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Cover Page Footnote

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TINKERING WITH THE SCHOOLHOUSE GATE: THE FUTURE OF STUDENT SPEECH AFTER MAHANOY AREA SCHOOL DISTRICT V. B.L.

Victoria Bonds[*]

When the Supreme Court last created a rule about students' First Amendment rights, MySpace was the most popular social media platform. Students' use of social media and technology has radically changed since then, and it is time the First Amendment case law reflects that. With the transition to online learning after the COVID-19 pandemic and overall increased reliance on technology, students need clear answers about when school officials can punish them for their social media posts.

The Supreme Court had a chance to clarify First Amendment student speech law this year in *Mahanoy Area School District v. B.L.*, but instead, left it up to the lower courts to decide when school officials can punish students for their off-campus speech. However, the current circuit courts' tests are unclear and heavily favor school officials. This Essay argues that the lower courts should instead adopt a test where school officials cannot punish students for their off-campus speech unless it falls within an exception to the First Amendment.

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I. INTRODUCTION

The COVID-19 pandemic has lasting legal implications for society. Quarantining taught us to "live online" and focused our attention on injustices in our society.[1] A growing number of young people use social media to get involved with political and social issues, as evident during the summer of 2020.[2] The beginning of that summer, on May 25, 2020, four Minneapolis police officers murdered George Floyd and sparked an online movement of global social unrest and an outpouring of support for Black Lives Matter both on social media and in person.[3] Students need clear answers about when school officials can punish them for something they post on social media, especially with the overall increased reliance on technology to communicate and the transition to online learning after the COVID-19 pandemic. Clarified First Amendment student speech law is now more important than ever.

The internet was an entirely different space when the Supreme Court ruled on students' First Amendment speech in 2007.[4] At that time, MySpace was the most popular social media platform with 49.5 million monthly

1. Jane Hu, *The Second Act of Social-Media Activism*, NEW YORKER (Aug. 3, 2020), https://www.newyorker.com/culture/cultural-comment/the-second-act-of-social-media-activism [https://perma.cc/T3AK-JCAJ].

2. According to a recent Pew Research survey, there has been a double-digit increase from 2018 in the percent of younger social media users who say that social media platforms are important to them when "finding other people who share their views about important topics," "getting involved with political or social issues[,] and having a venue to express their opinions." Brooke Auxier, *Activism on Social Media Varies by Race and Ethnicity, Age, Political Party*, PEW RSCH. CTR. (July 13, 2020), https://www.pewresearch.org/fact-tank/2020/07/13/activism-on-social-media-varies-by-race-and-ethnicity-age-political-party/ [https://perma.cc/9JB2-ED79]. Comparatively, "there has been little to no change . . . for social media users ages 30 or older." *Id.*

3. Hu, *supra* note 1; Eliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html [https://perma.cc/RH5A-AXEQ]. Described above is an extremely simplified statement about the Black Lives Matter Movement and systemic racism in our society. For more information, *see generally #DefundThePolice*, BLACK LIVES MATTER (May 30, 2020), https://www.blacklivesmatter.com/defundthepolice/ [https://archive.ph/i1t24].

4. *See* Katherine A. Ferry, Comment, *Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech*, 49 LOY. U. CHI. L.J. 717, 727 (2018).

users.[5] Now, MySpace has 5.5 million monthly visitors.[6] In 2007, Facebook had 14 million monthly users,[7] whereas today it has 2.7 billion monthly users.[8] Fourteen years ago, Instagram, Pinterest, Snapchat, and TikTok had not yet launched.[9] Only 55% of teens in the U.S. used social media in 2007,[10] as compared with today where at least 90% of teens use social media.[11] Social media has quickly become one of the most common mediums of performing off-campus speech. But First Amendment law has not evolved so quickly. Specifically, and what has become a recurring unresolved issue: The Supreme Court has not yet come up with a standard for when the First Amendment protects a student's off-campus speech. With the expansion of the schoolhouse gate into students' homes because of the transition to online learning, a clear test is crucial to protect students' First Amendment rights.

The Supreme Court's first attempt at regulating student speech was in 1969 in *Tinker v. Des Moines School District*.[12] Although the Court held that students have First Amendment protections inside the schoolhouse gate,

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5. Tom Tsinas, *Social Media by the Numbers: MySpace*, SEARCH ENGINE PEOPLE (Nov. 25, 2007), https://www.searchenginepeople.com/blog/social-media-by-the-numbers-myspace.html [https://perma.cc/ES47-EKYZ].

6. *Traffic Analytics:myspace.com*, SEMRUSH (Nov. 2021), https://www.semrush.com/analytics/traffic/overview/myspace.com [https://perma.cc/GM2Z-QX68].

7. Fred Vogelstein, *How Mark Zuckerberg Turned Facebook into the Web's Hottest Platform*, WIRED (Sept. 6, 2007, 12:00 PM), https://www.wired.com/2007/09/ff-facebook [https://perma.cc/3Z7D-GTZY].

8. Jessica Bursztynsky & Todd Haselton, *Facebook Rebuts 'The Social Dilemma,' a Popular Netflix Documentary*, CNBC (Oct. 2, 2020, 9:01 PM), https://www.cnbc.com/2020/10/02/facebook-rebuts-the-social-dilemma-popular-netflix-documentary.html [https://perma.cc/ZG5P-QQAS].

9. *The Evolution of Social Media: How Did It Begin, and Where Could It Go Next?*, MARYVILLE UNIV., https://online.maryville.edu/blog/evolution-social-media/ [https://perma.cc/9VQK-ZAHU].

10. Amanda Lenhart & Mary Madden, *Social Networking Websites and Teens*, PEW RSCH. CTR. (Jan. 7, 2007), https://www.pewresearch.org/internet/2007/01/07/social-networking-websites-and-teens [https://perma.cc/C2DU-A2FF].

11. *Social Media and Teens*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Mar. 2018), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Social-Media-and-Teens-100.aspx [https://perma.cc/NBS5-QBGP].

12. Ferry, *supra* note 4, at 720, 724.

the Court noted that there are exceptions.[13] The Court created the "*Tinker* exception," which established that the First Amendment does not preclude schools from regulating student speech that substantially and materially disrupts the operations of the school or invades the rights of other students.[14] Yet, the Court did not clarify or provide a test for when the *Tinker* exception applies to off-campus student speech.[15] Thus, the silence from the highest court of the land has forced circuit courts to take it upon themselves to create these tests. However, these tests are unclear and unpredictable. The current tests leave students and school officials[16] alike confused about when the First Amendment protects off-campus student speech.

The landscape of student speech law was rocked last year when the Third Circuit created a completely new approach to applying the *Tinker* exception in *Mahanoy Area School District v. B.L.* The court held that the *Tinker* exception does not apply to off-campus speech and, therefore, school officials cannot punish students' vulgar, off-campus speech.[17] School officials appealed the case, and the Supreme Court granted certiorari for a student speech case for the first time in fourteen years.[18] Although the Court, in this case, agreed that the school officials violated the student's First Amendment rights, the Court declined to create any general tests.[19] This decision left lower courts with the same unclear and unpredictable tests for when the *Tinker* exception applies to off-campus speech.

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13. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506, 512–13 (1969).

14. *Id.* at 513.

15. *See generally id.* Off-campus speech is "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020).

16. According to the U.S. Department of Education, "a 'school official' includes a teacher, school principal, president, chancellor, board member, trustee, registrar, counselor, admissions officer, attorney, accountant, human resources professional, information systems specialist, and support or clerical personnel." *Who Is a "School Official" Under FERPA?*, U.S. DEP'T OF EDUC., https://studentprivacy.ed.gov/faq/who-%E2%80%9Cschool-official%E2%80%9D-under-ferpa [https://perma.cc/9NBP-TNTA]; see 34 C.F.R. § 99.31(a)(1)(i)(B) (2012).

17. *B.L.*, 964 F.3d at 191.

18. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044 (2021); Ferry, *supra* note 4, at 720–21.

19. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2045, 2048.

This Essay explores how lower courts can best protect student speech rights in light of *Mahanoy.* Part II provides an overview of student speech case law and discusses *Mahanoy*. Next, Part III analyzes the three unclear tests circuit courts use to determine when the *Tinker* exception applies to off-campus student speech. Lastly, Part IV proposes that lower courts can resolve the uncertainty of when *Tinker* applies—left by the Court in *Mahanoy*—by holding that *Tinker* does not apply to off-campus speech, speech that the First Amendment clearly protects.

II. LANDMARK STUDENT FREE SPEECH CASES

The Supreme Court case law on student speech is extremely limited. There are five landmark Supreme Court cases relating to student speech: *Tinker v. Des Moines School District*, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, *Morse v. Frederic*, and *Mahanoy Area School District v. B.L.*[20]

The Court heard the first landmark student speech case in 1969 in *Tinker v. Des Moines School District*, where public school students planned to wear black armbands to school in protest of the Vietnam War.[21] School district officials became aware of the students' plan and adopted a policy to suspend any student wearing an armband.[22] Ruling for the students, the Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[23]

However, the Court added a narrow exception "in light of the special characteristics of the school environment."[24] The Court set forth the "*Tinker* exception," holding that school officials can only curtail students' First Amendment rights when the speech *substantially* and *materially* disrupts the operations of the school or *invades* the rights of other students.[25] Since the

20. Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007); *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038.

21. *Tinker*, 393 U.S. at 504.

22. *Id.*

23. *Id.* at 506, 514.

24. *Id.* at 506.

25. *Id.* at 509.

armbands did neither, the school district could not punish students for wearing the armbands to school.[26] The Court noted that for "school officials to justify prohibition of a particular expression of opinion," they "must be able to show . . . something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" caused their action.[27]

In the three subsequent student speech cases, the Supreme Court put forth exceptions to the bright-line rule that *Tinker* created. *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederic,* further narrowed the scope of students' First Amendment right to speech.[28]

First, in 1986 in *Fraser*, the Supreme Court expanded the *Tinker* exception and held that school officials can punish a student for their speech if school officials determine that the speech is vulgar, lewd, or disruptive to the school's basic educational mission.[29] The Court upheld a school official's decision to suspend a student for delivering a vulgar speech at a school assembly.[30]

Two years later, the Court added another caveat to the *Tinker* exception. In *Kuhlmeier*, the Court held that school officials can control the style and content of student speech in "school-sponsored expressive activities" if the school officials' actions are reasonably related to legitimate educational purposes.[31] A high school principal's decision to censor two student journalists' articles describing students' experiences with pregnancy did not violate the First Amendment because of the school's legitimate concern for student privacy and interest in upholding the school journal's moral duties.[32]

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26. *Id.* at 514.

27. *Id.* at 509.

28. Ferry, *supra* note 4, at 725–28.

29. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

30. *Id.* Justice Brennan argued in his concurrence that the school could not punish the student if he had delivered the same speech outside the school environment merely because the school officials considered his language to be inappropriate. *Id.* at 688 (Brennan, J., concurring).

31. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

32. *Id.* at 276. The principal was concerned that the "pregnant students still might be identifiable from the text" of the article and that the article's references to birth control and sexual activity "were inappropriate for some of the younger students at the school." *Id.* at 263.

The third case that the Supreme Court further limited student speech was nineteen years after *Kuhlmeier*, in *Morse*.[33] In *Morse*, the Court held that the First Amendment allows school officials to prohibit speech at school-sponsored events if a reasonable person can interpret the student's speech as promoting illegal drug use.[34] The Court upheld the school officials' decision to suspend a student for displaying a banner at a school-sponsored event that read "BONG HiTS 4 JESUS," even though the event occurred off-campus.[35] The school officials' decision to suspend the student was within the scope of their authority since the speech occurred at a school-sponsored event within normal school hours.[36]

Taken together, the Supreme Court has expanded the *Tinker* exception to permit school officials to punish student speech that is vulgar, lewd, or disruptive to the school's basic educational mission;[37] speech that occurs during school-sponsored activities;[38] and speech that promotes illegal drug use.[39]

A. Mahanoy Area School District v. B.L.

In June 2021, the Supreme Court finally heard a student First Amendment speech case for the first time since *Morse* in 2007.[40] A new landmark student speech case was long overdue because none of the prior cases involved social media, which is arguably one of the most accessible and utilized ways for students to speak today. If a student wants to publish something for their peers to see, the student no longer has to be on their school's

33. Morse v. Frederick, 551 U.S. 393 (2007).

34. *Id.* at 403.

35. *Id.* at 397.

36. *Id.* at 400–01.

37. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

38. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

39. *Morse*, 551 U.S. at 403.

40. Ferry, *supra* note 4, at 728.

newspaper or abide by their school's restrictions to do so.[41] Instead, a student can simply type out their opinion in a Tweet or Facebook post and instantly share it with their community. Students no longer have to wait until their school has an assembly to speak to a large portion of the student body.[42] An Instagram or Snapchat video expressing their views is always readily available to students and can easily be shared with the entire school. Social media is incredibly more prominent in students' lives since the last landmark student speech case in 2007.[43]

The Court had an opportunity to adapt student speech law to the age of social media on June 23, 2021, when the Court decided *Mahanoy Area School District v. B.L.*[44] Although the Court held in *Mahanoy* that school officials violated a student's First Amendment rights by punishing her for what she posted on social media while off-campus, the Court left it up to the lower courts to create any new rules for regulating off-campus student speech.[45]

1. Facts of the Case

B.L. was a cheerleader on Mahanoy Area High School's cheerleading team.[46] After her coach decided not to promote her to the varsity team, B.L. posted a picture of herself and her friend on her Snapchat story with their middle fingers raised and a caption stating: "Fuck school fuck softball fuck cheer fuck everything."[47] The photo was visible to about 250 of B.L.'s

41. When the Court decided that a school could censor a student's article in a school newspaper in *Kuhlmeier*, 484 U.S. at 276 in 1988, social media and the internet were not invented.

42. The ability to easily reach your peers outside of school through social media was not an option when the Court decided *Bethel School District Number 403*, 478 U.S. at 685 in 1986. In that case, the Court noted that the school could not punish a student for delivering a vulgar speech outside the school environment merely because the school officials considered the language to be inappropriate. *Id.* at 688 (Brennan, J., concurring).

43. *See* Ferry, *supra* note 4, at 719, 728.

44. Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038 (2021).

45. *Id.* at 2045, 2048.

46. *Id.* at 2043.

47. *Id.*

Snapchat friends, many of whom were her fellow students.[48] Several students were upset by the photo.[49] One of B.L.'s teammates took a screenshot of her photo and sent it to the cheerleading coaches.[50] The coaches decided that B.L.'s photo violated the team and the school's rules concerning the use of profanity and participating in a school related activity and removed B.L. from the team.[51] B.L.'s parents attempted to appeal the decision up to the school board but were unsuccessful.[52]

2. Procedural Posture

B.L. sued the Mahanoy Area School District ("School District") in the United States District Court for the Middle District of Pennsylvania.[53] The District Court ruled that B.L.'s speech was not subject to regulation under *Tinker* and, thus, the School District's decision to punish B.L. for her speech violated the First Amendment.[54] Subsequently, the School District appealed the ruling to the Third Circuit Court of Appeals.[55]

The Third Circuit affirmed the decision.[56] Core to its ruling was that B.L.'s speech took place off-campus because she created the photo "away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school."[57] It was not enough that she mentioned the school and that her speech reached students and school officials.[58] The School District argued that because B.L.'s

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 2043–44.

55. *Id.* at 2044.

56. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 177 (3d Cir. 2020).

57. *Id.* at 180.

58. *Id.*

photo was "likely to substantially disrupt the cheerleading program," the School District could punish B.L. under the *Tinker* exception.[59]

Disagreeing, the Third Circuit held—for the first time in any circuit—that the *Tinker* exception does not apply to off-campus speech.[60] Underlying the court's holding was the rationale that a test based on whether the student speech occurs in the context of a school-controlled, -owned, or -sponsored event is a "much more easily applied and understood" test.[61] This "clarity benefits students, who can better understand their rights, but it also benefits school administrators, who can better understand the limits of their authority and channel their regulatory energies in productive but lawful ways."[62] Applying this new test to B.L.'s case, the Third Circuit held that B.L. enjoyed the full scope of First Amendment protections because her photo was off-campus speech and thus was not subject to regulation under *Tinker*.[63] The School District then appealed the ruling to the United States Supreme Court.[64]

3. Supreme Court Opinion

The Supreme Court upheld the Third Circuit's judgment that the School District violated B.L.'s First Amendment rights but disagreed with the Third Circuit's rationale.[65] The Court disagreed that the *Tinker* exception does not apply to off-campus speech because the "special characteristics that give schools additional license to regulate student speech" remain significant in some off-campus circumstances.[66] These circumstances include bullying,

59. *Id.* at 183.

60. *Id.* at 189.

61. *Id.* at 190.

62. *Id.*

63. *Id.* at 192.

64. Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2044 (2021).

65. *Id.* at 2048.

66. *Id.* at 2045.

harassing, or threatening other students or teachers; participation in online school activities; and breaches of school security devices.[67]

Given the advent of virtual learning, the Court did not set forth any general rules on what is considered off-campus speech.[68] The Court also did not decide to what extent, if at all, schools' special interests for limiting traditional First Amendment protections apply when a student speaks off-campus.[69] Instead, the Court set forth three features of off-campus speech that diminish a school's special interest in limiting students' First Amendment rights.[70] The first feature is that when students are off-campus, school officials are rarely acting *in loco parentis*, or in place of a parent.[71] When school officials are supervising students at school, they are acting in the legal place of a parent.[72] Parents generally have full legal authority over students when the child is off-campus.[73] Second, "courts must be more skeptical of [school officials'] efforts to regulate off-campus speech."[74] Otherwise, students would be subjected to limited First Amendment rights at all hours if on- and off-campus speech are treated the same. Finally, the school itself, as the "nurser[y] of democracy," has an "interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[75] However, the Court emphasized that it left "for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference" in allowing schools to limit students' First Amendment rights.[76]

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67. *Id.*

68. *Id.* at 2045–46.

69. *Id.*

70. *Id.* at 2046.

71. *Id.*

72. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

73. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046.

74. *Id.*

75. *Id.*

76. *Id.*

B.L.'s case is one example of when it was unconstitutional for a school to limit a student's First Amendment right to speech off-campus.[77] Her criticism of her community "did not involve features that would place it outside" what the First Amendment ordinarily protects.[78] B.L.'s speech was a form of pure speech, which is afforded full protection under the First Amendment.[79] Pure speech is speech "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends,"[80] otherwise known as speech "of public concern."[81] The First Amendment does not protect pure speech that falls within one of the narrow categories of unprotected speech.[82] Since B.L. spoke outside of school hours and away from the school, did not target any members of the school community, and transmitted the speech through her personal cell phone to a private audience of friends, the School District's interest in punishing her pure speech was diminished regardless of the risk that the speech might reach the school.[83]

B.L's First Amendment freedoms thus outweighed any institutional interest of the School District.[84] First, the School District's interest in promoting good manners by punishing students for using vulgar language aimed at the school was considerably weakened because B.L. spoke outside of the school context, not *in loco parentis*.[85] The school did not have authority over B.L. when she posted her Snapchat off-campus.[86] Moreover, the School District did not present evidence that it usually made an effort to prevent

77. *Id.* at 2046–47.

78. *Id.* at 2046.

79. *Id.* at 2046–47.

80. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

81. Lane v. Franks, 573 U.S. 228, 235 (2014).

82. *See infra* notes 141–49 (explaining the different types of unprotected speech).

83. *Mahanoy Area Sch. Dist*., 141 S. Ct. at 2047.

84. *Id.* at 2047–48.

85. *Id.* at 2047.

86. *Id.*

students from using vulgarity outside of the classroom.[87] Second, the School District did not demonstrate that it was attempting to prevent a substantial disruption within a school-sponsored activity because B.L's speech only took up, at most, five to ten minutes of class for a few days.[88] And third, there was little evidence that B.L.'s speech caused a substantial disturbance to team morale.[89] In sum, the School District violated B.L.'s First Amendment rights by punishing her for her off-campus speech.[90]

In ruling for B.L., the Court recognized that school officials do not have the same authority to punish students for off-campus speech outside of school as they do for on-campus speech.[91] But the Court noted the challenges that arise when school officials punish students for something that the student posted on social media off-campus and yet did not create a rule addressing this conduct,[92] leaving lower courts without any guidance.

III. THE SUPREME COURT LEAVES CIRCUIT COURTS WITH THE SAME UNPREDICTABLE AND BROAD TESTS FOR OFF-CAMPUS SPEECH SINCE *TINKER*.

The Supreme Court left it up to the lower courts to decide when a school's special interests outweigh a student's First Amendment rights when off-campus.[93] Circuit courts[94] have developed three approaches for ascertaining whether the *Tinker* exception applies to off-campus speech: (A) the reasonably foreseeable test, (B) the nexus test, and (C) a case-by-case

87. *Id.*

88. *Id.* at 2047–48.

89. *Id.* at 2048.

90. *Id.*

91. *Id.* at 2046.

92. *Id.* at 2045.

93. *Id.* at 2046.

94. The First, Sixth, Seventh, Tenth, and D.C. Circuits have not yet addressed whether the *Tinker* exception can be applied to off-campus speech by students. Amy B. Cyphert, *Tinker-ing with Machine Learning: The Legality and Consequences of Online Surveillance of Students*, 20 NEV. L.J. 457, 483 n.162 (2020).

determination.[95] However, no court has created a clear and predictable test for when the *Tinker* exception applies to off-campus speech.[96] The holes in these approaches are especially prominent when applying them to cases where students speak via social media.

A. Reasonably Foreseeable Test

The first approach circuit courts use for finding that the *Tinker* exception applies to off-campus speech is the reasonably foreseeable test, which applies the *Tinker* exception if it is "reasonably foreseeable that a student's off-campus speech would reach the school environment."[97] This approach is ineffective in the digital age where the nature of nearly all off-campus online speech is that it could make its way inside the schoolhouse gate and to the attention of school officials.[98]

Before the rise in technology and social media, it was often a remote possibility that students and school officials could access speech expressed in the public square.[99] For example, in the past, school officials would have had to get ahold of a student's diary to read their personal thoughts. Whereas now, they can view their students' thoughts through any social media platform, like Twitter, TikTok, Instagram, and Facebook. And it is not just teens who are on social media. Children ages four to fourteen spend an average of 80 minutes per day on TikTok.[100] The unprecedented interconnectivity of the modern public square of the internet, particularly social media, makes it possible for anyone to view a student's speech at any point in time. Although a student can control where and how they speak off-campus, they have little

95. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 186 (3d Cir. 2020).

96. The current circuit courts tests in reality have no limit on school officials' authority to punish off-campus speech. Similarly, the commerce clause allows Congress to have a blank check in the name of regulating commerce. *See* Seven-Sky v. Holder, 661 F.3d 1, 18 (D.C. Cir. 2011) (stating that the commerce clause has no clear qualitative limitation).

97. *B.L.*, 964 F.3d at 186.

98. *See supra*, note 96 for comparison to the commerce clause, another legal "test" with seemingly no limitations.

99. *B.L.*, 964 F.3d at 187.

100. Sarah Perez, *Kids Now Spend Nearly as Much Time Watching TikTok as YouTube in US, UK and Spain*, TECHCRUNCH (June 4, 2020, 12:34 PM), https://techcrunch.com/2020/06/04/kids-now-spend-nearly-as-much-time-watching-tiktok-as-youtube-in-u-s-u-k-and-spain [https://perma.cc/K8NJ-AR2H].

control of whether their online speech comes to the attention of school officials.[101] Even if students make their social media accounts private, someone can always screenshot their speech and share it with school officials.[102] Despite the flaws in the reasonably foreseeable test, the Second and Eighth Circuits continue to follow this approach.[103]

For example, the Eighth Circuit held in *S.J.W. v. Lee's Summit R–7 School District*, that it was reasonably foreseeable that a student's sexist and racist blog posts about his classmates would reach school officials.[104] Thus, the school officials' punishment did not violate his First Amendment rights.[105] Although the student made it difficult for his classmates to search for his blog, the court instead focused on the fact that the speech targeted the education institution.[106] The court implied that it was within the scope of school officials' authority to regulate any speech students post online because it was reasonably foreseeable that any online speech, even that remotely related to a school, would reach school grounds.[107]

Thus, the reasonably foreseeable test makes it difficult for students speaking off-campus, particularly on social media, to predict when they enjoy full or limited First Amendment rights. *Tinker's* schoolhouse gate exception should not encompass the public square, especially since the public square has become much larger with the ability for anyone to share their thoughts at any time with a large audience via social media. Such expansion would go against precedent and subvert the "longstanding principle that heightened authority over student speech is the exception rather than the rule."[108] The reasonably foreseeable test affords school officials broad

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

102. *See* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2043 (2021).

103. Wisniewski v. Weedsport Cent. Sch. Dist., 494 F.3d 34, 38–39 (2d Cir. 2007); *see* S.J.W. v. Lee's Summit R–7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012).

104. *S.J.W.*, 696 F.3d at 778.

105. *Id.*

106. *Id.* at 773, 778. The student used a Dutch domain site, which prevented users in the United States from finding his blog through a Google search. *Id.* at 773.

107. Ferry, *supra* note 4, at 753.

108. *B.L.*, 964 F.3d at 187–88.

discretion when deciding to punish a student for their speech, well beyond the narrow exception in *Tinker*.

B. Nexus Test

The second approach that circuit courts use is permitting school officials to regulate off-campus speech under the *Tinker* exception when there is a sufficient nexus between a school's pedagogical interests and the speech it seeks to regulate.[109] Courts refer to this test as the "nexus test."[110] Similar to the reasonably foreseeable test, the nexus test is unclear and overbroad and affords school officials too much authority. Nevertheless, the Fourth Circuit uses the nexus test.[111]

The nexus test leaves students without clarity about when a school can implicate its educational interests to limit students' off-campus speech. School officials can justify punishing students for their speech by articulating any legitimate interest, such as the guise of school safety or promoting education.[112] This low burden of proof allows school officials to regulate much more speech than *Tinker* intended.[113] For example, school officials could punish a student who posted a TikTok off-campus berating gay marriage that does not mention any student and is unrelated to the school because the speech has a sufficient nexus to school officials' interest in institutional diversity.[114]

Additionally, the nexus test is overbroad and does little to protect student's First Amendment rights. The nexus test thus erases *Tinker*'s distinction between on- and off-campus speech.[115] By reducing the *Tinker* exception to only a determination of whether a student's speech interferes with the work and discipline of the school, "[s]chools can regulate off-campus speech

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109. *Id.* at 186.

110. *Id.*

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

112. *See* Ferry, *supra* note 4, at 764–65.

113. See *supra* note 96 for comparison to the commerce clause, another legal "test" with seemingly no limitations.

114. *See* Ferry, *supra* note 4, at 756.

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

under *Tinker* when the speech would satisfy *Tinker*."[116] In other words, it does not matter that a student recorded and posted a TikTok entirely off-campus, only that the video caused a substantial and material disruption on-campus related to any overly broad educational interest.

For instance, in *Kowalski v. Berkeley City Schools*, the Fourth Circuit held that there was a sufficient nexus between a student's MySpace page where the student was harassing a peer and the school officials' interest in preventing bullying to create a safe school environment.[117] The court upheld the school officials' decision to suspend the student who created the MySpace page.[118] The court declined to consider if the student's speech was on- or off-campus and determined that it did not need to define the limits of when the nexus test applies to off-campus speech.[119]

Reducing the *Tinker* exception to one analytical step expands school officials' regulatory power beyond the intention in *Tinker*. School officials can easily meet the burden of the nexus test by articulating even a slight connection to a broad list of educational interests.

C. Case-by-Case Determination

The third approach that circuit courts use is applying "*Tinker* to off-campus speech without articulating a governing test or standard," which this Essay refers to as a "case-by-case determination" approach.[120] By deciding cases relating to student speech but not articulating a standard, courts leave students and school officials without clear guidance.

Case law applying this standard delivers more questions than answers. For example, the Fifth Circuit in *Bell v. Itawamba City School Board* declined to "adopt a specific rule," and yet held that school officials could punish a student's off-campus rap recording under *Tinker* because the speech threatened, harassed, and intimidated two teachers.[121] Similarly, the Ninth Circuit in *Wynar v. Douglas City School District* declined to "divine and

116. *Id.*

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

118. *Id.* at 567.

119. *Id.* at 573.

120. *B.L.*, 964 F.3d at 186.

121. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 394 (5th Cir. 2015).

impose a global standard" for off-campus speech but held that *Tinker* reaches off-campus speech presenting "an identifiable threat of school violence," and therefore, school officials could punish a student for sending instant messages from home to his friends threatening a school shooting.[122] The Fifth and Ninth Circuits determined that the *Tinker* exception applies to off-campus speech without articulating a test.[123]

Courts themselves acknowledge their precedent is in disarray. In *Longoria v. San Benito Independent Consolidated School District*, the Fifth Circuit recognized the flawed precedent that applied the *Tinker* exception on a case-by-case basis.[124] The court stated that cases in the Fifth Circuit "fail[] to clarify the law governing school officials' actions in disciplining off-campus speech" and send "inconsistent signals with regard to how far school authority to regulate student speech reaches beyond the confines of the campus."[125] This approach lacks any clear limitations of school officials' authority to regulate off-campus speech.[126] Moreover, the nature of the internet makes it difficult to determine when a student's speech on social media is specifically directed towards the school community.[127] Since the Fifth Circuit precedent did not provide sufficient guidance, the court decided the case on the theory of qualified immunity.[128]

Determining if the *Tinker* exception applies on a case-by-case basis without a test ignores that "courts must pursue ex ante clarity not for clarity's own sake, but to avoid chilling potential speech and to give government officials notice of the constitutional boundaries they may not cross."[129] Under a case-by-case determination, students cannot predict when the First Amendment protects their speech and school officials cannot know when they can

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122. Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1065, 1069 (9th Cir. 2013).

123. *See Bell*, 799 F.3d at 394; *see also* Longoria v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267–68 (5th Cir. 2019); *see also Wynar*, 728 F.3d at 1069.

124. *Longoria*, 942 F.3d at 267–68.

125. *Id.*

126. *See supra* note 96 for comparison to the commerce clause, another legal "test" with seemingly no limitations.

127. *See Longoria*, 942 F.3d at 269–70.

128. *See id.* at 270.

129. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 188 (3d Cir. 2020).

punish a student for off-campus speech. Imagine a situation where two students film and post a TikTok video entirely off-campus. The content of the video does not violate any school policies, so the students assume that school officials cannot punish them for posting the video. But under the case-by-case determination, if the TikTok video causes a material and substantial disruption at school, it is entirely possible school officials could lawfully punish one student but not the other. A test without clear guidelines can lead to unchecked rampant discrimination and free speech suppression.

Circuit courts that use these three approaches expand the *Tinker* exception beyond what the Supreme Court originally intended in *Tinker*. Under each of the three approaches, school officials can too easily justify reaching into students' homes to regulate off-campus speech. Circuit courts that use the reasonably foreseeable test and the nexus test have created a mere "speed bump" for school officials to overcome when punishing off-campus student speech. The reasonably foreseeable test is essentially a rational basis test.[130] The low bar for what constitutes "substantial" and "material" disruption of the school environment, combined with the ease with which student speech may disrupt or interfere with school activities, has led lower courts to allow school officials to restrict speech under *Tinker* with "relatively minimal showings of interference."[131] Thus, as students get farther and farther away from the "schoolhouse gate" to an exceedingly virtual space, the standard of review must be higher to protect students' First Amendment rights. The Supreme Court has indicated that there are features about the off-campus environment that require a high level of scrutiny,[132] but the current circuit court tests have not lent themselves to increased protections for students nor predictability.[133]

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130. *See* S.J.W. v. Lee's Summit R–7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012) (allowing schools to punish off-campus student speech that substantially disrupts the school environment and students can reasonably foresee that their speech reaching school officials); *see also* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 571–73 (4th Cir. 2011) (upholding the punishment of a student who created a Myspace page ridiculing students because there was a nexus between the student's speech and "the high school's legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.").

131. Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1299–300 (2008).

132. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

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

IV. A RULE WHERE *TINKER* DOES NOT APPLY TO OFF-CAMPUS SPEECH THAT THE FIRST AMENDMENT CLEARLY PROTECTS OUTSIDE THE SCHOOL CONTEXT RESOLVES UNCLEAR STUDENT SPEECH LAW.

In light of the Supreme Court failing to state a rule in *Mahanoy* and the current circuit rules being ineffective, unclear, and in violation of students' constitutional rights, courts should hold that the *Tinker* exception does not apply to off-campus speech that the First Amendment clearly protects outside the school context. This rule will provide a clear and predictable test for students and school officials alike. To hold that a student's speech is protected under the First Amendment, courts simply have to determine that the speech was: (1) off-campus, and (2) did not fall into an exception to the First Amendment. Such a rule would modernize the *Tinker* exception for the digital age.

A. Off-Campus Determination

The *Tinker* exception focuses on the student's choice to make a disruption *at school*.[134] The Court's rationale for this exception does not apply to the off-campus environment because a student has little control over how their speech, while made off-campus, affects the school environment.[135]

The accessible nature of the internet means that students can access any social media post anywhere, thus blurring the line between on-campus and off-campus. For example, students have no control over if someone who follows their private social media account screenshots their social media posts or private messages without the student's consent nor knowledge and then shares the screenshot with school officials. However, just because a student's speech "involves [a] school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment" does not mean that the speech is on-campus.[136] "It is the off-campus statement itself that is not subject to *Tinker*'s narrow recognition of school authority."[137] Meaning, the only relevant information is whether the student originally spoke on- or off-campus.

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134. *See* id. at 189.

135. *Id.* at 188.

136. *Id.* at 180.

137. *Id.* at 190.

Off-campus speech occurs when a student speaks "outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[138] For example, school officials can punish students for comments said in Zoom classes or Snapchats posted while on a physical campus or during a school field trip. But if students make the same comments at a coffee shop across the street from the school, post on Snapchat at home on their personal device, or write an editorial for the city's newspaper, those circumstances are off-campus.[139] If the speech occurs off-campus, school officials cannot punish students unless an exception to the First Amendment applies.[140] Thus, to determine if the *Tinker* exception applies, the threshold consideration is whether the student spoke off-campus in a manner traditionally protected by the First Amendment.

B. First Amendment Exceptions

Traditional exceptions to First Amendment law already permit school officials to punish students for off-campus speech that threatens violence or harasses others.[141] Whether in or outside the school context, the government may address and punish fighting words;[142] true threats;[143] false statements, such as fraud or defamation;[144] expressions that incite others;[145] obscenity;[146]

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138. *Id.* at 189.

139. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) (school could not punish the student if he had delivered the same vulgar speech outside the school environment merely because the school officials considered his language to be inappropriate).

140. *See infra* notes 141–49 for examples of when speech is not protected by the First Amendment.

141. *B.L.*, 964 F.3d at 190.

142. Virginia v. Black, 538 U.S. 343, 359 (2003) (fighting words are not protected speech).

143. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (a state may punish words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

144. United States v. Alvarez, 567 U.S. 709, 719 (2012) (false statements, such as fraud or defamation, are not perforce unprotected).

145. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (incitement is not protected speech).

146. Miller v. California, 413 U.S. 15, 18 (1973) (obscenity is not protected speech).

commercial speech;[147] child pornography;[148] and speech integral to criminal conduct.[149]

For example, a circuit court held that a school official punishing a student for writing a threatening letter was constitutional under the "true threats" doctrine.[150] Theoretically, school officials could also punish a student under the "true threats" doctrine if the student posted a video on TikTok threatening another student. Furthermore, forty-four states have criminal sanctions for cyberbullying, forty-nine states have laws that require schools to have anti-bullying policies, and forty-five states have laws that require schools to sanction students for cyberbullying.[151] Therefore, school officials could likely still punish a student for posting a TikTok that bullied another student but did not rise to the level of a threat. While holding that the *Tinker* exception does not apply to off-campus speech that the First Amendment protects "leaves some vulgar, crude, or offensive speech beyond the power of schools to regulate," it is exactly this sort of "hazardous freedom" that is the foundation of our national strength, democratic beliefs, and societal independence.[152]

Lower courts holding that the *Tinker* exception does not apply to off-campus speech that the First Amendment and state law protects does not run afoul to *Mahanoy*. Namely because the Supreme Court did not consider such a holding.[153] The Court disagreed with the Third Circuit's holding that the *Tinker* exception does not apply to off-campus speech because of the special

147. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) (the government can regulate commercial speech).

148. New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography is not protected speech).

149. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (holding that the First Amendment affords no protection to speech "used as an integral part of conduct in violation of a valid criminal statute.").

150. Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 619, 621–27 (8th Cir. 2002).

151. Joseph Johnson, *Number of U.S. States with State Cyber Bullying Laws as of November 2018, by Policy*, STATISTA (Jan. 25, 2021), https://www.statista.com/statistics/291082/us-states-with-state-cyber-bullying-laws-policy/ [https://archive.is/kFhor]; *see, e.g.* CAL. EDUC. CODE §§ 234(b), 32261(d).

152. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 191 (3d Cir. 2020) (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 508–09 (1969)).

153. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021).

circumstances that give schools additional license to regulate student speech, such as bullying, harassing, or threatening other students or teachers; "participation in . . . online school activities; and breaches of school security devices."[154] However, the Court did not consider that the Third Circuit clearly stated its holding only applies to off-campus student speech that the First Amendment protects outside the school context.[155] As discussed, school officials can punish students for off-campus speech that bullies, harasses, or threatens others if it falls under an exception to the First Amendment.[156]

Any concerns related to online learning or devices are moot because those circumstances would likely be considered "on-campus" and thus, subject to the *Tinker* exception. As to concerns about students breaching school security devices, it is a federal crime to access a protected computer without consent with an intent to cause harm or commit fraud.[157] Therefore, the special circumstances of the school environment that concerned the Court are still recognized under traditional exceptions to the First Amendment.

C. The Expedited Need for a Clear Test with the COVID-19 Pandemic

Prior to the COVID-19 pandemic, there was already a rise in the use of technology in students' everyday lives and the classroom.[158] According to a 2019 Gallup poll, about two thirds of surveyed teachers use digital learning tools every day in their classrooms.[159] During the COVID-19 pandemic, many students transitioned to entirely online classes. By June 2020, "97% of college students [had] switched to online instruction."[160] A February

154. *Id.*

155. *B.L.*, 964 F.3d at 189.

156. See *supra* notes 141–49 (explaining the different types of unprotected speech).

157. 18 U.S.C. § 1030(a)(4).

158. *See B.L.*, 964 F.3d at 179.

159. Gallup, EDUCATION TECHNOLOGY USE IN SCHOOLS 6 (2019), https://www.newschools.org/wp-content/uploads/2020/03/Gallup-Ed-Tech-Use-in-Schools-2.pdf [https://perma.cc/5NXV-7YT8].

160. *Online Education Statistics*, EDUCATIONDATA (June 2020), https://educationdata.org/online-education-statistics [https://perma.cc/QM8A-ZJTY].

2021 survey revealed that 70% of K-12 students were either learning remote or hybrid.[161]

The COVID-19 pandemic radically changed the concept of traditional education. There is a growing preference for online courses, the use of more digital materials, and the inclusion of more technology for in-person classes for students and faculty.[162] For example, in a 2021 survey, 53% of college faculty indicated they would like to teach courses in a fully online format post-pandemic.[163] The transition to online learning blurs the line between on- and off-campus, and thus will trigger new cases where circuit courts must decide if the *Tinker* exception applies.

Accordingly, students need clear guidelines about when schools can punish them for something they post online. Social media is a large part of a student's day. Almost six in ten teens use social media daily and spend an average of two hours a day on social media.[164] Teens will likely not understand the complexities of the current circuit tests, especially when courts themselves are not confident with how the tests apply.[165] Students misunderstanding when their off-campus speech is subjected to school punishment could be a costly mistake. It could result in a disciplinary action that tarnishes their academic record and prevents them from receiving scholarships or getting into colleges.[166] Parents—not school officials—should be the ones

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161. *NPR/Ipsos Poll: Parents' Views on Return to Classroom*, IPSOS (2021), https://www.ipsos.com/sites/default/files/ct/news/documents/2021-03/topline_npr_parents_poll_03052021.pdf [https://perma.cc/AL9X-5CSX].

162. *See* JEFF SEAMAN & NICOLE JOHNSON, PANDEMIC-ERA REPORT CARD 13 (2021), https://cengage.widen.net/view/pdf/sq4wmggt6e/pandemic-era-report-card.pdf?t.download=true&u=rhkluf [https://perma.cc/TJV5-GLVE].

163. *Id.* at 19.

164. COMMON SENSE [VICKY RIDEOUT], THE COMMON SENSE CENSUS: MEDIA USE BY TWEENS AND TEENS 39 (Seeta Pai, ed., 2015), https://www.commonsensemedia.org/sites/default/files/uploads/research/census_researchreport.pdf [https://perma.cc/A64P-CU29].

165. *See* Longoria v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267–68 (5th Cir. 2019).

166. Sarah Shapiro, *How Discipline Policies Can Hold Students Back from College*, REAL CLEAR EDUC. (Jan. 5, 2018), https://www.realcleareducation.com/articles/2018/01/05/how_discipline_policies_can_hold_students_back_from_college.html [https://perma.cc/H52E-7RG7]. For undergraduate students in public colleges, such disciplinary action could even prevent the student from being admitted into their state's bar. OFFICE OF ADMISSIONS, THE ST. BAR OF CAL., FREQUENTLY ASKED QUESTIONS: MORAL CHARACTER DETERMINATIONS 6 (Oct. 15, 2020),

who punish their children for something the student posts on their private social media account outside of school. Accordingly, the bright-line rule that school officials cannot punish students for off-campus speech unless an exception to the First Amendment applies is a much more appropriate and easily understood test.

Lower courts should hold that the *Tinker* exception does not apply to off-campus speech that is protected by the First Amendment to prevent school officials from reaching into students' homes and controlling their actions as if they were on-campus.[167] A rule that the *Tinker* exception does not apply to off-campus student speech unless it falls within an exception to the First Amendment allows First Amendment law to meet the rapidly evolving challenges that accompany a rise in student use of technology. Lower courts can adopt this rule without contradicting *Mahanoy*. After more than fifty years of lower court confusion since *Tinker*, this rule finally affords clarity to students and school officials.

V. CONCLUSION

The increase in reliance on technology with schools incorporating online learning creates more opportunities for school officials to punish students' off-campus speech. The three different circuit court approaches easily allow school officials to expand the schoolhouse gate well beyond what the Court intended in *Tinker*. School officials can manipulate the threshold for what is "reasonably foreseeable" or a "sufficient nexus" in an online school environment to regulate off-campus student speech under the *Tinker* exception. The current circuit court tests also create uncertainty about when the First Amendment protects student speech. Schools that incorrectly believe that a student's speech is within the *Tinker* exception could violate students' fundamental constitutional rights and face a costly lawsuit.

Since the Supreme Court declined to create a new rule in *Mahanoy*,[168] the onus is on lower courts to decide how to best protect students' rights in a digital age. Lower courts should adopt a test focusing on where the student speech occurred, and whether the speech falls into an exception to the First

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http://www.calbar.ca.gov/Portals/0/documents/admissions/moralCharacter/Moral-Character-FAQ.pdf [https://perma.cc/V4PP-XVL8].

167. *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011).

168. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021).

Amendment. This is a clear and predictable test, which does not contradict *Mahanoy*.