NOTE

"F*CK SCHOOL"? RECONCEPTUALIZING STUDENT SPEECH RIGHTS IN THE DIGITAL AGE

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INTRODUCTION

It is well established law in the United States that students in K-12 public schools do not shed their First Amendment right to freedom of speech "at the schoolhouse gate."[1] This well-established law, the holding of *Tinker*, is a forceful defense of students as "persons" with fundamental rights.[2] Yet, the schoolhouse gates no longer exist in the way that the *Tinker* Court imagined. With the advent of online-learning, students can participate in public school and its associated activities across time and space. What is less established, and arguably not established at all, is what happens to student speech rights when the iconic schoolhouse gate is a shiny glass computer screen.

When the case *Mahanoy Area School District v. B.L.*[3] was granted certiorari, the Supreme Court had the opportunity to confront the question of where to draw the modern schoolhouse gate—a question that has been confounding educators and splitting the federal circuit courts. The Court declined.[4] Instead, *Mahanoy* is a narrow decision, holding merely that the First Amendment likely does not *prohibit* the regulation of off-campus speech.[5] The Court has never previously considered "true off-premises student speech."[6] Therefore, the Court has never definitively stated whether, and to what extent, the First Amendment *permits* the regulation of off-campus speech.

Curiously, though the pandemic has forced a nationwide shift to online distance learning,[7] and *Mahanoy* itself is a result of speech made through Snapchat,[8] the opinion makes minimal references to technology. The Court does not seriously engage with the line-drawing problem of the on- and off-campus divide when students are engaged in online distance learn-

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

2 *Id.* at 511 (internal quotations omitted).

3 Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy (*Mahanoy II*), 141 S. Ct. 2038, 2042 (2021).

4 *Id.* at 2045.

5 *See id.* (noting that "the special characteristics that give schools additional license to regulate student speech" do not necessarily disappear when student speech occurs off campus, but declining to actually decide "whether or how [First Amendment protections] must give way off campus.").

6 *Id.* at 2048, 2048 n.1 (Alito, J., concurring) (providing a survey of school speech jurisprudence to illustrate that the Court has only ever dealt with on-campus speech).

7 Benjamin Herold, *The Scramble to Move America's Schools Online*, EDUCATIONWEEK (Mar. 27, 2020), https://www.edweek.org/technology/the-scramble-to-move-americas-schools-online/2020/03 [https://perma.cc/Q5RP-2CJ8].

8 *Mahanoy II*, 141 S. Ct. 2038, 2042 (2021).

ing. However, for better or for worse, online distance learning is here to stay.[9]

This Note will examine the impact that the nationwide shift to online distance learning due to the pandemic has had on K-12 public school students' First Amendment speech rights. I will begin with the four foundational Supreme Court cases about on-campus student speech. Next, I will briefly examine the federal circuit split regarding off-campus student speech. Finally, I will examine *Mahanoy* itself, both in the Supreme Court and the lower courts.

After laying this foundation, I will discuss how online distance learning complicates the theoretical framework of the on- and off-campus divide that the federal circuit courts have created and that the Supreme Court has not disturbed. I will discuss online learning during the pandemic and provide hypotheticals to illustrate the challenge of drawing a strict line between activity that occurs on-campus, as opposed to off-campus, when the classroom is a child's bedroom or other location in the home. I will also briefly discuss cyberbullying, a public health crisis[10] that affects one in six high school students per year,[11] and note that *Tinker* is likely not the correct vehicle to address this crisis.

I concede that in the brave new world of nationwide online education, the on- and off-campus framework has become challenging to define. Nevertheless, I argue that courts must commit to rigorously separating on- and off-campus speech. *Tinker* is the best existing defense of student speech rights. To remain faithful to the precedent of *Tinker*, and the underlying message that schools are not meant to be totalitarian, surveillance chambers, I argue that courts must only regulate speech that occurs on-campus, based on the modern understanding of what it means to be on-campus. Once the modern schoolhouse

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9 *E.g.*, Hunter McEachern, *Oklahoma City Public Schools Announces Built-in Remote Learning Days Ahead of 2021-2022 School Year*, KFOR (July 30, 2021), https://kfor.com/news/local/oklahoma-city-public-schools-announces-built-in-remote-learning-days-ahead-of-2021-2022-school-year/ [https://perma.cc/6ZMK-C78Q] (describing a public school system that has included seven days of online distance learning in its traditional school year).

10 *See* Elizabeth Wolfe and Saeed Ahmed, *A New Anti-Cyberbullying Campaign Sends Participants Messages Inspired by Ones Sent to Real Victims*, CNN (Oct. 17, 2019), https://www.cnn.com/2019/10/17/health/anti-bullying-psa-monica-lewinsky-epidemic-video-wellness-trnd/index.html [https://perma.cc/9FM2-URQL] (classifying cyberbullying as a public health crisis, not an epidemic).

11 *Preventing Bullying*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 21, 2021), https://www.cdc.gov/violenceprevention/youthviolence/bullyingresearch/fastfact.html [https://perma.cc/79F5-PD3T].

gates have been located, off-campus speech must not be touched by school officials.

The pandemic has forced us, as a society, to reckon with many different logical cracks. Schooling has been a source of stress and difficulty for students and their families just as much as it has been for faculty and administrators. However, schoolchildren should not suffer a permanent abridgment of their rights due to this pandemic and its aftermath. If public school is to remain a place of open, accessible education, then students must be generally free to express themselves, to the extent that the First Amendment allows, without fear of discipline.

I
LEGAL FRAMEWORK

A. Overview

1. *Student Speech in the Supreme Court*

Any analysis of student speech jurisprudence must begin with the foundational case *Tinker v. Des Moines Independent Community School District*.[12] In *Tinker*, the Court held that student speech could not be prohibited or disciplined by school officials unless the speech was substantially disruptive to the schooling environment.[13] This rule applies to students during "the authorized hours" of the school day, whether in the classroom, at lunch, or outdoors for recreation.[14] While the holding in *Tinker* is relatively straightforward, the importance and significance of *Tinker* cannot be overstated: to date, *Tinker* remains the seminal case in student speech jurisprudence.[15]

After *Tinker*, before *Mahanoy*, the Court dealt with student speech three more times. Each time the Court somewhat tempered the broad freedom it had afforded to students—holding that that school officials may prohibit and limit student speech

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12 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 503 (1969).

13 *Id.* at 513.

14 *Id.* at 512–13.

15 *See, e.g.*, B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist. (*Mahanoy I*), 964 F.3d 170, 186 (3d Cir. 2020), *aff'd*, 141 S.Ct. 2038 (2021) (providing a survey of how each federal circuit has interpreted student speech through *Tinker*).

that is "vulgar and offensive,"[16] school-sponsored,[17] or promoting illegal drug use.[18]

In the latter of these cases, *Morse v. Frederick*, the Court had the opportunity to address off-campus speech but declined to do so in an inventive way: by expanding the territory of the school.[19] The Court rejected the argument that the student's speech occurred off-campus, even though the student was, in a literal sense, not on the school campus.[20] This work of legal fiction set the groundwork for the modern understanding of what it means to be on-campus, so it merits a brief exploration of the facts.

On the day of the incident in *Morse*, many students in Juneau, Alaska had been released from school so that they could watch an Olympic ceremony in their city.[21] Frederick, a high school senior, stood on the sidewalk across from the school to watch the ceremony.[22] Knowing that the ceremony would be televised, Frederick prepared a banner with a nonsensical, possibly sacrilegious reference to marijuana to show to the cameras: Bong Hits 4 Jesus.[23] Shortly after Frederick revealed the banner, the school principal crossed the street, confiscated the banner, and disciplined Frederick.[24]

When the case reached the Supreme Court, the Court immediately rejected the argument that this case was not a school speech case.[25] Even though Frederick was not on school grounds, the Court reasoned that the incident occurred during school hours, during an approved social event.[26] Frederick stood in a group of students and "directed his banner toward the school, making it plainly visible to most students."[27] Therefore, though he was physically off-campus, the Court located Frederick and his speech on-campus.[28] By extending the schoolhouse gates, the Court temporarily avoided expanding

16 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).
17 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–73 (1988) (holding that student speech within a school newspaper was subject to heightened control by school officials).
18 Morse v. Frederick, 551 U.S. 393, 409 (2007).
19 *Id.* at 400–01.
20 *Id.*
21 Frederick v. Morse, 439 F.3d 1114, 1115 (9th Cir. 2006), *rev'd*, 551 U.S. 393.
22 *Id.*
23 *Id.*
24 *Id.*
25 *Morse*, 551 U.S. at 400.
26 *Id.*
27 *Id.* at 401.
28 *Id.*

Tinker, but provided room for a circuit split regarding on- and off-campus jurisprudence.

2. *Student Speech in the Federal Courts*

Though the Supreme Court has consistently declined to speak on the extent to which school officials may regulate student speech that takes place off-campus,[29] six federal circuit courts have dealt with this issue.[30] With no guidance aside from *Tinker* and its progeny, the federal circuit courts have developed various approaches to regulation of student speech. I will briefly discuss each circuit that has dealt with this issue to illustrate how on- and off-campus jurisprudence has developed.

B. The Reasonable Foreseeability Circuits

1. *The Eighth Circuit*

As the circuit that originally dealt with *Tinker*, before the case was appealed to the Supreme Court, the Eighth Circuit was one of the first to deal with issues of student speech. The Eighth Circuit developed its off-campus jurisprudence through cases that contained violent off-campus behavior that ultimately touched the school environment.[31] In response, the Eighth Circuit developed a foreseeability approach to off-campus speech.[32] School officials may regulate off-campus speech that could reasonably be expected to reach and impact the school environment.[33] Presciently, the Eighth Circuit noted that the location of student speech, either on- or off-campus, is less important than whether the speech was aimed at the school environment.[34]

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29 The Court even declined to speak on the matter in *Mahanoy II*. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy (*Mahanoy II*), 141 S. Ct. 2038, 2045 ("[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and *whether* or *how* ordinary First Amendment standards must give way off campus . . . ." (emphasis added)).

30 The Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits have dealt with off-campus speech.

31 *See* Doe *ex rel.* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 619 (8th Cir. 2002) (a male student wrote a letter describing brutal and graphic violence about a female classmate); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 756 (8th Cir. 2011) (a student sent instant messages to classmates about getting a gun and shooting other students).

32 S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012).

33 *Id.*

34 *Id.*

2. *The Second Circuit*

One decade after *Tinker*, the Second Circuit acknowledged that a case could arise where a student might incite disruption off-campus.[35] However, it was not until three decades later that the circuit formulated a standard for how to assess off-campus speech.[36]

Similar to the Eighth Circuit, the Second Circuit held that a student's off-campus speech may be regulated based on a foreseeability approach.[37] School officials may discipline speech if it is reasonably foreseeable that the speech will create a substantial risk of disruption within the school environment.[38] The court reached this conclusion based on the *Morse* Court's interpretation of *Tinker*,[39] the wise prevision of *Thomas*,[40] and decisions from fellow circuits.[41] The Second Circuit maintains a foreseeability approach, but subsequently added that school officials must only regulate student speech that is a legitimate concern to the school environment.[42]

C. The Sufficient Nexus Circuits

1. *The Fourth Circuit*

The Fourth Circuit has held that school officials may regulate off-campus speech if the speech has a "sufficient nexus" with the school and its pedagogical interests.[43] This "sufficient nexus" language is similar to the reasonable foreseeability test of the Second and Eighth Circuits, but the Fourth Circuit test is broader, because the speech must only touch the school and

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35 Thomas *ex rel.* Tiedeman v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979).

36 Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007).

37 *Id.*

38 *Id.*

39 *Id.* at 38 (stating that the *Morse* Court formulated *Tinker*'s holding as: "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'").

40 *Thomas*, 607 F.2d at 1052 n.17.

41 The Second Circuit relied upon subsequently questioned decisions from the Eighth Circuit, the Fifth Circuit, and a Pennsylvania trial court. *See Wisniewski*, 494 F.3d at 38–39 (citing Doe *ex rel.* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 625–27 (8th Cir. 2002); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1075–77 (5th Cir. 1973); J.S. *ex rel.* H.S. & I.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 418–22 (Pa. Commw. Ct. 2000)).

42 Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008).

43 Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573–74, 577 (4th Cir. 2011).

its interests to permit regulation.[44] A sufficient nexus is clearly satisfied when student speech would foreseeably disrupt the school environment,[45] but disruption is not a requirement.[46] To combat some of the sweeping authority given to school administrators through the "sufficient nexus" test, the Fourth Circuit also requires that school officials act in good faith when regulating off-campus student speech.[47]

2. *The Ninth Circuit*

The Ninth Circuit has dealt with off-campus speech extensively, compared to the other federal circuits, in three high-profile cases.[48] The Ninth Circuit reached the same conclusion as its sister circuits: that while students have greater freedom of speech off-campus, as opposed to on-campus, the right to free off-campus speech is not absolute.[49] To determine whether school officials may regulate off-campus speech, the Ninth Circuit adopted a "sufficient nexus" framework similar to the Fourth Circuit, but also developed a test to aid in the "sufficient nexus" determination.[50] Within this test, the relevant considerations are: "(1) the degree and likelihood of harm to the school;"[51] "(2) whether it was reasonably foreseeable that the speech would reach and impact the school;"[52] and "(3) the relation between the content and context of the speech and the school."[53] The Ninth Circuit has also carved out an exception for violence, stating that there is always a sufficient nexus when school officials reasonably conclude that student speech indicates a "credible, identifiable threat of school violence."[54]

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44 *See id.* at 574 (noting that the student's speech reached the school through the internet, making it actionable).

45 *Id.* at 573–74.

46 *See id.* at 573 (reasoning that a school may be justified in regulating any student speech that implicates its pedagogical interests).

47 *Id.* at 577.

48 The cases are: McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700 (9th Cir. 2019); C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016); Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062 (9th Cir. 2013).

49 *McNeil*, 918 F.3d at 706.

50 *Id.* at 707. The court crafts its test using Fourth and Ninth Circuit precedent. *See id.* (citing *Wynar* and *Kowalski*).

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* at 708.

D. The No-Rule Circuit

1. *The Fifth Circuit*

The Fifth Circuit is unique among the circuits that have decided student speech cases, because this circuit has explicitly declined to adopt any rule at all for regulation of off-campus student speech.[55] Instead, the circuit has decided "only to sketch guidelines" to provide guidance for students and school officials.[56] It matters if a student speaker's intention is to reach the school environment.[57] It also matters if the speaker has taken actions to make the speech reach the school environment.[58] Ultimately, the Fifth Circuit has held that school officials may regulate off-campus speech, but may only do so when the speech is directed at the school environment and is intentionally threatening, intimidating, or harassing.[59] While the circuit has rejected any rigid rules, the circuit has also specifically rejected a sharp on- and off-campus divide, noting that physical property lines are not a useful boundary because of the Internet.[60]

E. The Lone Wolf

1. *The Third Circuit*

In the most recent, and most dramatic, circuit court approach to student speech rights, the Third Circuit held that off-campus student speech is fully protected by the First Amendment.[61] In other words, school officials may not regulate or discipline off-campus student speech *at all* if that speech is protected under ordinary First Amendment standards.[62] This

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55 Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015). ("[I]n holding Tinker applies to the off-campus speech in this instance, 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.").

56 *Id.* at 394 (quoting Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 974 (5th Cir. 1972)).

57 *Id.* at 395.

58 *Id.*

59 *Id.* at 396.

60 *Id.* at 395–96 ("The pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction advocated by [the student], 'making any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.'") (quoting Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 220–21 (3d. Cir. 2011) (Jordan, J., concurring)).

61 B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist. (*Mahanoy I*), 964 F.3d 170, 192 (3d Cir. 2020), *aff'd*, 141 S.Ct. 2038 (2021).

62 *Id.*

case, *Mahanoy*, was decided by the Supreme Court in June 2021.[63]

F. *B.L. v. Mahanoy Area School District*

1. *In the Third Circuit*

In *Mahanoy*, a student became upset when she learned that she did not make her high school's varsity cheerleading team.[64] She took her frustrations to the social media platform Snapchat.[65] Over the weekend, in a local convenience store called the Cocoa Hut,[66] the student posted a picture of herself with her middle finger raised and the caption: "Fuck school fuck softball fuck cheer fuck everything."[67]

The picture was only visible to approximately two hundred and fifty "friends" on the student's Snapchat account; many, but not all of these "friends" were fellow students at her high school.[68] The student made no attempt to share her picture with more people.[69] However, as is common on the internet, the speech spread anyway. One of the student's teammates took a screenshot of the picture and showed it to the school cheerleading coaches.[70] The coaches testified that several students approached them to express that the picture and caption were inappropriate.[71] As a result of a picture on Snapchat, posted from a convenience store, the student was removed from the junior varsity cheerleading team.[72]

After several unsuccessful appeals to various school officials,[73] the student sued the school district for violating her

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

64 *Mahanoy I*, 964 F.3d at 175.

65 *Id.*

66 *Mahanoy II*, 141 S. Ct. at 2043.

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

68 *Id.*

69 *See id.* (describing how the student merely posted the picture to Snapchat).

70 *Id.* The Court did not discuss whether it matters that the student's speech only reached the coaches because another student took a screenshot of the speech. Perhaps this fact is irrelevant to the analysis. However, some commentators have advocated for a different analysis for student speech that is brought on to campus by another student. *See* Tracy L. Adamovich, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student*, 82 ST. JOHN'S L. REV 1087, 1090 (2008) (arguing that when a student's speech is off-campus, but another student brings it on-campus, the courts should use a balancing test analogous to public employee First Amendment claims).

71 *Mahanoy I*, 964 F.3d at 175–76.

72 *Id.* at 176.

73 *Id.* ("[The student] and her parents appealed that decision to the athletic director, school principal, district superintendent, and school board.").

First Amendment right to speech.[74] The student was successful at the district court level; the court granted summary judgment in her favor because her speech occurred off-campus[75] and because it had not caused any "actual or foreseeable substantial disruption."[76] The court made a point to recognize that whether *Tinker* applies to off-campus speech is still undecided.[77]

On appeal, the circuit court also found in the student's favor, but took a much stronger approach. First, the court established that the student's social media post was off-campus speech.[78] The on- and off-campus divide cannot be solved by looking to "the bricks and mortar surrounding the school yard,"[79] the court reasoned, but rather, the school context.[80] The student created her post over the weekend, away from the literal school campus, and away from any school-affiliated websites or forums.[81] For these reasons, the court "easily" concluded that her speech occurred off-campus.[82]

After concluding that the student's speech occurred off-campus, the Third Circuit reached its most explosive holding: that *Tinker* "does not apply to off-campus speech" whatsoever.[83] Likely aware that this opinion would generate a great deal of debate and scrutiny, the court discusses and considers the other circuits' approaches at length.[84] Ultimately, the Third Circuit decides that it must break from their approaches for three reasons: that the other approaches have produced rules that are "untethered" from their original contexts;[85] that

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74 *Id.*

75 *Id.* (noting that the court relied upon Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)).

76 *Id.* (noting that the court relied upon Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

77 B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 444 (M.D. Pa 2019) *aff'd*, 141 S.Ct. 2038 (2021).

78 *Mahanoy I*, 964 F.3d at 178.

79 *Id.* (quoting Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d. Cir 2011) (en banc)).

80 *Id.* at 180.

81 *Id.* at 180–81.

82 *Id.*

83 *Id.* at 186.

84 *Id.* at 186–89.

85 *Id.* at 187. The court compares Second Circuit cases *Wisniewski v. Bd. of Ed.*, 494 F.3d 34 (2d Cir. 2007) and *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), to illustrate its point. *Id.* In *Wisniewski*, the student created an emoticon depicting the violent murder of a teacher. *Id.* Here, the Third Circuit agrees that the Second Circuit appropriately applied *Tinker* because of the disruptiveness of a threat of violence. *Id.* However, in *Doninger*, there was no violence whatsoever. *Id.* The Third Circuit states that the Second Circuit unreasonably broadened the

the other circuits' approaches give school officials too much authority;[86] and that the other approaches do not provide clarity and predictability.[87]

Instead of relying upon the reasoning from any of its sister circuits, the Third Circuit notes that it has always held that off-campus student speech should be entitled to the same protection as adult speech under the First Amendment.[88] The Third Circuit points out that *Tinker*'s insistence on regulating disruptive speech makes sense within the "captive audience" of a school.[89] However, the effect that a student's off-campus speech will have on the school environment depends entirely upon other people's choices and reactions, rather than the speech itself.[90] The court concludes that regardless of the ways in which technology has changed student speech, administrators must not be given the authority to suppress speech solely because they believe that it is "inappropriate, uncouth, or provocative."[91]

The standard that the Third Circuit ultimately outlines is that off-campus speech is any speech "outside school-owned, -operated, or -supervised channels" and speech "that is not reasonably interpreted as bearing the school's imprimatur."[92] In other words, if the speech does not appear through school channels, and is not reasonably school-sponsored, then the speech cannot be regulated by *Tinker*.[93] The Third Circuit makes clear that this test does not alter *Tinker*'s application to on-campus speech in any way.[94]

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purpose of the reasonable foreseeability test it had created by applying it to a nonviolent situation. *Id.*

86 *See Doninger*, 527 F.3d 41.

87 *Mahanoy I*, 964 F.3d at 188. The Third Circuit uses the Fifth Circuit's explicit refusal to adopt a rule as an example of an unclear circuit, but also takes issue with the Circuits that have created tests that would require students to predict the future.

88 *Id.* at 189; J.S. *ex rel.* Synder v. Blue Mountain Sch. Dist., 650 F.3d 915, 936 (3d Cir. 2011) (en banc) ("[T]he First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.").

89 *Mahanoy I*, 964 F.3d at 189 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986)).

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* The court notes that a potential criticism of this approach is what to do about off-campus speech that causes disruption within the school. *Id.* at 190. The court responds that school officials remain free to address any student who disruptively "shares or reacts to" off-campus speech. *Id.* The only speech that cannot be disciplined is the off-campus speech itself. *Id.*

94 *Id.*

One major gap in the court's test is what to do in the case of violent speech.[95] The court notes this gap, but points out that in the case at bar, it does not have to contend with threatening or harassing off-campus speech.[96] The court suggests that if and when such a case arises, those particular issues will need to be dealt with through "other lines of First Amendment law;" not *Tinker*.[97] Such a suggestion is not uncommon—before the broadening of *Tinker*, many circuits dealt with off-campus student speech through other lines of First Amendment law.[98]

Despite its own jurisdictional precedent, the Third Circuit acknowledges that its approach is a break from all the other circuit courts.[99] Ultimately, this deepening circuit split resulted in the Supreme Court taking its most recent foray into student speech rights.

2. *In the Supreme Court*

The Supreme Court's decision in *Mahanoy* could have brought an end to the circuit split, but the Court declined the invitation.[100] Instead, the Court provides a stunningly narrow holding: that *Tinker* does not forbid the punishment of off-campus speech.[101] While the Court notes that it disagrees with the reasoning of the Third Circuit, the judgment was ultimately affirmed.[102]

In dicta, the Court takes time to lay out three features of off-campus speech that distinguish it from on-campus speech—thus providing an insight into how the Court characterizes the difference between on- and off-campus. First, the

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95 *Id.*

96 *Id.*

97 *Id.*

98 *See, e.g.*, Doe *ex rel.* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 619 (8th Cir. 2002) (dealing with a student's off-campus threats of violence against another student through a First Amendment "true threat" analysis).

99 *Mahanoy I*, 964 F.3d at 188-89 ("[The other circuits'] approaches sweep in too much speech and distort *Tinker*'s narrow exception into a vast font of regulatory authority. We must forge our own path.").

100 Mahanoy Area Sch. Dist. v. B.L. (*Mahanoy II*), 141 S. Ct. 2038, 2045 (2021) (declining to set forth a "broad, highly general" rule).

101 *Id.* at 2040, 2045 (noting that "[t]he special characteristics that give schools additional license to regulate student speech" do not necessarily disappear when student speech occurs off-campus, but declining to actually decide "whether or how [First Amendment protections] give way off campus").

102 *Id.* at 2048 ("Although we do not agree with the reasoning of the Third Circuit's panel majority . . . we nonetheless agree that the school violated B.L.'s First Amendment rights.").

Court mentions parental rights.[103] The underlying rationale of why schools have the right to abridge student speech rights in the first place is because schools stand *in loco parentis* while students are in their care.[104] Second, the Court mentions that failure to distinguish between on- and off-campus speech could permit a school to discipline students for speech uttered throughout the full twenty-four-hour day.[105] If the school had such a broad reach, the school could theoretically prohibit students from engaging in a certain type of speech altogether—a proposition that clearly disturbs the Court.[106] Third, the school has an interest in protecting a student's unpopular speech.[107] Schools are "nurseries of democracy," according to the Court, and therefore have a strong interest in protecting a variety of ideas.[108]

In his concurrence, Justice Alito makes a point to clarify that the First Amendment permits public schools to regulate some student speech that does not occur "on school premises during the regular school day,"[109] but that school officials should "proceed cautiously" before disciplining off-campus speech.[110] Ultimately, though well-reasoned, the clarification does little more than recite the lesson from *Morse*.[111]

With minimal clarification from the Court about where to place the modern schoolhouse gates, the circuit courts will likely remain split until the Court takes up the issue again. However, the lack of reference to technology in *Mahanoy* de-

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103 *Id.* at 2046.

104 *Id.* Interestingly, this rationale is not located in the text of *Tinker*. The Court does not cite the exact source of the doctrine in its opinion. *Id.* However, in his concurrence, Justice Alito spends a considerable amount of time examining the theory of implied parental consent that permits a school to discipline a student in the first place. *Id.* at 2049–52 (Alito, J., concurring). Alito admits, however, that this reasoning has not been directly discussed or espoused by the Court. *See id.* at 2050 ("Our cases involving the regulation of student speech have not directly addressed this question [of why a person's status as a public school student abridges her First Amendment rights].").

105 *Id.* at 2046.

106 *Id.* ("[C]ourts 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.").

107 *Id.*

108 *Id.*

109 *Id.* at 2049 (Alito, J., concurring).

110 *Id.* at 2059 (Alito, J., concurring).

111 *See supra* notes 17–26 and accompanying text. The student in *Morse* was disciplined for speech made across the street from the school, while school was out for the day—by necessity, it must be permissible for public schools to discipline speech that does not literally occur on school premises. *See* Morse v. Frederick, 551 U.S. 393 (2007).

serves a second look.[112] Online distance learning has changed the way that the schoolchildren of America are educated and will likely persist, even when the pandemic is in the past.

II
THE PANDEMIC, DISTANCE LEARNING, AND A MODERN TEST

A. An Exploration of Online Distance Learning

According to the U.S. Census Bureau, almost 93% of households with school-age children engaged with distance learning during the COVID-19 pandemic.[113] In *Tinker* and *Mahanoy* terms, this statistic means that modern school-age children have been almost universally participating in some form of off-campus schooling.[114]

So, what exactly happens in these distance learning classrooms? The answer is: it depends.[115] There is a broader conversation to be had about the ways in which the pandemic has disproportionately affected certain groups of schoolchildren. Similarly, there is a broader conversation about the negative physical and mental effects of online learning on schoolchildren.[116] However, for the purposes of this Note, let us assume that the online distance learning experience is intended to be a

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112 *Mahanoy II*, 141 S. Ct. at 2045 (mentioning merely the "advent of computer-based learning").

113 Kevin Mcelrath, *Nearly 93% of Households With School-Age Children Report Some Form of Distance Learning During COVID-19*, UNITED STATES CENSUS BUREAU, https://www.census.gov/library/stories/2020/08/schooling-during-the-covid-19-pandemic.html [https://perma.cc/3K4D-FNEX].

114 *See id.* ("[The] closure of schools [is] forcing students to continue their education from home.").

115 *See, e.g.*, Amelia Nierenberg, *Students, Parents and Teachers Tell Their Stories of Remote Learning*, N.Y. TIMES (Oct. 14, 2020) https://www.nytimes.com/2020/10/14/education/learning/students-parents-teachers-remote-stories.html [https://perma.cc/V9MD-3K2Y] (a compilation of student and teacher experiences).

116 For further reading, see, e.g., Heather Kelly, *Kids Used to Love Screen Time. Then Schools Made Zoom Mandatory All Day Long*, WASH. POST (Sept. 4, 2020), https://www.washingtonpost.com/technology/2020/09/04/screentime-school-distance/ [https://perma.cc/2M7A-9BEJ] (noting that young children have been increasingly reporting medical problems like headaches and fatigue from being required to sit in front of a screen all day); Juliana Kim, *With Remote Learning, a 12-Year-Old Knows Her English is Slipping Away*, N.Y. TIMES (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/nyregion/coronavirus-english-language-students.html [https://perma.cc/7VEX-B2KV] (highlighting the difficulties that non-native English speakers face in online classes); Torrey Trust, *The 3 Biggest Remote Teaching Concerns We Need to Solve Now*, EDSURGE (Apr. 2, 2020), https://www.edsurge.com/news/2020-04-02-the-3-biggest-remote-teaching-concerns-we-need-to-solve-now [https://perma.cc/BN3R-JZKM] (discussing student concerns about privacy, accessibility, and access to technology).

replica of the traditional classroom model.[117] Under this model, each weekday, students must wake up in the morning, go to their classroom, and sit in that class for the rest of the school day.[118] Students have a break for lunch, but otherwise are not allowed to leave the class, eat unapproved snacks, or lie down in the middle of teaching.[119] All of these rules seem fairly standard in a normal classroom, but now the classroom is located in a student's home or other location outside of the schoolhouse, accessible only through a computer screen.

B. The On- And Off-Campus Divide

Because students take classes through a computer screen, while sitting somewhere outside of the schoolhouse, they cannot be thought to be on- or off-campus in the sense that the *Tinker* Court meant.[120] In fact, the iconic schoolhouse gates in *Tinker* are no longer physically located anywhere.[121] Instead, to determine whether speech occurs on-campus, the Court must determine whether schools control the location of the speech or sponsor the speech itself.[122] The Court and scholars have recognized for years that student speech cannot be regulated based on a geographic boundary due to the nature of electronic speech.[123] Yet, the schoolhouse gates must be

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117 As an example of this model, see Kelly, *supra* note 116.

118 *Id.*

119 *Id.*

120 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (referring to literal schoolhouse gates).

121 *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 401 (2007) (finding that the student was on-campus even though he was standing across the street from the school). One could theoretically argue that *Tinker* and its progeny apply solely to students who are physically on school grounds, even if the boundaries are stretched. Students participating in online distance learning would, then, never be on-campus. However, this view does not seem to hold weight in a post-*Mahanoy* world. *See* Mahanoy Area Sch. Dist. v. B.L. (*Mahanoy II*), 141 S. Ct. 2038, 2045 (2021) (mentioning "computer-based learning" as a particular concern in the on- and off-campus line-drawing problem). If the Court could easily dispose of the on- and off-campus divide through strictly geographical means, it would not spend time pondering what it means to be off-campus.

122 *See Mahanoy II*, 141 S. Ct. at 2045; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–73 (1988) (holding that student speech within a school newspaper was school-sponsored, so it could be regulated by administrators); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680, 685 (1986) (holding that student speech that occurred during a school assembly was on-campus, in part because it was a school-sponsored event).

123 *See, e.g.*, Elizabeth A. Shaver, *Denying Certiorari in Bell v. Itawamba County School Board: A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539, 1541 (2017); Reno v. ACLU, 521 U.S. 844, 851 (1997) ("[The Internet is] located in no particular geographical location . . . .").

placed *somewhere* if the on- and off-campus divide is to exist at all. While I do not claim to have the answers to questions that have confounded courts and scholars for decades, I will outline some considerations that should guide the line-drawing.

1. *A Hypothetical*

Consider the following scenario: a student is sitting at a desk in her bedroom, "in" her online classroom, with her camera and microphone turned on. Her state of being is arguably as engaged with a school-sponsored activity, through a school-sponsored forum,[124] as a student can be. Therefore, it must be set as the baseline for being on-campus. If the student is on-campus, her speech is subject to *Tinker* and its progeny. If the student says something substantially disruptive,[125] vulgar,[126] or promoting illegal drug use,[127] then she may be disciplined for her speech.

Now, the student's camera and microphone glitch and turn off. She has not moved. While the student is sitting in front of her computer screen, but is not visible or audible to her classmates or to her teacher, is she still on-campus? To some, the answer may intuitively be yes. The student has not moved a muscle, after all. But the difficulty is that the student is inside of her home, where courts have suggested that school administrators should not be able to reach.[128] Perhaps the student sitting at her desk, invisible and inaudible, could be analogized to a student in a hallway; such a student is not in class, but is still subject to regulation by virtue of being on-campus.[129] In that case, what happens if the student stands up? What if the student takes three steps away from her desk? At what stage is she definitively off-campus?

Reset our student. She is on-campus, in her chair with her camera and microphone on. She has just been called on by her English teacher, but she gave an incorrect answer and the whole class laughed. She is very upset. Imagine that she turns

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

125 *Id.* at 509.

126 *Fraser*, 478 U.S. at 683.

127 Morse v. Frederick, 551 U.S. 393, 403, 409 (2007).

128 *See, e.g.*, Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) ("It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.").

129 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (noting that the holding of the case is not confined merely to the classroom itself).

off her camera and microphone and walks outside of her room. Once she is in the hallway, she begins to a profanity-laden rant, screaming to her mother about how much she hates her teacher, her classmates, and the novel *Lord of the Flies*. The student has undoubtedly taken steps to ensure that her speech does not reach the school environment. But what if the teacher, disturbed by the student's reaction, turns the student's camera and microphone back on? What if the student's rant causes a real, substantial disruption of class? In most jurisdictions, the student could be disciplined for this behavior, even though *Tinker* has explicitly forbidden public schools from becoming "enclaves of totalitarianism" with "absolute authority over their students."[130] Should a student's constitutional rights within her own home be dependent on one single button? Or a more fundamental question: how can we remain true to *Tinker* while accounting for technological advances the *Tinker* Court never could have anticipated?

2. Formulating a New Test

The first step to formulating a modern, Internet-conscious test is to set the boundaries of what it means to be on- and off-campus. Of course, there are some scholars who advocate for eliminating the on- and off-campus divide altogether,[131] but as long as *Tinker* remains settled law, the line between on- and off-campus cannot be erased.

What is on-campus? As a *Tinker* baseline, a student is on-campus when she is physically on the school grounds, during authorized hours, participating in any school-sanctioned activity.[132] Following the logic of *Morse*, a student is also on-campus when she is close enough to school grounds to be

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130 *Id.* at 511. Another complication to this particular hypo is that in *Mahanoy*, the Court takes great pains to mention that the reason schools have the right to discipline in the first place is because schools stand in *loco parentis* while children attend. Mahanoy Area Sch. Dist. v. B.L. (*Mahanoy II*), 141 S. Ct. 2038, 2044-45 (2021). It would be absurd to claim that this underlying logic could support a teacher disciplining a student for talking to her own mother. However, an in-depth discussion of the school operating *in loco parentis* is outside the scope of this Note.

131 *E.g.*, Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 974 (2008) (arguing that, when evaluating discipline of technologically enabled speech, courts should completely reject the on- or off-campus dichotomy and solely consider speaker intention).

132 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969) (noting that a student's rights "do not embrace merely the classroom hours" but include "the cafeteria . . . the playing field . . . [and] the campus during the authorized hours").

reasonably considered within the premises, during authorized hours, participating in any school-sanctioned activity.[133] Therefore, during school hours, in any school-sanctioned activity, a student is on-campus if she is on or reasonably around the physical premises of the school. *Mahanoy* did not include any additional guidance to the meaning of "on-campus,"[134] so as far as Supreme Court jurisprudence is concerned, this is the complete standard for being on-campus.[135]

All of the circuits, including the Third Circuit,[136] have expanded the definition of on-campus to varying degrees.[137] Many circuits blur the lines between on- and off-campus.[138] In addition, virtually all commentators and scholars who have written on the matter advocate for blurring the line between on- and off-campus. Some arguments present innovative, hybrid tests for consideration.[139] Other arguments draw on outside areas of law, such as employment law, to suggest balancing tests.[140] Some scholars advocate focusing less on location and

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133 *See* Morse v. Frederick, 551 U.S. 393, 401 (2007) ("[The student] cannot 'stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.'"). I concede that there are many ways to formulate the holding of *Morse*. It is impossible to know whether the Court would have reached the same conclusion if any number of variables had been different (e.g., if the student had been many miles away from the physical school; if the event had occurred on the weekend; if the student had been alone). However, it is apparent that the student's physical proximity to the school grounds is a key fact that permitted the Court to assume that he was on campus.

134 *Mahanoy II*, 141 S. Ct. at 2045–46.

135 The other two cases within the *Tinker* line, *Fraser* and *Kuhlmeier*, do not alter this standard. The student speech in *Kuhlmeier* was published in a school-sponsored newspaper, leading the Court to hold that educators can exercise "editorial control over the style and content of student speech in school-sponsored expressive activities." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). The speech in *Fraser* was spoken at a mandatory assembly in the school. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).

136 The Third Circuit expands the definition of on-campus speech by focusing not solely on geography, but on "school-owned, -operated, or -supervised channels." B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist. (*Mahanoy I*), 964 F.3d 170, 189 (3d Cir. 2020) *aff'd*, 141 S.Ct. 2038 (2021).

137 *See supra* notes 27–57 and accompanying discussion.

138 *Id.*

139 *See, e.g.*, Scott Dranoff, *Tinker-ing with Speech Categories: Solving the Off-Campus Student Speech Problem with a Categorical Approach and a Comprehensive Framework*, 55 WM. & MARY L. REV. 649, 653 (2013) (arguing for a new framework to classify student speech, which would be only considered on-campus if: "(1) it actually takes place on campus; (2) it advocates on-campus action; or (3) a reasonable person would believe, given the circumstances, that the student intended for his speech to reach the school").

140 *See, e.g.*, Adamovich, *supra* note 70 at 1090 (arguing that when a student's speech is off-campus, but another student brings it on-campus, the courts should use a balancing test analogous to public employee First Amendment Claims); James M. Patrick, *The Civility-Police: The Rising Need to Balance Stu-*

more on speaker intention.[141] Some scholars advocate focusing less on speaker location or intention and more on speech content.[142]

However, the issue with all these approaches is that they are not grounded in *Tinker*. Blurring the line between on- and off-campus opens the door for twenty-four-hour student speech surveillance that the Court worries about.[143] Similarly, allowing school administrators to regulate speech based purely on intention or content provides too much authority to school administrators to touch and examine off-school speech.[144] A particular difficulty of allowing school administrators to regulate speech based on content is that administrators could find reasons to silence speech that would otherwise be constitutionally protected, but that they find inappropriate.[145] The Constitution requires some risk of inappropriateness.[146]

For these reasons, I argue that the Third Circuit's return to *Tinker*, while a huge departure from its sister circuits, is the most faithful interpretation of Supreme Court jurisprudence, and the most protective of students' constitutional right to speech. The Third Circuit defines a student as being on-campus when that student is within "school-owned, -operated, or -supervised channels."[147] At all other times, unless the student

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dents' Rights to Off-Campus Internet Speech Against the School's Compelling Interests, 79 U. CIN. L. REV. 855, 857 (2010) (arguing that all regulation of off-campus speech should be evaluated using a balancing test).

141 *E.g.*, Alexander G. Tuneski, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 139–40 (2003) (arguing that students should only be disciplined for literal off-campus speech when the student has intentionally taken steps to direct the speech toward the school).

142 *E.g.*, Allison N. Sweeney, *The Trouble with* Tinker*: An Examination of Student Free Speech Rights in the Digital Age*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 359, 426 (2019) (arguing that off-campus speech should only be regulated if the content of that speech actually interferes with the rights of students and faculty in the school community).

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

144 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("School officials do not possess absolute authority over their students.").

145 *See* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist. (*Mahanoy I*), 964 F.3d 170, 187–88 (3d Cir. 2020), *aff'd*, 141 S.Ct. 2038 (2021) (suggesting that giving school administrators expansive control over off-campus student speech based on content "subverts the longstanding principle that heightened authority over student speech is the exception rather than the rule").

146 *See Tinker*, 393 U.S. at 508–09 ("[O]ur Constitution says we must take this risk [of speech causing an argument or a disturbance]; and our history says that it is this sort of hazardous freedom— this kind of openness—that is the basis of our national strength . . . ."); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("[Courts should have] no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.").

147 *Mahanoy I*, 964 F.3d at 189.

is creating speech that would appear to be attributed to the school, the student is off campus.[148]

After defining on- and off-campus, the next step is to apply the boundary to the online distance learning model. For that, we return to our student, attending class from home.

3. *A Return to the Hypothetical*

A student is sitting at a desk, in her bedroom, "in" her online classroom, with her camera and microphone turned on. The student is clearly on-campus because she is within a school-owned, -operated, and -supervised channel. Any speech that the student makes may be disciplined pursuant to *Tinker*.[149]

The student turns her camera and her microphone off. She is sitting in front of her computer screen, but not visible or audible to her classmates or to her teacher. Therefore, any speech that the student makes is not within a school-owned, -operated, and -supervised channel. Any speech she makes literally could not be heard by her classmates, so the risk of discipline is non-existent, but the student is off-campus. The student remains off-campus when she stands, when she walks away from her desk, and all the way until she returns "within" a school channel.

For the most difficult part of the hypothetical, our student turns her microphone and camera off (off-campus), walks outside of her room (off-campus), and begins to scream that she hates her teacher (off-campus). If the teacher turns the student's microphone back on, then, unfortunately, the student has returned to campus. The physical analogy could be a student screaming in the carpool lane, or perhaps just past the edge of the playground. The student's speech has occurred within a school channel, so she is clearly on-campus. The Third Circuit's definition applies easily and clearly to online distance learning models, without the need to study factors such as foreseeability, nexus, or intention.

I concede that this result may seem intuitively unfair. However, through the lens of *Tinker*, there is no distinction

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148 *See id.* (including speech that is "reasonably interpreted as bearing the school's imprimatur" as on-campus speech).

149 It bears repeating that *Tinker* does not permit discipline of all student speech. *Tinker* requires that speech first be materially and substantially disruptive before an educator may even consider discipline. *Tinker*, 393 U.S. at 509; *see also Mahanoy I*, 964 F.3d at 189 (focusing on the narrowness of *Tinker* and the disruption standard).

between a student shouting an expletive while sitting in front of her computer with the microphone on and a student shouting an expletive while standing in her hallway with the microphone on. *Tinker* is not about student intention—it is an objective test of disruption. If the result is disturbing because the school can regulate speech inside a student's home in the first place, then perhaps the actual disturbing realization is that the home is no longer the sacred enclave it was once imagined to be.[150] In any event, the solution to minimizing disruptive behavior lies with adapting our current models of online distance learning—not abridging student speech rights.

III
BULLYING AND CYBERBULLYING

Bullying is a major concern in the school context and has only become a much graver concern in the digital age. Threats of violence and harassment of other students can disrupt the educational mission of an entire school if not handled swiftly.[151] Indeed, the Court is so concerned about bullying that a significant percentage of oral argument in *Mahanoy* was devoted to the topic.[152] However, *Tinker* is not a panacea for all school-related difficulties. Jurisprudence exists, before and after *Tinker*, providing that violent speech is an exception to the First Amendment, especially in an educational setting.[153] For this reason, an exception to *Tinker* is not needed for the violence of bullying and cyberbullying.

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150 In the oral argument for *Mahanoy II*, both advocate Lisa S. Blatt and Justice Sotomayor took as fact the assumption that a student could "absolutely not" be punished by the school for cursing inside her parents' home. Oral Argument at 16:04-16:28, Mahanoy Area School District v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 20-255), https://www.oyez.org/cases/2020/20-255 [https://perma.cc/NRV4-J99X]. Advocate David D. Cole repeated it. *Id.* at 58:32. Yet, the simple fact that students can be disciplined while engaged in online distance learning belies the assumption that the home is an untouchable zone for speech.

151 *See, e.g.*, Wisniewski v. Bd. of Educ., 494 F.3d 34, 35–39 (2d Cir. 2007) (noting that the student's violent, threatening depiction would clearly disrupt the school environment).

152 Oral Argument, Mahanoy Area School District v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255), https://www.oyez.org/cases/2020/20-255 [https://perma.cc/NRV4-J99X].

153 *See, e.g.*, Augustus *ex rel.* Augustus v. Sch. Bd., 507 F.2d 152, 156 (5th Cir. 1975); Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966); Doe *ex rel.* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 619 (8th Cir. 2002) (mentioning the use of the "true threat" exception to the First Amendment).

CONCLUSION

With the pandemic still raging through the United States, online distance learning will not disappear anytime soon.[154] Many schoolchildren who have experienced the classroom within their own bedroom over the past year will continue to do so in the upcoming year. Concerns such as student discipline, cyberbullying, and freedom within one's own home will persist. Online learning has presented new and difficult challenges, but the law must adapt to new challenges that technology presents.

In my opinion, the best way to retain student rights is to return wholeheartedly to *Tinker*—to abridge public schoolchildren's First Amendment rights only to the extent *Tinker* permits. Courts should only regulate speech that occurs on-campus, based on the modern understanding of what it means to be on-campus, which is participating in a school-sponsored forum of speech. Courts should step back, in general, from creating amorphous tests that are challenging to grasp for students and teachers alike.

Schools are faced with the increasingly daunting task of keeping children safe and focused in the digital age. Schools should be able to deal with harassment and threats of violence; schools are entitled to do so through various lines of First Amendment law. But schoolchildren's benign silliness, melodrama, immaturity, and even rudeness is simply part of living in a country founded on the right to free speech. Ultimately, students have the Constitutional right to critique, criticize, and vent frustrations when they are off-campus—even if they choose to say "fuck school" to do it.

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154 Apoorva Mandavilli & Roni Caryn Rabin, *The C.D.C. Warns that the New Virus Variant Could Fuel Huge Spikes in Cases*, N.Y. TIMES, Jan. 15, 2021, https://www.nytimes.com/live/2021/01/15/world/covid19-coronavirus/the-cdc-warns-that-the-new-virus-variant-could-fuel-huge-spikes-in-cases [https://perma.cc/A6QJ-SQ76].