*TINKER*ING WITH CIRCUIT CONFLICTS BEYOND THE SCHOOLHOUSE GATE

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ABSTRACT

For many years, school districts throughout the United States have wrestled with questions about the scope of their authority to discipline student speech that takes place away from school. Federal courts have handled many cases with differing outcomes. The U.S. Supreme Court has been silent, however, denying review to at least seven cases in the last nine years. This Article argues that the Supreme Court has passed up the cases because, while the factual outcomes at times appear in conflict, the legal analyses rely on the case of Tinker v. Des Moines Independent Community School District. *Although it seems like chaos in lower federal courts, the Supreme Court may well have persuaded itself that there is no legal conflict.*

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INTRODUCTION

For many years a legal and policy debate has raged in the United States over whether public school officials have the authority, consistent with the free-speech guarantee of the First Amendment,[1] to regulate student expression that takes place outside of school. The debate, with enormous practical stakes, involves school administrators, students, parents, social media companies, legislators, law enforcement, lawyers, and judges.[2]

A prominent voice missing from the debate is the U.S. Supreme Court. Since 2011, the Supreme Court has declined to review petitions for certiorari at least seven times in cases raising issues about punishment for off-campus speech by middle and high school students.[3]

This hands-off approach has led even federal judges to call out for guidance from the high court. U.S. District Court Judge John Jones wrote in 2016 that "we must observe that schools need clear guidance from . . . the Supreme Court as to whether and when they can regulate off-campus speech."[4]

As the plea from Judge Jones suggests, lower courts have reached different results, a few finding off-campus speech by students protected by the First Amendment, but most affirming the authority of school officials to discipline students for off-campus speech. Why will the Supreme Court not step in to adopt a clear rule and provide guidance to schools and courts?

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1 U.S. CONST. amend. I (prohibiting Congress from making laws "abridging the freedom of speech"). For application of the free-speech guarantee to the states, see *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that freedom of speech is "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

2 The debate is captured in blog posts, media articles, court rulings, and many more sources. *See, e.g.*, Nat'l Const. Ctr. Staff, *The Debate Over Student Off-Campus Speech and First Amendment Protection*, CONST. DAILY (May 9, 2016), https://constitutioncenter.org/blog/when-does-student-off-campus-speech-get-first-amendment-protection/ (highlighting the belief that schools need "definition from federal appeals courts and the Supreme Court" on issues surrounding First Amendment rights and regulating students' freedom of speech); *see also* David R. Wheeler, *Do Students Still Have Free Speech in School?*, ATLANTIC (Apr. 7, 2014), https://www.theatlantic.com/education/archive/2014/04/do-students-still-have-free-speech-in-school/360266/ (noting that the Internet has complicated recognized free-speech rights for students, with schools "regularly punish[ing] students for online comments, even if those comment are made away from school property and after school hours").

3 *See infra* Part II, discussing the cases and denials of certiorari.

4 R.L. v. Cent. York Sch. Dist., 183 F. Supp. 3d 625, 646 (M.D. Pa. 2016) (upholding a high school's suspension of a student for creating a Facebook post referring to a bomb potentially going off at school the next day).

Because the Supreme Court generally does not explain denials of petitions for certiorari, no one but the Justices knows for sure.

This Article argues, based on a review of a dozen lower court rulings, that the most logical explanation is that the Supreme Court Justices do not believe that the differing results reached by lower courts reflect an actual disagreement in the federal courts of appeals that must be resolved. Rather, it seems that the Supreme Court must believe that differences in outcomes in the lower courts are simply a reflection of factual differences in the many cases, rather than in the legal standard being applied.

This Article first examines the foundational standard for free speech in public schools. It then explores the differences in some of the lower court rulings to determine if there is disagreement over the appropriate legal standard. Finally, this Article concludes with the view that, whether or not there is disagreement among the circuits, the Supreme Court ought to consider clarifying the standard that governs off-campus speech by public school students.

I. FOUNDATIONAL CASES

The Supreme Court has made clear, and virtually all lower courts accept the fact, that the starting point for analyzing any student speech case is derived from *Tinker v. Des Moines Independent Community School District*.[5] The landmark ruling began in 1965 when students in Des Moines, Iowa, were suspended for wearing black armbands to school to protest the Vietnam War and to support a call for a Christmas holiday truce in the fighting.[6] School officials adopted a rule against wearing armbands at school after they learned that John Tinker planned to wear one to his high school while his sister, Mary Beth Tinker, would wear one to her middle school.[7] The suspensions were served, but the Tinker parents and the parents of other suspended students sued in a U.S. District Court to vindicate the students' rights.[8]

5 393 U.S. 503 (1969).

6 *Id.* at 504.

7 *Id.*

8 *Id.*

A U.S. District Court judge in Des Moines dismissed the complaint, finding in favor of the school officials, and the U.S. Court of Appeals divided evenly after an en banc hearing, thereby affirming the District Court.[9]

The Supreme Court reversed the Eighth Circuit by a vote of 7–2. Justice Abe Fortas wrote the majority opinion, and Justices Hugo Black and John Harlan dissented.[10] The majority held, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[11] Justice Fortas admonished school officials that concern over possible disruption may not be enough to prohibit free speech. He wrote in an almost poetic ode to free speech that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[12] This is so because:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.[13]

The line to be drawn by school officials, Justice Fortas said, is that they may not prohibit and discipline speech unless they can show that a student's conduct "would materially and substantially disrupt the work and discipline of the school."[14] This standard, Justice Fortas said, should govern the entire experience at school, not merely classroom discussion. It applied, he wrote, to "the authorized hours" of the school day.[15]

The ruling in *Tinker* was the high point in the Supreme Court's protection of student speech rights in public schools. Critics have argued that several subsequent Supreme Court rulings cut back significantly on the protection for student speech.[16] There are three rulings by the Supreme Court after

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9 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 382 F.2d 988 (8th Cir. 1967) (per curiam), *aff'g by an equally divided court*, 258 F. Supp. 971 (S.D. Iowa 1966).

10 *Tinker*, 393 U.S. at 504, 514–15, 526.

11 *Id.* at 506.

12 *Id.* at 508.

13 *Id.*

14 *Id.* at 513.

15 *Id.* at 512–13.

16 *See* Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825 (2009) (calling for a revitalization of the *Tinker* approach by the Supreme Court to provide for greater protection of student speech).

Tinker that have curtailed student speech rights, although they have not overruled *Tinker*.

In *Bethel School District No. 403 v. Fraser*,[17] the Supreme Court upheld the suspension of high school student Matthew Fraser in Pierce County, Washington. Fraser gave a nominating speech for a friend in a high school assembly. His speech was filled with sexual innuendo which school officials said was lewd, vulgar, and inappropriate for the assembly audience, some of whom were ninth graders and only fourteen-years old.[18] A federal district court in Washington ruled in Fraser's favor, and the U.S. Court of Appeals for the Ninth Circuit affirmed.[19]

The Supreme Court opinion was written by Chief Justice Warren Burger who was joined fully by four other Justices. Two Justices, William Brennan and Harry Blackmun, concurred only in the Court's judgment, and two others, Thurgood Marshall and John Paul Stevens, dissented. Chief Justice Burger wrote, "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[20] Indeed, Chief Justice Burger found Fraser's speech so offensive that he did not include the text in the majority opinion; Fraser's comments appear only in the opinion of Justice Brennan, concurring in the judgment.[21]

Chief Justice Burger noted in discussing *Tinker* that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[22] Chief Justice Burger's majority opinion distinguished the earlier ruling in *Tinker* as involving an attempt to suppress a particular political viewpoint. Chief Justice Burger wrote:

> We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.[23]

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17 478 U.S. 675 (1986).

18 *Id.* at 677–78.

19 Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356 (9th Cir. 1985).

20 *Bethel*, 478 U.S. at 683.

21 *Id.* at 687 (Brennan, J., concurring).

22 *Id.* at 682 (majority opinion).

23 *Id.* at 685.

The Court's next encounter with the limits of student speech came in 1988 in *Hazelwood School District v. Kuhlmeier*.[24] By a 6–3 vote, the Court upheld a principal's censorship of a high school student newspaper that was produced as part of a journalism class.[25] The principal at Hazelwood East High School in St. Louis County, Missouri, objected to two articles, one on the experience of students with pregnancy, the other on the impact of divorce on students in the school. Even with identifying information excluded for privacy purposes, the principal believed the articles were inappropriate for the school newspaper, and that students might still be identifiable in the articles.[26]

The lawsuit was filed by former staff members of the newspaper, led by former editor Cathy Kuhlmeier. A federal district court ruled for the school,[27] but the U.S. Court of Appeals for the Eighth Circuit reversed.[28] The appeals court viewed the paper as a public forum and thus applied the *Tinker* standard, stating that the newspaper could only be censored if its content would cause material and substantial disruption to the school.[29]

In the Supreme Court, Justice Byron White wrote for the majority that the newspaper was not an open forum for the exchange of ideas. He distinguished *Tinker*, saying that case involved the right of students to speak, whereas the present case involved the decision of school officials not to promote particular speech in a school publication.[30] Justice White wrote that educators should have the right to set high standards for student speech disseminated by the school, and must be able to control speech about sex, alcohol, drugs, and other sensitive subjects.[31]

Justice White wrote for the Court:

> Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive

24 484 U.S. 260 (1988).

25 *Id.*

26 *Id*. at 262–63.

27 Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450 (E.D. Mo. 1985).

28 Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368 (8th Cir. 1986).

29 *Id*. at 1371–74.

30 *Hazelwood*, 484 U.S. at 271–73.

31 *Id*. at 271–72.

> activities so long as their actions are reasonably related to legitimate pedagogical concerns.[32]

The final rung in the Supreme Court's post-*Tinker* trilogy was *Morse v. Frederick*.[33] A high school student in Juneau, Alaska, stood across from his school as the Olympic Torch passed by in the procession to the 2002 Winter Games in Salt Lake City, Utah. As the torch passed, the student, Joseph Frederick, held up a long banner that proclaimed "Bong Hits for Jesus." The school principal immediately confiscated the banner and suspended Frederick for ten days, maintaining that the banner advocated illegal drug use in violation of school rules.[34] A federal district court in Alaska ruled for the school, but the U.S. Court of Appeals for the Ninth Circuit reversed and found, using the *Tinker* standard, that there was no threat or prediction of a threat of disruption to the school.[35]

The Supreme Court reversed the Ninth Circuit and ruled for the school officials. The majority opinion, by Chief Justice John Roberts, was joined by four others and partially by Justice Stephen Breyer who wrote a separate concurrence and dissent. Three Justices, John Paul Stevens, David Souter and Ruth Bader Ginsburg, dissented entirely. Chief Justice Roberts concluded that the school sponsored the watch-party for the Olympic Torch, and that the school had a strong interest in disavowing advocacy of illegal drugs. Citing the dangers of illegal drug use, Chief Justice Roberts wrote, "The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[36] Clarifying the scope of the holding, Chief Justice Roberts explained, "The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."[37]

The upshot of these cases is mixed. *Tinker* set the benchmark principle that students have a right to freedom of speech in public schools as a vital part of the educational mission of preparing them for their place in a

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32 *Id.* at 272–73.

33 551 U.S. 393 (2007).

34 *Id.*

35 Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006).

36 Morse v. Frederick, 551 U.S. 393, 410 (2007).

37 *Id.* at 409.

democratic society.[38] *Bethel*,[39] *Hazelwood*,[40] and *Morse*[41] all reaffirmed the *Tinker* standard as the benchmark but distinguished it or limited its application when the cases involved lewd or vulgar school speech, or school-sponsored speech that educators deemed inappropriate for pedagogical reasons, or speech advocating illegal drug use.[42]

None of these cases deal directly with the issue that has jumped to the front-burner in the last twenty years with the advent of the Internet, the availability of laptops, tablets, cellphones, and more, and the wildfire spread of social media availability and use.[43] That issue is the scope of the authority of school officials to discipline student expression that takes place away from school. But while none of the four Supreme Court rulings dealt with off-campus speech, all four shape the landscape and represent the only Supreme Court case precedents available to lower federal court judges who confront cases of students speaking beyond school property.

II. SPEECH OFF-CAMPUS IN THE LOWER COURTS

Cases involving student speech away from school take many forms. Some involve what seem to be threatening speech, others bullying, still others speech critical of schools or school officials, and others speech deemed

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38 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (describing the principle that students have a right to freedom of speech in public schools).

39 Bethel v. Fraser Sch. Dist. No. 403, 478 U.S. 675 (1986) (illustrating support for the ruling in *Tinker*).

40 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (furthering support for *Tinker*).

41 *Morse*, 551 U.S. 393 (reaffirming *Tinker*).

42 For a summary of this view in a recent district court ruling, see *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429 (M.D. Pa. 2019). The court wrote:

> Under the Supreme Court's student speech precedents, there are thus four rules: (1) "Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language;" (2) "Under *Kuhlmeier*, a school may regulate school-sponsored speech . . . on the basis of any legitimate pedagogical concern;" (3) Under *Morse*, a school may categorically prohibit speech that can reasonably be regarded as encouraging illegal drug use; and (4) "Speech falling outside of these categories is subject to *Tinker's* general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."

B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 436 (M.D. Pa. 2019) (internal brackets and citations omitted).

43 One of the first off-campus speech cases did not involve the Internet or social media at all. In *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002), the U.S. Court of Appeals for the Eighth Circuit, sitting en banc, upheld the discipline of a student who wrote threatening letters at home in the summer between the seventh and eighth grades. The letters, addressed to a girl who had broken off a relationship with him, were not delivered by the student but were taken from the writer's home and given to the girl at the start of the eighth-grade school year by another student. The Eighth Circuit upheld his expulsion, treating it as threatening speech and so, not relying on *Tinker* at all.

inappropriate to particular circumstances. These cases have been decided at every level of the federal courts, except the Supreme Court.[44] The cases that have been appealed to the Supreme Court and rejected have covered a range of these issues.

Part II of this Article examines a sampling of these cases, but it is not an exhaustive survey. Section A examines a few of the more recent federal court rulings, and then in Section B, it surveys the cases in which the Supreme Court has denied certiorari.

A. Recent Cases

In one of the most recent cases, *B.L. v. Mahanoy Area School District*,[45] a high school student—who was relegated to the junior varsity cheerleader squad after tryouts for sophomore year—was barred from the cheer squad for one year after a Snapchat post that read, "fuck school fuck softball fuck cheer . . . ." The post violated a cheerleading squad rule that prohibited negative comments on the Internet about the team or coaches and urged avoiding foul language. The daughter of one coach took a screenshot of the Snapchat post and showed it to the coaches.[46]

In a lawsuit by the student and her parents against the high school in Schuykill County, Pennsylvania, a federal judge in the U.S. District Court for the Middle District of Pennsylvania acknowledged that it remained an open question whether *Tinker* applies to speech uttered outside of school. The judge held that, "Coaches cannot punish students for what they say off the field if that speech fails to satisfy the *Tinker* or *Kuhlmeier* standards."[47] The judge essentially found that the school district could not show actual or likely substantial disruption at school for purposes of the *Tinker* standard; nor could the school show that a Snapchat post on a student's personal account, made

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44 Many of these disputes are litigated in federal court because the claim is that school officials have deprived students of their federal constitutional right to freedom of speech. Most such cases are filed under 42 U.S.C. § 1983, which creates a cause of action against local officials who, acting under color of state law, deprive anyone of a constitutional right. For an example of a case filed in state court, see *N.Z. v. Madison Bd. of Educ.*, 94 N.E.3d 1198 (Ohio Ct. App. 2017) (upholding discipline of student connected to a notebook and text messaging group invoking the name Dylan Klebold, one of the two Columbine, Colorado shooters in 1999).

45 *Mahanoy,* 376 F. Supp. 3d at 432 (describing the girl that was removed from cheer for speaking negatively about it).

46 *Id.*

47 *Id.* at 444.

on a weekend at a restaurant, with the student not wearing any kind of cheerleading uniform or official school clothing, was school-sponsored speech. The message then is that the *Tinker* standard governed, but in a way that worked in the student's favor.

The U.S. Court of Appeals for the Third Circuit affirmed the ruling in favor of the student.[48] In a departure from the reasoning of many other courts, two of the three judges concluded that student speech that takes place off campus is entitled to the same First Amendment protection as any other expression and that the *Tinker* standard does not apply.[49] The third member of the panel joined the ruling in the student's favor but disagreed with the conclusion that the *Tinker* standard does not apply.[50]

In another recent ruling, *McNeil v. Sherwood School District 88J*,[51] the U.S. Court of Appeals for the Ninth Circuit upheld the year-long expulsion of a high school sophomore who created a "hit list" in his personal journal that was not shared with anyone. The student's mother found the diary and shared it with a therapist, who shared it with police, who shared it with the school.[52] The federal district court in Oregon, ruling in a suit by the student and his parents, granted summary judgment to the school district.

The Ninth Circuit panel said it was largely bound by an earlier circuit case, *Wynar v. Douglas County School District*,[53] which established that while students "enjoy greater freedom to speak when they are off campus than when they are on campus, their off-campus speech is not necessarily beyond the reach of a school district's regulatory authority."[54] In *McNeil*, the Ninth Circuit panel said the dispositive question was not whether the student intended to communicate the speech to anyone else. Rather, the Ninth Circuit outlined a three-part test:

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48 B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., No. 19-1842, 2020 WL 3526130 (3d Cir. June 30, 2020) (affirming ruling that school violated student's free speech rights).

49 *Id.* at *12. The panel's ruling in fact creates a *new* circuit split in off-campus student speech law. *Id.* at *18 (Ambro, J., concurring in the judgment). This Article has focused on the circuit split as to the application of *Tinker* to off-campus speech and the Supreme Court's inaction on that split, but this holding—that *Tinker* does not apply at all—raises a different question that the Supreme Court may act on.

50 *Id.* at *16.

51 McNeil v. Sherwood Sch. Dist., 918 F.3d 700 (9th Cir. 2019) (describing acts not supported by freedom of speech in schools).

52 *Id.* at 703–05.

53 728 F.3d 1062 (9th Cir. 2013).

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

> We now clarify that courts considering whether a school district may constitutionally regulate off-campus speech must determine, based on the totality of the circumstances, whether the speech bears a sufficient nexus to the school. This test is flexible and fact-specific, but the relevant considerations will include (1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school. There is always a sufficient nexus between the speech and the school when the school district reasonably concludes that it faces a credible, identifiable threat of school violence.[55]

Here, too, the jumping off point for the ruling is the application of the *Tinker* standard, especially in the first two parts of the Ninth Circuit test.

In another case of relatively recent vintage, *A.N. v. Upper Perkiomen School District*,[56] a federal district court rejected a motion for a preliminary injunction ordering a student readmitted to high school after he was suspended and notified of likely expulsion for an Instagram post. The student took a piece of a video about gun violence based on the Sandy Hook shooting, called *Evan*, and spliced in a song, *Pumped Up Kicks*, which features menacing lyrics about gun violence. He posted the video mash-up on Instagram anonymously under an account he had created using another name. The post remained for two hours, but several students in the district saw it and posted comments asking if it was a threat. The mother of another student saw the post and emailed school officials. Another parent called the state police.[57]

In a lawsuit by the student and his parents, the federal district court in the Eastern District of Pennsylvania applied the *Tinker* standard to out-of-school speech, based on precedent of the U.S. Court of Appeals for the Third Circuit,[58] and held that the video on Instagram caused an actual disruption as well as an environment for predicting a likely disruption.[59]

The trend in these most recent cases involving off-campus speech is clear, then. The results may vary, but the differences are in the facts of the cases. All three courts used some variant of the *Tinker* standard in analyzing student

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55 *Id*. at 707–08 (citations omitted).

56 A.N. v. Upper Perkiomen Sch. Dist., 228 F. Supp. 3d 391 (E.D. Pa. 2017).

57 *Id.* at 393–96.

58 *See* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d. Cir. 2013) (requiring a court to find with reasonable foreseeability that off-campus student speech would create a substantial disruption or material interference in school).

59 *Upper Perkiomen*, 228 F. Supp. 3d at 399–400.

speech beyond the schoolhouse gate. None of these cases has been appealed to the Supreme Court, but as the next Section will explore, they fit a pattern with the cases that have reached and been rejected by the Supreme Court.

B. The Supreme Court Passes

The Supreme Court seems to have gone out of its way to avoid deciding a case involving regulation of off-campus student speech.[60] This Section examines the cases in which the Supreme Court has denied certiorari on issues involving off-campus speech.

In *Wisniewski v. Board of Education of the Weedsport Central School District*,[61] the U.S. Court of Appeals for the Second Circuit upheld the one-semester suspension of an eighth-grade student in upstate New York who created an America On Line (AOL) Instant Messaging icon of a pistol firing a bullet and hitting a person's head. The icon was captioned with words suggesting his English teacher should be killed. The student's friends could see the icon, and one student notified the teacher and provided a copy. The suspension followed.[62] The Northern District of New York upheld the discipline.

The Second Circuit used the *Tinker* standard and found that the Instant Messaging post "crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school,'"[63] quoting *Tinker*. The Supreme Court, without comment, declined to hear the petition for certiorari by the parents.[64]

In *Doninger v. Niehoff*,[65] the U.S. Court of Appeals for the Second Circuit focused on the qualified immunity of school officials at a high school in

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60 *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, 1540 (2017) (noting that the Supreme Court missed an opportunity to address off-campus student speech); William Calve, Comment, *The Amplified Need for Supreme Court Guidance on Student Speech Rights in the Digital Age*, 48 ST. MARY'S L.J. 377, 378–79 (2016) (arguing that the Supreme Court should issue guidance on off-campus student speech).

61 494 F.3d 34 (2d Cir. 2007).

62 *Id.* at 35–37.

63 *Id.* at 38–39 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

64 Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 552 U.S. 1296 (mem.), *denying cert. to* 494 F.3d 34 (2d Cir. 2007).

65 642 F.3d 334 (2d Cir. 2011).

Burlington, Connecticut. School officials prohibited Avery Doninger from running for senior-class secretary because of a blog post she made from home referring to "douchebags" in the school administration who canceled an annual student battle of the bands and repeating what officials considered misinformation from an earlier mass email students had sent to parents. The officials also barred students from wearing t-shirts supporting Doninger at an election assembly. Doninger won the election on a write-in campaign but was not allowed to assume the office.[66]

Doninger's mother initially asked for an injunction ordering a new election. When Doninger graduated, the injunctive relief was mooted, but Avery amended the lawsuit to ask for damages. Both the federal district court in Connecticut and the Second Circuit found that any free speech claim Doninger might have was not clearly established at the time and, therefore, could not overcome claims of qualified immunity by the school officials.[67] The Second Circuit did, however, include a lengthy discussion of *Tinker* and the subsequent Supreme Court rulings on student speech.[68] The Supreme Court declined to grant Doninger's petition for certiorari, issuing no comment on the denial of review.[69]

The case of *Kowalski v. Berkeley County Schools*[70] involved suspension of a senior at Musselman High School in Berkeley County, West Virginia, for ridiculing another student on a MySpace page. About two dozen friends joined the MySpace page, and comments largely focused on suggesting that the target of the ridicule was a slut who had herpes. The target of the ridicule's father found out and complained to school officials. The officials in turn suspended Kara Kowalski for ten days, barred her from the cheerleading squad for the school year, and locked her out of school social events for ninety days.[71] A federal district court in West Virginia granted summary judgment to school officials and rejected Kowalski's free-speech claim that the school violated the First Amendment.[72]

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66 *Id.* at 339–43.

67 *Id.* at 352–53.

68 *Id*. at 344–45.

69 Doninger v. Niehoff, 565 U.S. 976 (mem.), *denying cert. to* 642 F.3d 334 (2d Cir. 2011).

70 Kowalski v. Berkeley Cty. Schs., 652 F.3d 565 (4th Cir. 2011).

71 For a summary of the facts giving rise to the issue in *Kowalski*, see *id.* at 567–70.

72 Kowalski v. Berkeley Cty. Pub. Schs., No. 3:07-CV-147, 2009 WL 10675108 (N.D.W. Va. Dec. 22, 2009).

The U.S. Court of Appeals for the Fourth Circuit discussed *Tinker* at length[73] and concluded, "we are confident that Kowalski's speech caused the interference and disruption described in *Tinker* as being immune from First Amendment protection."[74] Without comment, the Supreme Court denied Kowalski's petition for certiorari.[75]

The U.S. Court of Appeals for the Third Circuit decided *J.S. v. Blue Mountain School District*[76] en banc in favor of an eighth grader who was suspended for ten days for creating a MySpace profile that made fun of her middle school principal. Created at home on her own time and home computer, the MySpace page did not name the principal but used his official school photograph, listed the individual's name as M-Hoe, and described him in derogatory ways, such as being somebody who enjoyed having sex in his office, and with profanity.[77] In a lawsuit filed by the parents, a federal judge in the U.S. District Court for the Middle District of Pennsylvania granted summary judgment to the school district.[78]

The Third Circuit used the *Tinker* test, assuming without actually deciding that it would apply to off-campus speech.[79] The appeals court said it was indisputable that the MySpace profile did not cause actual disruption at the school, but the school district argued that it was reasonable for officials to have forecast that it would cause disruption.[80] Rejecting this argument, the Third Circuit wrote, "The facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile."[81]

Despite the facts that the *Blue Mountain* case divided the Third Circuit, 8–6, and that the school district lost, the Supreme Court denied certiorari without any comment.[82] The Court denied the petition for certiorari despite

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73 *Kowalski*, 652 F.3d at 571–73.

74 *Id.* at 572.

75 Kowalski v. Berkeley Cty. Schs., 565 U.S. 1173 (2012) (mem.), *denying cert. to* 652 F.3d 565 (4th Cir. 2011).

76 J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc).

77 For a summary of the facts giving rise to the issue in *Blue Mountain*, see *id.* at 920–22.

78 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

79 *Blue Mountain*, 650 F.3d at 926.

80 *Id.* at 930.

81 *Id.* at 931.

82 J.S. v. Blue Mountain Sch. Dist., 565 U.S. 1156 (2012) (mem.), *denying cert. to* 650 F.3d 915 (3d Cir. 2011).

a five-judge concurring opinion that suggested that off-campus speech was entitled to the full protection of the First Amendment and should not be limited by student speech cases,[83] and despite a strong dissent that warned that the ruling "leaves schools defenseless to protect teachers and school officials against such attacks and powerless to discipline students for the consequences of their actions."[84] It is important to note that the dissenting judges wrote that they agreed with the use of the *Tinker* test, but "disagree with the Court's application of that rule to the facts of this case."[85]

The Third Circuit ruling is notable because the same Court issued a second en banc ruling on the same day, also finding that a student's free-speech rights were violated. In *Layshock v. Hermitage School District*,[86] a senior at Hickory High School in Hermitage, Pennsylvania, created a fake, derogatory MySpace profile of his school principal. This was done on his grandmother's computer outside school hours. The profile was viewed widely by Justin Layshock's friends and eventually was discovered by school officials who suspended him for ten days and barred him for extracurricular activities and from his graduation ceremony.[87] A federal district court in the Western District of Pennsylvania ruled in favor of Layshock and his parents.[88]

The *Layshock* case was not appealed to the Supreme Court, and the Third Circuit was unanimous in finding that there was insufficient evidence that the MySpace profile caused disruption at school or that there was enough of a connection between the profile and school to invoke *Tinker*.[89] Notably, two judges wrote a concurring opinion to flag the open question in both *Blue Mountain* and *Layshock*, whether the *Tinker* standard can be used to regulate off-campus speech.[90] Although there was no petition for certiorari in *Layshock*, there can be little doubt that Supreme Court Justices and their law clerks reviewing *Blue Mountain* were made aware of the decision and concurring opinion in *Layshock* and the questions raised about the reach of the *Tinker* standard.

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83 *Blue Mountain*, 650 F.3d at 936 (Smith, J., concurring).

84 *Id.* at 941 (Fisher, J., dissenting).

85 *Id.*

86 Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011).

87 For a summary of the facts giving rise to the issue in *Layshock*, see *id.* at 207–10.

88 Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).

89 *Layshock*, 650 F.3d at 216.

90 *Id.* at 219–20 (Jordan, J., concurring); *Blue Mountain*, 650 F.3d at 936 (Smith, J., concurring).

When Taylor Bell, a senior at Itawamba Agricultural High School in Mississippi, posted a rap recording on his Facebook page and then on YouTube, the U.S. Court of Appeals for the Fifth Circuit, in *Bell v. Itawamba County School Board*,[91] weighed into the debate over school authority to punish off-campus speech. Again, the *Tinker* standard was the order of the day. Bell's rap lyrics suggest sexual misconduct by two coaches at his school with female students; sitting en banc, the Fifth Circuit found the lyrics included profane and vulgar words and threatening language. Bell was suspended for seven days, placed in an alternative school for the remaining six weeks of the grading period, and barred from school events.[92] The Northern District of Mississippi ruled for the school board in a lawsuit brought by Bell and his mother.[93]

The Fifth Circuit ruled, 12–4, that *Tinker* was the governing standard, that Bell's rap lyrics threatened teachers at the school, and that "a substantial disruption reasonably could have been forecast as a matter of law."[94] The views in the Fifth Circuit could not have been more polar opposite. The majority wrote that "the real tragedy in this instance is that a high school student thought he could, with impunity, direct speech at the school community which threatens, harasses, and intimidates teachers and, as a result, objected to being disciplined."[95]

The leading dissent among several opinions saw the case quite differently, finding Bell to effectively be a whistleblower disclosing misconduct by two coaches. The dissent argued that the majority:

> denigrates and undermines not only Bell's First Amendment right to engage in off-campus online criticism on matters of public concern but also the rights of untold numbers of other public school students in our jurisdiction to scrutinize the world around them and likewise express their off-campus online criticism on matters of public concern.[96]

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91 Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 383 (5th Cir. 2015) (en banc).

92 For a summary of the facts giving rise to the issue in *Bell*, see *id.* at 383–87.

93 Bell v. Itawamba Cty. Sch. Bd., 859 F. Supp. 2d 834 (N.D. Miss. 2012).

94 Bell, 799 F.3d at 391.

95 *Id.* at 400.

96 *Id.* at 404 (Dennis, J., dissenting).

The case received substantial attention. In the Fifth Circuit, amici briefs were filed by Mary Beth Tinker[97] and by the Student Press Law Center.[98] In the Supreme Court, Bell's petition for certiorari received support from amicus briefs from the Mississippi Center for Justice,[99] a group of prominent rap artists,[100] the Advancement Project,[101] the Foundation for Individual Rights in Education,[102] Massachusetts Citizens for Children,[103] and the Marion Brechner First Amendment Project.[104] The Supreme Court denied the petition for certiorari without comment.[105]

In *C.R. v. Eugene School District*,[106] the U.S. Court of Appeals for the Ninth Circuit upheld a two-day suspension for a seventh grader who was accused of harassing two disabled sixth-grade students after school in a park that was adjacent to school property. The students were enrolled at Monroe Middle School in Eugene, Oregon. The harassment was reported by a school aide and included vulgar language and sexual comments aimed at the sixth graders.[107] In a lawsuit filed by C.R.'s parents contesting the school's authority over off-campus speech, a federal district court in Oregon granted summary judgment to the school officials.[108]

A Ninth Circuit panel upheld the suspension, once again using the *Tinker* standard. The Ninth Circuit wrote:

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97 Brief of Amicus Curiae Mary Beth Tinker in Support of Appellants, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d (No. 12-60264), 2015 WL 6107618. Mary Beth Tinker was one of the original plaintiffs in the *Tinker* case after she wore a black armband to her middle school.

98 Brief of Amicus Curiae Student Press Law Center Filed in Support of Appellee, Seeking Reversal, Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (5th Cir. 2014), *reh'g en banc*, 799 F.3d 379 (No. 12-60264), 2012 WL 2374248.

99 Brief of Mississippi Center for Justice as Amicus Curiae in Support of Petitioner, Bell v. Itawamba Cty. Sch. Bd., 136 S. Ct. 1166 (2016) (No. 15-666), 2015 WL 9315589.

100 Amici Curiae Brief of Erik Nielson, Charles E. Kubrin, Travis L. Gosa, Michael Render (aka Killer Mike) and Other Scholars and Artists, *Bell*, 136 S. Ct. 1166 (No. 15-666), 2015 WL 9315591.

101 Brief of Advancement Project and One Voice as Amici Curiae in Support of Petitioner, *Bell*, 136 S. Ct. 1166 (No. 15-666), 2015 WL 9315592.

102 Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Student Press Law Center and the Foundation for Individual Rights In Education, Inc., In Support of Petitioner, *Bell*, 136 S. Ct. 1166 (No. 15-666), 2015 WL 9315590.

103 Motion for Leave to File and Brief of Amicus Curiae Massachusetts Citizens for Children In Support Of Petitioners, *Bell*, 136 S. Ct. 1166 (No. 15-666), 2015 WL 9488473.

104 Brief of Amicus Curiae the Marion B. Brechner First Amendment Project in Support of Petitioner, *Bell*, 136 S. Ct. 1166 (No. 15-666), 2015 WL 9184817.

105 *Bell*, 136 S. Ct. 1166.

106 C.R. v. Eugene Sch. Dist., 835 F.3d 1142, 1145–46 (9th Cir. 2016).

107 For a summary of the facts giving rise to the issue in *Eugene*, see *id.* at 1145–47.

108 C.R. v. Eugene Sch. Dist. 4J, No. 6:12-cv-1042-TC, 2013 WL 5102848 (D. Or. Sept. 12, 2013).

> In our digital age, a school's power to discipline students for off-campus speech has become an increasingly salient question for the courts. This case, however, presents us with an analog problem: Whether the School District overstepped its authority when it disciplined C.R. for engaging in sexual harassment a few hundred feet from the school's physical boundaries, a few minutes after class let out. Under this set of facts, we conclude that C.R.'s speech was tied closely enough to the school to subject him to the school's disciplinary authority. As imposed by the school, that discipline complied with the requirements of *Tinker*.[109]

CONCLUSION

What emerges from these cases, and numerous others not considered in the preceding section, is a kaleidoscopic image of school regulation of speech beyond the schoolhouse gates. The cases have continued unabated in federal courts throughout the country for close to two decades. As discussed in the preceding section, at least seven cases involving off-campus speech by middle and high school students have gone to the Supreme Court in the last dozen years, and all have been denied review by the Justices. Several patterns are clear.

First, federal judges consistently voice either overt or subtle frustration over the question unresolved by the Supreme Court as to whether the *Tinker* standard of material and substantial disruption applies to off-campus speech. Sometimes judges merely note that the Supreme Court has not resolved this issue. At other times judges write separate opinions to flag the issue.

Second, the issue of whether and how the *Tinker* standard applies to off-campus speech has been squarely teed-up to the Justices of the Supreme Court on numerous occasions. Among the seven cases in which certiorari has been denied, some certainly were not the best vehicles, as when the appellate court focused on qualified immunity and discussed the free speech concerns only tangentially.[110] But in two of the denied cases, the appellate courts considered and decided the issues en banc, providing full and detailed deliberations as a vehicle for the Supreme Court to take up the challenge.[111] Between the Third Circuit in *Blue Mountain* and the Fifth Circuit in *Bell*, the

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109 *Id.* at 1155.

110 *See* Doninger v. Niehoff, 642 F.3d 334, 339 (2d Cir. 2011) (reversing a district court ruling on the basis of qualified immunity and without deciding the merits of off-campus student speech).

111 Bell v. Itawamba Cty. Sch. Bd., 790 F.3d 379 (5th Cir. 2015); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011).

relationship between *Tinker* and off-campus speech was considered by thirty federal appeals court judges who produced eleven separate opinions.

Third, if there is a common thread that explains the Supreme Court's highly visible abstention from the issue of off-campus speech, it must be that the Justices do not perceive a conflict of authority among the federal appeals courts. In Rule 10 of the Supreme Court's procedures, the first consideration for whether petitions of certiorari will be granted is if a conflict exists among the federal appeals courts.[112]

Since the Justices have not uttered a word of explanation in any of the seven denials of petitions for certiorari, it is impossible to know what they are thinking. However, a close reading of the appeals court decisions in the seven cases suggests that they all agreed that *Tinker* was the standard to apply. If there are differences in the cases, those variances are in the application of the *Tinker* standard to the facts rather than in differences in the law.

Still, given the number of lower court opinions that note the uncertainty over whether *Tinker* applies to speech beyond the schoolhouse gate, the Supreme Court might want to consider taking up the issue in a future case and providing clear guidance to lower courts and school officials.

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112 SUP. CT. R. 10.