. Their experiences with our public schools will "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities."[198] Because "[t]his influence is crucial to the continued good health of a democracy," student experiences with our public schools must not include government censorship and surveillance.[199]

We must properly educate tomorrow's leaders about the power of their First Amendment rights and the limits of governmental authority. When considering the student speech cases that will continue to arrive on their dockets, courts should reaffirm *Tinker*'s animating concern—echoed in *Mahanoy*—for strong student speech rights, not abandon it.

197. This is already happening. *See, e.g.*, Dan Levin, *A Racial Slur, a Viral Video, and a Reckoning*, N.Y. TIMES (Dec. 26, 2020), https://www.nytimes.com/2020/12/26/us/mimi-groves-jimmy-galligan-racial-slurs.html [https://perma.cc/6GNR-B9ZT] (detailing one student's decision to release a video of another student using a racial slur in 2016 to discredit that student's 2020 support for the Black Lives Matter movement, which resulted in severe consequences, including her withdrawal from the University of Tennessee).

198. Ambach v. Norwick, 441 U.S. 68, 79 (1979).

199. *Id.*