LIMITED – NOT ELIMINATED: THE "MIDDLE" GROUND OF OFF-CAMPUS STUDENT SPEECH

Kristopher L. Caudle*

Abstract

In a previous article, On-Campus or Off-Campus – That is Still the Question*, the author argued that the Supreme Court failed to adequately address modern student speech issues in Mahanoy Area School District v. B.L. ex rel. Levy and that under Justice Alito's concurrence in Mahanoy, "off-campus" speech must now be viewed along a "spectrum." On one end of the spectrum, student speech occurring in traditional "on-campus" settings, or certain settings that are "tantamount" to the "on-campus" environment, are still subject to regulation under the Tinker doctrine. On the opposite end of the spectrum, regulation of speech rendered outside the traditional on-campus environment, published through social media applications, addressing matters of public concern, even if "crude" or distasteful—is limited.*

Along this new "digital frontier," Mahanoy left behind a "middle" ground on the off-campus student speech spectrum—"targeted" forms of "serious or severe bullying or harassment." A look into this terrain reveals a new First Amendment paradigm in 2026—while regulation into off-campus speech was limited by Mahanoy—in the middle ground, it was not eliminated.

This article analyzes differing circuit court approaches that have emerged for the middle ground since Mahanoy, as well as the doctrinal problems they create for the First Amendment. This article also examines why the regulatory scope of federal laws, like Title IX of the Education Amendments of 1972, must be carefully balanced because of new executive orders and wider policy shifts by the Department of Education in 2025. This article concludes with a new framework for analyzing off-campus student speech issues, as well as a comment on the impact of social media in the administration of public education.

* Kristopher L. Caudle is a Visiting Assistant Professor of Law at Elon University School of Law. Thanks to the law faculty at Elon's 2025 Works-In-Progress Symposium for their feedback during the development of this article. A special thank you to Professor Enrique Armijo for his comments and First Amendment insight.

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I. INTRODUCTION

Without much fanfare, a Spanish teacher in Malvern, Pennsylvania did what so many Americans have done over the past decade—she created a TikTok account.[1] However, when the middle school teacher opened TikTok for the first time, she saw what another co-worker had already seen—a fake profile impersonating her online.[2] One of the fake posts included a "real photo" of the Spanish teacher on vacation at "the beach with her husband and their young children," with a salacious caption—"Do you like to touch kids? Answer: Sí."[3]

As the story in Malvern unfolded, the situation became more dire. At least twenty other teachers at the same middle school learned that they too had become victims of "impostor accounts" created on TikTok.[4] To their surprise, the perpetrators weren't cybercriminals, or online hackers—they were a group of their own eighth grade students.[5] While some of the imposter accounts were "benign" in nature, many more were "rife" with "disparaging, lewd, racist and homophobic" comments targeting teachers and their family members.[6]

By the time school administrators became aware of the incident, hundreds of students had already viewed or commented on the imposter accounts online.[7] Although some of the students claimed the posts were just a "joke," an "undercurrent conversation" about the teachers began to circulate around the school.[8] Even seasoned teachers felt "kicked in the stomach," with their professional reputations tarnished, and the privacy of their families intimately violated.[9] Following a school-level investigation, several students were "briefly suspended" for their online conduct.[10] However, the school district's superintendent "wish[ed]" that he "could do more" to discipline culpable students, but believed his options were "legally limited" because the posts occurred "off-campus during nonschool hours on personal devices."[11]

Malvern is just another episode in a disturbing trend of "off-campus" student speech incidents since 2021,[12] when the United States Supreme Court

1. *See* Natasha Singer, *Students Target Teachers in Group TikTok Attack, Shaking Their School*, N.Y. Times (July 6, 2024), https://www.nytimes.com/2024/07/06/technology/tiktok-fake-teachers-pennsylvania.html [https://perma.cc/YE35-25PR].
2. *See id*.
3. *Id.*
4. *Id.*
5. *See id*.
6. *Id.*
7. *See id*.
8. *See id*.
9. *See id*.
10. *See id*.
11. *Id*.
12. *See infra* Part IV.

issued its opinion in *Mahanoy Area School District v. B.L. ex rel. Levy*.[13] *Mahanoy* was a much-anticipated case involving the online rant of Bridget Levy—a student-athlete relegated to the junior varsity cheerleading squad at her high school.[14] Amid her "frustrat[ion]" with the outcome of her school's cheerleading tryouts,[15] Levy posted a now-infamous photo of her "middle fingers" raised with the caption: "Fuck school fuck softball fuck cheer fuck everything."[16] Levy's post was published to Snapchat[17] with her personal smartphone, at a local sundry store, "on her own time."[18] Levy's post ultimately made its way to her coach's desk, and she was suspended from the junior varsity cheerleading team for violating rules prohibiting "profanity in conjunction with a school extracurricular activity."[19] Levy's case made it all the way to the United States Supreme Court, which ruled in her favor, holding that the type of speech at issue *in her case* was protected by the First Amendment.[20]

In the wake of *Mahanoy*, school officials, like the ones in Malvern, now proceed with "cautio[n]" when regulating off-campus student speech.[21] Student speech is typically viewed along a "spectrum."[22] On one end of the spectrum, speech occurring in traditional "on-campus" locations, such as school buildings,[23] or in digital settings that are "tantamount" to the school building, like remote learning,[24] may still be regulated by school officials

13. 594 U.S. 180 (2021).

14. *See id.* at 184–85.

15. *Id.* at 211 (Thomas, J., dissenting); *see id.* at 185 (majority opinion) (discussing the caption of second post that said "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" (alterations in original)).

16. *Id.* at 185; *see also* Kristopher L. Caudle, *On-Campus or Off-Campus? – That is Still the Question:* Mahanoy Area Sch. Dist. v. B.L. *and the Supreme Court's New Digital Frontier*, 44 CAMP. L. REV. 165, 184 & n. 149 (2022) (noting media coverage of the Supreme Court's decision in *Mahanoy*).

17. Snapchat is a popular social media application that "allows users to post photos and videos that disappear after a set period of time." *Mahanoy*, 594 U.S. at 184.

18. *Id.* at 184, 192.

19. *See id.* at 185.

20. *See id.* at 183–87.

21. *See id.* at 211 (Alito, J., concurring); *id.* at 190 (majority opinion) ("Taken together, [the] features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished.").

22. *Id.* at 203–09 (Alito, J., concurring) (explaining that "on-campus" and "off-campus" student speech exists on a "spectrum"); *see infra* Section II.B, Part IV (noting factors for the "on-campus" versus "off-campus" distinction); *see also* Kutchinski v. Freeland Cmty. Sch. Dist., 69 F.4th 350, 357–58 (6th Cir. 2023) (relying on *Mahanoy* for the proposition that a school's "ability to regulate off-campus speech" exists on a spectrum depending on the type of speech).

23. *See Mahanoy*, 549 U.S. at 195 (Alito, J., concurring) (referring to the boundaries of "on-premises" speech).

24. *See id.* at 196, 204–05.

under the Supreme Court's longstanding *Tinker* doctrine.[25] On the opposite end of the spectrum, regulation of "off-campus" speech, outside of the regular school day, posted through social media platforms, addressing matters of public concern, even if "crude" or distasteful, is *limited*.[26]

"Between these two extremes," *Mahanoy* left behind a middle ground on the off-campus speech spectrum.[27] This "Middle Ground" encompasses one of the most difficult categories of speech that school officials encounter: "serious or severe bullying or harassment targeting particular individuals."[28] Since 2021, several circuits have issued opinions interpreting *Mahanoy* within this evolving context.[29] A look into this terrain reveals a new First Amendment paradigm in 2026: while regulation into off-campus speech was *limited* by *Mahanoy*, in the Middle Ground, it was not *eliminated*.[30]

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25. *Id.* at 188 (majority opinion) ("[W]e do not believe the special characteristics that give schools additional license to regulate student speech [under *Tinker*] always disappear when a school regulates speech that takes place off campus."); *see Kutchinski*, 69 F.4th at 356–57 (stating that schools may regulate four categories of student speech, including "on-campus and some off-campus speech that 'materially disrupts classwork or involves substantial disorder or invasions of the rights of others'" (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969))); *infra* Sections II.A–B.

26. *See Mahanoy*, 594 U.S. at 195, 206–07, 211 (Alito, J., concurring) (stating that the "regulation of many types of [off-campus] student speech raises serious First Amendment concerns," and that "school officials should proceed cautiously before venturing into this territory"); *id.* at 219 (Thomas, J., dissenting) (noting that the majority "stat[ed] just one rule: Schools can regulate speech less often when that speech occurs off campus"); Erwin Chemerinsky, *Education, the First Amendment, and the Constitution*, 92 U. CIN. L. REV. 12, 24 (2023) (arguing that *Mahanoy* "is not an absolute prohibition of punishing students for their speech over social media"); Mary-Rose Papandrea, Mahanoy v. B.L. *& First Amendment "Leeway*,*"* 2021 SUP CT. REV., at 53, 64–65 (discussing *Tinker* doctrine principles within the context of Justice Alito's speech spectrum).

27. *Id.* at 207 (Alito, J., concurring); *accord McLelland v. Katy Indep. Sch. Dist*, 63 F.4th 996, 1009 (5th Cir. 2023) (stating that *Mahanoy* left a "middle ground" that provides "no clearly established rule"); *see Mahanoy*, 594 U.S. at 190 ("We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference."); *Kutchinski*, 69 F.4th at 357–58 (identifying a "middle" portion of the student speech spectrum); Caudle, *supra* note 16, at 168–69, 194–95, 198.

28. *Mahanoy*, 594 U.S. at 207–09 (Alito, J., concurring). Along with "serious or severe bullying or harassment," the Middle Ground may also include "perceived threats" to the learning community and "speech that criticizes or derides school administrators, teachers, or other staff members." *Id.* But, for the purposes of this article, the term Middle Ground addresses only concepts of targeted serious or severe bullying and harassment.

29. *See infra* Part IV.

30. *See, e.g.*, *Mahanoy*, 594 U.S. at 188, 190 (holding that "the leeway the First Amendment grants to schools" to regulate student speech is "diminished" in the off-campus context but noting that Levy's off-campus speech was just "one example."); Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 721–22 (9th Cir. 2022); Chemerinsky, *supra* note 26 (noting in a post-*Mahanoy* article that "[i]f the student is engaged in bullying or harassing behavior . . . then even off-campus speech might be punished" and arguing that *Mahanoy* "is not

At the same time, *Tinker* does not exist in a vacuum. Alongside student free speech rights, public schools have "affirmative dut[ies]" to prohibit "bullying" and "harassment" under federal laws, including Title IX of the Education Amendments of 1972 ("Title IX") and state anti-bullying statutes.[31] Within this domain, twenty-first century administrators face a labyrinth of conflicting laws, regulations, and policies, sprinkled into the free speech analysis.[32] Moreover, the debate continues to rage about whether regulation

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an absolute prohibition of punishing students for their speech over social media"); *Kutchinski*, 69 F.4th at 358 (holding that under *Mahanoy*, a school could still regulate off-campus speech that amounted to "serious or severe harassment"); L.M. v. Town of Middleborough, 103 F.4th 854, 867 (1st Cir. 2024) (citing *Mahanoy* for the premise that "[t]he Supreme Court has recently affirmed schools' authority to regulate 'severe bullying and harassment'"), *cert. denied*, 145 S. Ct. 1489 (2025); Doe v. Morehouse Coll., 622 F. Supp. 3d 1279, 1287 (N.D. Ga. 2022) (holding that in the post-secondary context, "schools are significantly constrained in their regulation of students' social media use," except in the areas of "severe bullying and harassment"); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33515 (Apr. 24, 2024) (interpreting *Mahanoy* as allowing school officials to regulate "sex-based harassment" in off-campus settings); Mahmoud v. Taylor, 606 U.S. 522, 557 (2025) (affirming in a non-speech case that under *Mahanoy* schools "hold[] a limited power to discipline them for misconduct." (citing Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy, 594 U.S. 180, 187–88 (2021)); *cf.* Tennessee v. Cardona, 762 F. Supp.3d at 612, 627–28 (E.D. Ky. Jan. 9, 2025) (vacating the DOE's 2024 Title IX regulations, noting that under the 2024 Title IX regulations, "harassment [was] not limited to speech occurring on school campuses and may capture conduct that occurs on social media"); *infra* notes 35–36, 38.

31. *See* T.K. v. New York City Dep't. of Educ., 779 F. Supp. 2d 289, 308 (E.D.N.Y. 2011) ("Title IX, IDEA, and Section 504 of the Rehabilitation Act place upon schools the affirmative duty to address bullying and harassment."); Hopkinton Pub. Schools v. John Doe, 19 F.4th 493, 498 (1st Cir. 2021) (recognizing nearly identical coverage between state's anti-bullying statute and school's anti-bullying policy); *infra* note 164 and accompanying text; *cf.* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 572 (4th Cir. 2013) ("[S]chools have a duty to protect their students from harassment and bullying in the school environment . . . .").

32. *See* sources cited *supra* note 30; Craig Trainor, Office of Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter on *Cardona v. Tennessee* and the Resulting Reversion to the 2020 Title IX Regulations 1 (Feb. 4, 2025) [hereinafter *Cardona* Dear Colleague Letter] (explaining that the 2024 Title IX regulations were vacated, and that the 2020 Title IX Regulations represented the "binding regulatory framework" for the purposes of Title IX enforcement); Office of Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Harassment and Bullying Background, Summary, and Fast Facts in 2010 at 1 (updated Jan. 14, 2025) [hereinafter Updated 2010 Harassment and Bullying Guidance], https://www.ed.gov/laws-and-policy/civil-rights-laws/harassment-bullying-and-retaliation/dear-colleague-letter-harassment-and-bullying-background-summary-and-fast-facts [https://perma.cc/HW6C-423Z] (updating the DOE's October 2010 Bullying and Harassment guidance is "Not for Reliance for Certain Purposes" because it was "inconsistent" with current interpretation of Title IX, without specifying whether portions of the 2010 guidance related to off-campus speech are still applicable). *Contrast* Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021) (authorizing the DOE to revise then existing 2020 Title IX regulations governing the scope of "sexual harassment" regulation), *and* Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025) (ordering all federal agencies to "promptly rescind" policies or guidance inconsistent with the definition of "sex" as an "individual's

of student speech should extend beyond the "schoolhouse gate"[33] into the digital abyss that is social media.[34] In addition, determining "when certain speech crosses the line from merely offensive" speech, which is protected, to a "more severe" type of speech that must be addressed,[35] is one of the most difficult tasks facing school administrators today.[36] As a result, students are "los[ing] some First Amendment protections,"[37] stuck in a "panopticon,"[38] while administrators continue to navigate the limits of off-campus speech

immutable biological classification as either male or female."), *with* Bostock v. Clayton Cnty., 590 U.S. 644, 660–61 (2020) (holding in the context of Title VII "transgender status [is] inextricably bound up with sex"), *and* United States v. Skrmetti, 605 U.S. 495, 498 (2025) (declining to consider the impact of *Bostock* "beyond the Title VII context"), *and id*. at 559 (Alito, J., concurring) (holding that Equal Protection Clause claims based on "sex" classification are not premised on "gender identity" but on "the two biological sexes: male and female."). For further background on the evolving legal duties and obligations owed to transgender students in public schools, see Patrick D. Murphree, *Schools in the Middle: Resolving Schools' Conflicting Duties to Transgender Student and Their Parents*, 86 UMKC L. REV. 405, 409–22 (2017) (examining how federal laws like Title IX conflict with individual student rights and parental rights to oversee a child's education).

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

34. *See supra* notes 30, 32 (discussing circuit court cases and the DOE's 2024 Title IX guidance that allowed schools to regulate off-campus speech in the Middle Ground and the "substantial control" analysis under Title IX's 2020 regulations).

35. Norris *ex rel.* A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 29 (1st Cir. 2020).

36. *See* Parents for Priv. v. Barr, 949 F.3d 1210, 1217 (9th Cir. 2020); L.M. v. Town of Middleborough, 103 F.4th 854, 881 (1st Cir. 2024) (noting that school officials "must have some margin to make high-stakes assessments in conditions of inevitable uncertainty.").

37. B.R. v. F.C.S.B., No. 119-cv-917, 2023 WL 2464975, at *14 n.11 (E.D. Va. Mar. 10, 2023) ("[T]he Supreme Court has recognized that schools have significant interests in *regulating* speech in schools if there is 'serious or severe bullying or harassment targeting particular individuals[,]' which means that students can lose some First Amendment protections if the school is attempting to regulate severe bullying.'" (alteration in original) (quoting Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy, 594 U.S. 180, 188 (2021))); *accord* Will Creeley, *What Happens at the Cocoa Hut Doesn't Stay at the Cocoa Hut: Assessing K-12 Student Speech Rights After* Mahanoy Area School District v. B.L., 73 CASE W. RES. L. REV. 1083, 1118 (2023) ("With their every statement away from campus monitored and potentially subject to punishment, students will be denied an opportunity to explore, to make mistakes, to evolve, and to learn the full power of the First Amendment's protection against government overreach.").

38. *See* Creeley, *supra* note 37, at 1118–19 (using the phrase "panopticon" to describe the current "surveillance state" within the student speech doctrine); *cf.* JONATHAN HAIDT, THE ANXIOUS GENERATION: HOW THE GREAT REWIRING OF CHILDHOOD IS CAUSING AN EPIDEMIC OF MENTAL ILLNESS, 49–95, 113–99 (2024) (explaining the "Great Rewiring" of American children is defined by the replacement of a "play-based childhood," where mistakes are encouraged as part of the learning process, with a "phone-based childhood"). For additional reading on the concept of a "surveillance" state in the educational context, see Emily F. Suski, *Beyond the Schoolhouse Gates: The Unprecedented Expansion of School Surveillance Authority Under Cyberbullying Laws*, 65 CASE W. RES. L. REV. 63, 70–100 (2014).

rights.[39] This reality chills speech and weakens the overall integrity of the *Tinker* doctrine as a tool for First Amendment jurisprudence.[40]

Since *Mahanoy*, one thing has become clear: "rampant social media use" is more than just a First Amendment issue; it is "threatening students' education, well-being and physical safety."[41] For many adolescents, social media has become a "dark alley" leading to "higher rates of depression, self-harm, and even suicide."[42] Social media platforms "normalize anonymous aggressive posts at a level not seen in previous generations."[43] The digital nature of social media accelerates this normative problem, by providing students with a readily accessible forum to "weaponize" speech against adults and fellow classmates.[44] Society is just beginning to understand the depths of this crisis—much less correct it.[45] Consequently, judges[46] and lawmakers

39. *See* Creeley, *supra* note 37; Suski, *supra* note 38 at 87–100.

40. *See B.R.*, 2023 WL 2464975, at *15; Emily Erickson & Matthew D. Bunker, *Waiting for Mahanoy: Examining the Still-Unsettled Jurisprudence of Online Student Speech*, 32 WM. & MARY BILL RTS. J. 991, 1047 (2024) ("*Mahanoy*'s feeble doctrinal structure leaves nearly all vital questions about online school speech unanswered . . . , [which] almost certainly produces chilling effects on student expression given the insecure borders of the doctrine."); Creeley, *supra* note 37.

41. *See* S.C. v. Metro. Gov't. of Nashville, 86 F.4th 707, 722 (6th Cir. 2023) (Bush, J., concurring) (citing Natasha Singer, *This Florida School District Banned Cellphones. Here's What Happened*, N.Y. TIMES (Nov. 6, 2023) https://www.nytimes.com/2023/10/31/technology/florida-school-cellphone-tiktok-ban.html [https://perma.cc/N5AY-RC6L]).

42. Press Release, Exec. Off. of the Governor, Governor DeSantis Signs Legislation to Protect and Uphold Parental Rights (Mar. 25, 2024), https://www.flgov.com/eog/news/press/2024/governor-desantis-signs-legislation-protect-children-and-uphold-parental-rights [https://perma.cc/4RRL-G9N7].

43. Singer, *supra* note 1.

44. *See id*.

45. *Cf.* Christopher J. Ferguson, *Do Social Media Experiments Prove a Link with Mental Health: A Methodological and Meta-Analytic Review*, 14 PSYCH. POPULAR MEDIA, 201, 204 (2024) (analyzing empirical research to argue that the correlation between adolescent mental health and social media applications are statistically insignificant). *See generally* HAIDT, *supra* note 38 (arguing that cell phones "fused" with social media applications harm school-age children).

46. *E.g.*, *Metro. Gov't.*, 86 F.4th at 723 (Bush, J., concurring).

from across the political aisle[47] are "call[ing] for new federal (and state) legislation" to address "student cell phone misuse."[48]

This article reaches into the post-*Mahanoy* world of secondary student speech in the Middle Ground. Part II begins with a survey of the *Tinker* doctrine, as well as the majority and concurring opinions in *Mahanoy*. Part III looks beyond *Tinker* to identify key principles governing the Middle Ground under separate federal and state laws. Parts IV and V dig deeper to show where *Tinker's* familiar framework continues to linger in the post-*Mahanoy* analysis. Specifically, Part IV and Section V.A analyze dueling off-campus approaches that have been crystallized since *Mahanoy*, as well as the doctrinal problems they create for the First Amendment. Section V.B builds on this foundation, to explain why federal harassment laws like Title IX and state anti-bullying statutes must be carefully balanced alongside *Tinker* and *Mahanoy* because of recent policy shifts by the United States Department of Education ("DOE").[49] Part V argues that school districts and courts need a more comprehensive post-*Mahanoy* approach to manage the myriad legal issues the Middle Ground creates for the learning environment in 2026. Part VI proposes a new framework for the Middle Ground—one that fills the gap on the spectrum created by Justice Alito in *Mahanoy*, and balances competing rights in one matrix. Part VII concludes with a comment on the impact of social media in the administration of public education.

II. THE *TINKER* DOCTRINE

Part II begins with an overview of First Amendment principles applied by the United States Supreme Court in its secondary student speech cases.

47. *E.g.*, Act of May 9, 2023, ch. 2023-36, 2023 Fla. Laws 627 (codified as amended at Fla. Stat. § 1006.07(2)(f) (2025)) (prohibiting student cell phone usage during class time); Phones-Free School Act, ch. 500, 2024 Cal. Stat. 5148 (2024) (codified as amended Cal. Educ. Code § 48901.7 (2025)) (requiring California public schools to implement student cell phone policies by July 1, 2026); S.L. 2025-38, Sec., Part 8, July 1, 2025 (codified as G.S. § 115C-76.100). For an example of a current local board of education student cell policy in North Carolina, see WAKE CNTY. PUB. SCHS., POLICY CODE 4318, STUDENT USE OF PERSONAL WIRELESS COMMUNICATION DEVICES 1–3 (June 3, 2025), https://polkschools.org/wp-content/uploads/2025/08/Policy-4318-Student-Use-of-Wireless-Communication-Devices.pdf [https://perma.cc/T2LN-WXRU].

48. *Metro. Gov't.*, 86 F.4th at 720, 723 (Bush, J., concurring). *See generally* HAIDT, *supra* note 38, at 248–51 (noting the mounting evidence that student phone use interferes with learning outcomes and social relationships).

49. *But cf.* Jaelyn R.M. Haile, Note, *Unshackling Student Speech: How to Retain Deference to K-12 Administrators Without Wrongly Suppressing Free Speech as "Harassment" Under Title IX*, 10 J. GLOB. JUST. & PUB. POL'Y 128, 146–63 (2024) (analyzing K-12 First Amendment free speech principles and pre-*Cardona* Title IX regulations in questioning the deference model for secondary school officials).

Section II.A provides a brief survey of classic speech cases decided prior to *Mahanoy*, while Section II.B looks at how *Mahanoy*'s majority and concurring opinions framed the off-campus speech inquiry for the Middle Ground.

A. Pre-Mahanoy Student Speech Cases

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[50] The enforcement of First Amendment rights is accessible to citizens vis-à-vis the states through the Fourteenth Amendment of the United States Constitution.[51]

During the twentieth century, the Supreme Court decided several constitutional cases arising in the public-school setting,[52] culminating with one of the Court's biggest hits, *Tinker v. Des Moines Independent Community School District.*[53] In *Tinker*, three students wanted to express their disagreement with the Vietnam War by wearing black armbands to their high school building.[54] The school's principal learned about the students' plan and adopted a new policy prohibiting students from wearing expressive clothing (like armbands) during the school day.[55] The group wore the armbands to school anyway and were suspended by the principal under the new policy.[56] The students filed a First Amendment lawsuit challenging the school's policy that ultimately reached the Supreme Court.[57] On appeal, the Court sided with

50. U.S. CONST. amend. I.

51. *E.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 524 (2022) ("The Court has held the [First Amendment] applicable to the States under the terms of the Fourteenth Amendment." (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940))).

52. *See* Caudle, *supra* note 16, at 169 & n.20.

53. 393 U.S. 503 (1969). Many scholars have commented on the legacy of *Tinker* in modern First Amendment jurisprudence. *See, e.g.*, David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 477–86 (1981); Mark Yudof, Tinker *Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 367–69 (1995); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 527-539 (2000); R. Randall Kelso*, The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 291 (2016).

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

55. *See id*.

56. *See id*.

57. *See id*.

the students,[58] and its holding became a landmark decision for free speech rights in the United States.[59]

Tinker's message was simple: "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[60] In the Court's opinion, the "passive expression of opinion" displayed by the armbands did not interfere with "the school's work or [collide] with the rights of other students to be secure and to be let alone."[61] Rather, the principal's limitation on speech was based on an "undifferentiated fear or apprehension of disturbance," which was "not sufficient to overcome the right to freedom of expression."[62] Any limitation on a student's speech, the Court said, must be based on "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[63]

Tinker's holding was practical: students have the freedom to speak, "even on controversial subjects," in all manner of school activities.[64] However, "conduct by the student, *in class or out of it* . . . [that] materially disrupts classwork or involves substantial disorder or invasion of the rights of others" may still be disciplined by a public school district under the First Amendment.[65] Therefore, under *Tinker*, public schools can regulate a student's speech if the speech is an (1) "invasion of the rights" of others, ("invasion of rights" test), or if it caused a (2) "material" and "substantial" disruption to the learning environment ("substantial disruption" test).[66] Under

58. *See id.* at 741.

59. Castorina *ex rel.* Rewt v. Madison Cnty Sch. Bd., 246 F.3d 536, 540 (6th Cir. 2001) (referring to *Tinker* as the "landmark decision concerning student speech"); *see also* Morse v. Frederick, 551 U.S. 393, 416 (2007) ("*Tinker* effected a sea change in students' speech rights, extending them well beyond traditional bounds."); Chemerinsky, *supra* note 53, at 527 (arguing that *Tinker* is "the most important Supreme Court case in history protecting the rights of students").

60. *Tinker*, 393 U.S. at 506.

61. *Id.* at 508.

62. *Id*.

63. *Id.* at 509.

64. *See id.* at 513 ("When he is in the cafeteria or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966))).

65. *See id.* at 512–13 (emphasis added); Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 188 (2021).

66. *Tinker*, 393 U.S. at 513; *see also* Caudle, *supra* note 16, at 171 (citing *Tinker*, 393 U.S. at 513).

66. *See Mahanoy*, 549 U.S. at 189, 192 (referring to the "substantial disruption" test); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001) (referring to *Tinker*'s "material disruption" test); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986)

either prong, a school's rationale for the regulation must be based on more than an "undifferentiated fear or apprehension of disturbance," or the "mere desire to avoid the discomfort and unpleasantness" of an "unpopular viewpoint."[67] In either *Tinker* domain, the Court has made clear that the "special characteristics" of the school environment granted school officials certain "leeway" to discipline students for their speech within the confines of the public-school setting.[68]

In the decades that followed *Tinker*, the Supreme Court issued three more student speech opinions, forming what has become known as the *Tinker* doctrine.[69] In *Bethel v. Fraser*, [70] the Court addressed whether a high school student's "pervasive sexual innuendo," delivered during a school assembly, was protected by the First Amendment.[71] The Court held that *Tinker* did not apply to this category of speech because public schools had separate authority to discipline students for "lewd" or "indecent" speech rendered *at school*, [72] even though the concurrence found that the same type of speech was protected

("It is true, however, that the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities."). *But see* discussion *infra* Part IV, Section V.A (discussing how the Supreme Court has never fully analyzed the scope of Tinker's "invasion of rights" prong); Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HAST. CONST. L.Q. 835, 841, 846–50 (2008) (questioning where *Tinker's* "rights of others" language fits into the speech analysis and analyzing the scope of the "rights of others" portion of *Tinker*); David L. Hudson Jr., Mahanoy Area School District v. B.L.*: The Court Protects Social Media but Leaves Unanswered Questions*, *in* CATO SUPREME COURT REVIEW 2021–2022, at 93, 106 (2022) (pointing out that one of the "unanswered questions" from Mahanoy was the status of the "rights of others" language in *Tinker*). For a more in-depth review of the "rights of others" language in *Tinker*, see Brian Pickard, *Tinkering with the Rights of Others*: Harper v. Poway Unified School District, 8 RUTGERS J.L. & RELIGION 7, 8–9 (2006).

67. *Tinker*, 393 U.S. at 508, 509; *cf.* L.M. v. Middlesborough, 145 S. Ct. 1489, 1490–92 (2025) (Alito J., dissenting) (arguing that the Court's student speech cases should incorporate principles of "viewpoint discrimination"); R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND L. REV. 355, 426 (2019) ("Whether some government action involves viewpoint discrimination is a critically important issue in First Amendment free speech doctrine. The Supreme Court has not done as good a job as it could in clarifying when government action involves viewpoint discrimination or instead involves content-based, subject-matter regulation.").

68. *Mahanoy*, 549 U.S. at 188. For an in-depth analysis on the Court's "special characteristics" and "leeway" discussion in *Mahanoy*, see Papandrea, *supra* note 26, at 91–97.

69. *See* Caudle, *supra* note 16, at 174 (referring to the First Amendment's *Tinker* doctrine).

70. 478 U.S. 675 (1986).

71. *Id.* at 677, 683.

72. *Id.* at 685 ("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.").

"*outside of the school environment*."[73] In distinguishing *Tinker*, the Court reasoned that school officials could regulate the type of speech at issue in *Fraser* because they hold a unique position as "role models," responsible for teaching "the shared values of a civilized social order" to school-age children.[74]

In *Hazelwood School District v. Kuhlemeier*,[75] the Court addressed the regulation of student speech by a principal in a school-sponsored, print newspaper.[76] In another break from *Tinker*, the Court held that public schools could regulate "school-sponsored expressive activities" that were "reasonably related to legitimate pedagogical concerns."[77] Nothing in *Tinker* or *Fraser*, the Court said, required schools to "tolerate student speech" that was "inconsistent with its 'basic educational mission,' even though the government could not censor similar speech *outside the school*."[78] In rendering its decision, the Court also addressed the lower court's analysis of *Tinker's* "invasion of rights" prong.[79] Without deciding the issue, the Court noted that *Tinker's* "invasion of rights" prong might be justified where student speech "could result in tort liability" for a school.[80]

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73. *Id.* at 688 (Brennan, J., concurring) (emphasis added) ("If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court's [majority] opinion does not suggest otherwise." (internal citation omitted)); *see also* Morse v. Frederick, 551 U.S. 393, 405 (2007) (emphasis added) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.").

74. *See Fraser*, 478 U.S. at 683.

75. 484 U.S. 260 (1988).

76. *Id.* at 262–63.

77. *See id.* at 272–73 ("[W]e conclude that the standard articulated in *Tinker* . . . 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.").

78. *See id.* at 266 (emphasis added) (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685–86 (1985)).

79. *See id.* at 265–66, 273 n.5; *cf.* Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1376 (8th Cir. 1986) ("Any yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance."), *rev'd*, 484 U.S. 260 (1988).

80. *Hazelwood*, 484 U.S. at 273 n.5. For a recent discussion on tort liability in student speech cases, see Erickson & Bunker, *supra* note, 40 at 1040 (proposing the addition of "some elements of . . . civil aiding and abetting" law into the student speech analysis). The issue of potential tort liability for speech rendered in the school setting was also recently addressed by the Seventh Circuit. *See* Kluge v. Brownsburg Cmty. Sch. Corp., 150 F.4th 792, 805–06, 810–11 (2025). Although the Seventh Circuit distinguished student speech from employee speech, it still recognized the delicate intersection of speech and federal anti-discrimination laws like Title VI in the learning environment. *Id*. Importantly, the school district argued that its failure to accommodate the teacher's request for a "last-name-only" religious accommodation to its school policy complied with Title VI, in part, because granting the accommodation would "expose[] the school to an unreasonable risk of Title IX liability." *Id.* at 810. The Seventh Circuit held that

Finally, in *Morse v. Frederick*, [81] the Court analyzed whether a high school could discipline a student for displaying a banner that read "BONG HiTS 4 JESUS" at a school event.[82] The Court held that "promoting illegal drug use" by a student at a school event was not protected speech under the First Amendment.[83] However, like *Fraser* and *Hazelwood*, *Morse* did not turn on the application of *Tinker*.[84] Rather, the Court's rationale focused on the school's "'important . . . perhaps compelling' interest" in "deterring drug use" among minor students.[85]

B. Mahanoy Area School District v. B.L. ex rel. Levy*: A Shift Towards the "Middle"*

In 2021, the Supreme Court opened the *Tinker* doctrine to the information age in *Mahanoy Area School District v. B.L. ex rel. Levy*.[86] As discussed in Section II.A, the Supreme Court's "patchwork"[87] of existing precedent had only ever addressed student speech rights within the context of a brick-and-mortar school building, during a traditional school day.[88] However, beginning in the late 2000s, *Tinker* was increasingly applied to online settings outside the school building, like the speech at issue in *Mahanoy*.[89] In this new digital context, *Tinker* came into question often, due to cyberbullying and the rapid growth of the internet at the turn of the millennium.[90] Over time, a circuit split of authority in off-campus student speech cases emerged.[91] When *Mahanoy* reached appellate review in 2020, the Third Circuit reflected on the circuit split, and attempted to define the "on-campus" versus "off-campus"

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the school district provided insufficient evidence to support its claim, adding that the accommodation did not "'place [the school] on the "razor's edge" of legal liability.'" *Id.* (quoting Jackson v. Methodist Health Servs. Corp., 121 F.4th 1122, 1127 (7th Cir. 2024)).

81. 551 U.S. 393 (2007).

82. *See id.* at 396–97.

83. *Id.* at 403.

84. *See id.* at 407.

85. *See id.* (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

86. Caudle, *supra* note 16, at 168.

87. *Morse*, 551 U.S. at 422 (Thomas, J., concurring) (referring to *Tinker's* "patchwork of exceptions").

88. *See supra* Section II.A.

89. *See* Caudle, *supra* note 16, at 175–79 (analyzing circuit split approaches to "off-campus" speech cases from 2007 to 2021); Denning & Taylor, *supra* note 66, at 869–79 (analyzing lower court student "cyberspeech" cases decided during the 2000s); Suski, *supra* note 38, at 87–92; Erickson & Bunker, *supra* note 40, at 1002–06.

90. *See* Caudle, *supra* note 16, at 175–79 (reviewing circuit court cases that addressed "student speech under *Tinker* within the context of violent and threatening online student speech"); Denning & Taylor, *supra* note 66, at 869–79.

91. *See* Caudle*, supra* note 16*,* at 175–79; Erickson & Bunker, *supra* note 40, at 994.

distinction with precision.[92] In the process, the Third Circuit held that Levy's speech—and *all* "off-campus" speech meeting its prescribed definition—were "categorically" prohibited from regulation by public schools.[93] The Supreme Court granted certiorari to review the Third Circuit's opinion.[94]

In its decision, the Supreme Court affirmed the Third Circuit's holding in favor of Levy but disclaimed the lower court's "categorical" approach.[95] Unlike the Third Circuit, the majority did not believe that a school's need to regulate student speech automatically "disappear[ed]" just because it "[took] place off campus."[96] Still, the majority chose not to adopt a "bright-line"[97] or "broad, highly general rule" stating what "counts as 'off campus'" speech, and the Court did not fully explain how *Tinker* should apply in the "off-campus" context.[98] However, it did acknowledge that a school's "regulation" of off-campus speech—"remain[ed] significant" in some off-campus areas beyond the facts of *Mahanoy*—such as "serious or severe bullying or harassment targeting particular individuals."[99] Still, the majority "hesitate[d]" to draw exact boundaries on this category of speech or prescribe how a student's "age" or "impact upon the school itself" might inform the analysis.[100] Rather, the Court simply acknowledged "serious or severe bullying or harassment" may "call for . . . regulation" by school officials to comply with other areas of education law outside of *Tinker*.[101] Ultimately, the majority's opinion held "little more than this:" a school's regulation of off-campus speech, *like the kind in Levy's case*, was "diminished."[102]

In his concurring opinion, Justice Alito painted with a broader brush.[103] As discussed, he envisioned off-campus speech issues as part of a "spectrum."[104] Along Justice Alito's spectrum, like the majority, he too recognized that a school needed the "authority to protect everyone on its premises" and that schools must have the ability "to prohibit threatening and

92. *See* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 178–81 (3d Cir. 2020), *aff'd*, 594 U.S. 180 (2021).

93. *See B.L.*, 964 F.3d at 196.

94. *Mahanoy*, 594 U.S. at 187.

95. *Id.* at 193–94*; see also Chen*, 56 F.4th at 718–20 (summarizing the Court's holding in *Mahanoy*).

96. *Mahanoy*, 594 U.S. at 188.

97. Chemerinsky, *supra* note 26.

98. *Id.* at 189; *id*. at 195–96 (Alito, J., concurring).

99. *Id.* at 188 (majority opinion).

100. *See id.* at 189.

101. *See id.* at 188.

102. *See id.* at 190; *id.* at 219 (Thomas, J., dissenting) (noting that the *Mahanoy* majority "stat[ed] just one rule: Schools can regulate speech less often when that speech occurs off campus").

103. *See id.* at 194–211 (Alito, J., concurring).

104. *Id.* at 203–09; *see supra* notes 21–25 and accompanying text.

harassing speech" occurring within its programs and activities.[105] As Justice Alito put it, "severe bullying and harassment [are] serious (and age-old) problems" that have "given rise" to "the most litigation" in lower courts.[106] Despite his recognition of a problem, he conceded that "bullying and severe harassment" were amorphous concepts, "not easy to define with the precision required for a regulation of speech."[107] Like the majority, he left for "future cases" to decide whether a "speaker's off-campus location" made the "critical difference" in the First Amendment analysis.[108]

In a separate portion of *Mahanoy*, the majority briefly analyzed Levy's off-campus speech in the wider context of *Tinker*'s "substantial disruption" test.[109] The Court intimated that "[m]any courts had taken" *Tinker*'s "substantial disruption" standard as one that allowed "considerable freedom . . . to discipline students for conduct that the First Amendment might otherwise protect."[110] However, the type of "alleged disturbance" in *Mahanoy*, the majority said, was not the "sort of 'substantial disruption' of a school activity" or "a threatened harm to the rights of others that might justify the school's action."[111] For the first time, the Court referred to *Tinker* as a "demanding standard," which it affirmed must be "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[112]

In sum, *Tinker* remains an essential component of First Amendment jurisprudence for public secondary schools.[113] *Tinker* is still the anchor in student speech, while *Fraser*, *Hazelwood,* and *Morse* form pragmatic "exceptions" within the doctrine—where neither a "substantial disruption," or "invasion of rights"—are required to comply with constitutional

105. *See id.* at 201, 204 (Alito, J., concurring).

106. *See id.* at 207–09.

107. *See id.* at 209 (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206–07 (3d Cir. 2001)). Note, the *Saxe* opinion was authored by then-Judge Alito, prior to his confirmation to serve on the United States Supreme Court. *See Saxe*, 240 F.3d at 202.

108. *Compare Mahanoy*, 594 U.S. at 190 ("We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference."), *with id.* at 195 (Alito, J., concurring) ("I will mention some of those categories, but like the Court, I do not attempt to set out the test to be used in judging the constitutionality of a public school's efforts to regulate such speech.").

109. *See id.* at 192–93 (majority opinion).

110. *See id.* at 186.

111. *Id.* at 192 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

112. *See id.* at 193. The Court noted that only a few cheerleaders were "upset" by Levy's comments and that "discussion of the matter" took up minimal instructional time in one teacher's Algebra class. *See id*. at 192.

113. *See supra* Part II.

guarantees.[114] Then there is *Mahanoy*. *Mahanoy* retreated from adopting a "highly general" rule that would have defined the "on-campus" versus "off-campus" distinction with precision but "cautio[ned]" school officials not to venture too far into speech issues like Levy's.[115] Like *Hazelwood*,[116] the *Mahanoy* majority did not critically examine *Tinker's* "invasion of rights" prong and spent little time applying the "substantial disruption" test—although it framed the standard as a "demanding" one for future courts.[117] Justice Alito's concurrence laid the foundation for an off-campus analysis, by creating a "spectrum" for courts to evaluate student speech.[118] The concurrence recognized a middle portion of the spectrum, however, both the majority and the concurrence left the mechanics of this category for another day.[119]

Accordingly, Part IV begins the dig into this new terrain by examining post-*Mahanoy* circuit court cases from the Middle Ground. But first, Part III unpacks the scope of the regulatory framework governing the Middle Ground beyond the First Amendment.

III. THE REGULATION OF BULLYING & HARASSING STUDENT SPEECH

Outside the *Tinker* doctrine, secondary public schools have separate statutory duties to prohibit bullying and harassment in the learning environment.[120] Over the years, many scholars have addressed the complexity of bullying and harassment issues within the First Amendment student speech

114. McClelland v. Katy Indep. Sch. Dist., 63 F.4th 996, 1006 (5th Cir. 2023) (framing *Fraser*, *Hazelwood*, and *Morse* as "exceptions" to *Tinker* and holding that the Supreme Court affirmed a "school's right to censor" student speech even without a "substantial disruption"); N.J. *ex rel.* Jacob v. Sonnabend, 37 F.4th 412, 423–24 (7th Cir. 2022); *accord* Denning & Taylor, *supra* note 66, at 866–79.

115. *Mahanoy*, 594 U.S. at 188–90; *id.* at 211 (Alito, J., concurring); *see also supra* note 26 (discussing the concurrence and dissent on the regulation of speech off campus).

116. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73, 273 n.5 (1988) (declining to address the lower court's holding that *Tinker* "preclude[ed] school officials from censoring student speech to avoid 'invasion of the rights of others,' except where that speech could result in liability to the school" (internal citations omitted)).

117. *See supra* Section II.B. For a deeper analysis on the consequences of the Court's interpretation of *Tinker* as a "demanding standard" in *Mahanoy*, see Kristopher L. Caudle, Demanding More – or Less? The Erosion of Deference in the Tinker Doctrine 20–22, 24–27, 36–49 (Nov. 10, 2025) (unpublished manuscript) (on file with author).

118. *See Mahanoy*, 594 U.S. at 201–07 (Alito, J., concurring).

119. *Id.* at 190 (majority opinion); *id.* at 207 ("I will mention some of those [middle] categories, but like the Court, I do not attempt to set out the test to be used in judging the constitutionality of a public school's efforts to regulate such speech.").

120. *See* discussion *infra* Part III.

context.[121] Federal anti-discrimination statutes, along with state-based, anti-bullying laws, weave together to form a complex regulatory scheme applicable to American public-school districts;[122] however, none of these laws were critically analyzed in *Mahanoy*[123] and the DOE's interpretation of *Mahanoy* within this area vacillated in 2025.[124] Therefore, Part III proceeds in two parts: Section A examines three federal anti-discrimination statutes that prohibit different forms of harassment in public schools; Section B then turns to a similar form of regulation for bullying under applicable state law.

A. The Regulation of Harassment Under Federal Law

Under federal law, all secondary public schools that receive "federal financial assistance" must prohibit "discrimination" based on certain categories within their "program[s] or activit[ies]."[125] Title VI of the Civil Rights Act of 1964 prohibits discrimination based on "race, color, or national origin."[126] Title II of the Americans with Disabilities Act of 1992 and Section

121. *E.g.*, Emily F. Suski, *A First Amendment Deference Approach to Reforming Anti-Bullying Laws*, 77 LA. L. REV. 701, 706–21 (2017) (providing an in-depth analysis of anti-bullying laws while noting the "limited solutions" to a "complex [bullying] problem"); Chemerinsky, *supra* note 26 (noting in a post-*Mahanoy* article that "[i]f the student is engaged in bullying or harassing behavior . . . then even off-campus speech might be punished"); *see also* Suski, *supra*, at 703 n.9 (collecting articles addressing anti-bullying and First Amendment issues).

122. *See* discussion *infra* Part III; *see also* Haile, *supra* note 49, at 146–63 (analyzing the intersection of the First Amendment and Title IX); Brett Adam Sokolow, Daniel Kast, and Timothy J. Dunn, *The Intersection of Free Speech and Harassment Rules*, A.B.A.: HUM. RTS. MAG. (Oct. 01, 2011), https://www.americanbar.org/groups/crsj/resources/human-rights/archive/intersection-free-speech-harassment-rules/ [https://perma.cc/JPF8-H3UJ] (discussing the intersection of First Amendment and Title IX principles prior to *Mahanoy* and *Cardona*).

123. *See Mahanoy*, 594 U.S. at 188 (recognizing that certain forms of "bullying or harassment" may "call for . . . regulation," without referencing any specific state or federal laws).

124. *See supra* notes 30–32, 34 and accompanying text; *infra* notes 133, 141, 148 and accompanying text (explaining the DOE's shift in policy in the winter of 2025).

125. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001) (outlining the scope of federal "anti-harassment statutes" that are applicable to public school districts in the United States); Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter on Title VI and Shared Ancestry or Ethnic Characteristics Discrimination 1 (May 7, 2024) [hereinafter May 2024 Title VI Guidance] (outlining guidelines in response to increase in discrimination complaints); Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter Responding to Bullying of Students with Disabilities 2 (Oct. 21, 2014) [hereinafter October 2014 Section 504 Guidance] (outlining guidelines of disability-based harassment and consequences to schools); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33884 (Apr. 29, 2024) (defining a "[r]ecipient" under Title IX as an entity to "whom Federal financial assistance is extended") (to be codified at 34 C.F.R. §106.2).

126. Title VI of the Civil Rights Act of 1964 §601, 42 U.S.C. § 2000d-1; 28 C.F.R. § 42.101 (2025).

504 of the Rehabilitation Act of 1974, (collectively, "Section 504"), work in tandem to prohibit discrimination based on disability.[127] Title IX prohibits discrimination based on "sex."[128] Section II.A.1 outlines the general requirements relevant to student speech under federal law. Sections II.A.2-3 then address requirements that apply to two specific types of harassment – "disability-related harassment" under Section 504 and "sexual harassment" under Title IX.

Harassment is a form of discrimination prohibited under federal law.[129] Consistent with the First Amendment,[130] harassment must be addressed by public school districts, if the alleged conduct is based on one of the prohibited categories captured by the federal law set forth above and creates a "hostile environment."[131] Generally, a "hostile environment" exists when "unwelcome conduct" is sufficiently "severe" or "pervasive" enough that it "denies" a student "equal access" to an educational "program or activity."[132] A school's

127. *See* October 2014 Section 504 Guidance, *supra* note 125; Title II of the Americans with Disabilities Act § 201, 42 U.S.C. § 12131; Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794; A.J.T. v. Osseo Area Sch., Indep. Sch. Dist. No. 279, 605 U.S. 335, 339–40 (2025) (referencing Section 504 and IDEA in noting that "[m]ultiple federal laws afford 'diverse' (and occasionally overlapping) protections for children with disabilities in public schools" (quoting Fry v. Napoleon Community Schools, 580 U.S. 154, 170 (2017))).

128. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88; 34 C.F.R. §§ 106.1–.9; *see also* cases cited *supra* note 30 (discussing school regulation of harassment).

129. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629*,* 643 (1999) (recognizing a private right of action for "hostile environment" claims for peer-on-peer forms of harassment under Title IX); *see* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992) (recognizing damages as an available remedy for a harassment cause of action brought under Title IX); *see also* Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 664–71, 670 n.14 (2d Cir. 2012) (explaining the scope of liability for Title VI).

130. *See Saxe*, 240 F.3d at 206 (recognizing that although student speech fits within the "ambit" of the hostile environment analysis, "[w]hen laws against harassment attempt to regulate oral or written expression on [offensive] topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications"); *cf. id.* at 206 n.6 ("Most commentators including those who favor and oppose First Amendment protection for harassing speech, agree that federal anti-discrimination law regulates speech on the basis of content and viewpoint."); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596–97 (5th Cir. 1995) ("[W]hen Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statutes imposes content-based, viewpoint-discriminatory restrictions on speech."); Haile, *supra* note 49 (noting the importance of the Supremacy Clause and as pertinent to student free speech intersecting bullying and harassment).

131. *See supra* notes 125–128 and accompanying text; May 2024 Title VI Guidance, *supra* note 125, at 2–5 (explaining how a school is not relieved of its federal obligations to respond to "harassment" based solely on its First Amendment concerns).

132. *Davis*, 526 U.S. at 644–45 ("[A] plaintiff must show harassment that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities."); *see also* May 2024 Title VI Guidance, *supra* note 125, at 2–5, 18 (noting that a school district can regulate harassment that "limits or denies a student's ability

failure to regulate harassment, even if it originates online or on social media, may still give rise to liability for school districts depending on the factual circumstances.[133] In addition, a school district's response to harassment is subject to oversight by the DOE's Office of Civil Rights.[134]

1. Disability-Related Harassment

The harassment of a student based on a disability" constitutes "disability-based harassment" in violation of Section 504.[135] Under Section 504's implementing regulations, "students with disabilities" are also entitled to the provision of a free appropriate public education ("FAPE").[136] In addition, harassing speech involving a student with a disability may impact the provision of a FAPE.[137] Similarly, additional procedures exist for analyzing speech that may be considered a "manifestation" of a student's disability.[138] Whether or not a student's speech is a "manifestation" of their disability is a

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to *participate in* or *benefit from* the school's program or activity" (emphasis added)); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 85 Fed. Reg. 30026, 30574 (May 19, 2020) (defining "sexual harassment" as "unwelcome conduct" that is "so severe, pervasive, and objectively offensive that it *effectively* denies a person equal access" to an education program or activity) (emphasis added)) (previously codified at 34 C.F.R. §106.30).

133. OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ONLINE OR DIGITAL SEXUAL HARASSMENT UNDER THE 2020 TITLE IX REGULATIONS 2–3 (2025) [hereinafter JANUARY 2025 TITLE IX GUIDANCE] https://www.ed.gov/media/document/digital-sexual-harassment-under-2020-title-ix-regulations-109318.pdf [https://perma.cc/7EFV-QR82]; *e.g.*, Chen *ex rel.* Chen v. Albany Unified Sch. Dist, 56 F.4th 708, 720–22 (9th Cir. 2022) ("[A] failure by the school to respond to Epple's harassment [on social media] might have exposed it to potential liability on the theory that it had 'failed to respond adequately' to a 'racially hostile environment' of which it had become aware."); Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th 257, 273 (4th Cir. 2021) ("[A]n educational institution could be liable under Title IX not only where its deliberate indifference '"cause[s] [students] to undergo" harassment,' but also where such indifference 'make[s] them liable or vulnerable' to harassment." (alteration in original) (quoting *Davis*, 526 U.S. at 645)); Ricketts v. Wake Cnty. Pub. Sch. Sys., 125 F.4th 507, 520–21 (4th Cir. 2025) (collecting cases recognizing a private right of action under Title VI for "student-on-student racial harassment," and holding that the same legal standard for Title IX in *Davis* applies to Title VI cases).

134. *See* Office of Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter on Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973 at 1, n.1 (July 19, 2022) [hereinafter July 2022 Section 504 Guidance] (explaining that the Office for Civil Rights enforces forms of disability-related harassment under Section 504).

135. October 2014 Section 504 Guidance, *supra* note 125.

136. July 2022 Section 504 Guidance, *supra* note 134, at 1; *see* 34 C.F.R. § 104.33(a) (2025) ("A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."); October 2014 Section 504 Guidance, *supra* note 125, at 1–3.

137. October 2014 Section 504 Guidance, *supra* note 125, at 9–10.

138. *See* July 2022 Section 504 Guidance, *supra* note 134, at 14–15, 25–26.

determination made by a "group of knowledgeable persons," called a "Section 504 team."[139] This specific administrative "evaluation," referred to as a Manifestation Determination Review ("MDR"), is governed through a separate process under Section 504.[140]

2. Sexual Harassment

Title IX prohibits "sexual harassment," and like Title VI and Section 504, this type of conduct must be regulated if it creates a "hostile environment."[141] Whether sexual harassment has occurred is highly factual, based on a "constellation of surrounding circumstances."[142] Unlike Title VI and Section 504, a school's response to complaints of sexual harassment is largely dictated by Title IX's formal grievance process.[143] Within this context, specific due process procedures exist for parties engaged in Title IX grievances,[144] which are not construed to limit any other separate rights held by disabled students under the Constitution[145] or other federal laws like Section 504.[146]

Title IX's interpretation continues to fluctuate for secondary public schools.[147] In May 2020, prior to the Supreme Court's opinion in *Mahanoy*, the DOE issued detailed Title IX regulations addressing sexual harassment within "education program[s] and activit[ies]."[148] Under the 2020 Title IX regulations, a school's response to sexual harassment is limited to "locations, events, or circumstances" where the school "exercised substantial control"

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139. *Id.* at 5.

140. *See id.* at 8–10. Note, an "eligible student" under Section 504 may also be entitled to a FAPE under another federal statute: the Individuals with Disabilities Education Act ("IDEA"). *See* 20 U.S.C. § 1400.

141. JANUARY 2025 TITLE IX GUIDANCE, *supra* note 133, at 2; *see* May 2024 Title VI Guidance, *supra* note 125, at 4.

142. Davis *ex rel.* LaShonda D. v. Monroe Cnty Bd. of Educ., 526 U.S. 629, 651 (1999) (quoting Oncale v. Sundowner Offshore Servs, Inc., 523 U.S. 75, 82 (1998)); *see* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30575–78 (May 19, 2020) (previously codified at 34 C.F.R. § 106.45) (providing the broad-based factual analysis for grievances administered under 2020 Title IX regulations).

143. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30575–78 (previously codified at 34 C.F.R. § 106.45) (providing requirements for a Title IX grievance process).

144. *See id.*

145. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30573 (previously codified at 34 C.F.R. § 106.6).

146. *See id.* at 30227–29 (discussing the intersection between Title IX, IDEA, and Section 504).

147. *See Cardona* Dear Colleague Letter, *supra* note 32, at 1–2.

148. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30567.

over the accused student and "the context in which the sexual harassment occurred."[149] The "substantial control" rule is a "fact-specific inquiry," grounded in the scope of a traditional school building, but also covers online sexual harassment enabled by the "use of cell phones or the internet."[150]

In April 2024, the DOE issued new Title IX regulations,[151] which resulted in multiple lawsuits across the United States.[152] Among many changes to the 2020 Title IX regulations, the DOE's 2024 Title IX regulations interpreted *Mahanoy*, as well as the circuit court case law discussed in Part IV, as permitting school districts to regulate off-campus student speech that "created a hostile environment."[153] In January 2025, the DOE's 2024 Title IX regulations were vacated nationwide by order of Judge Reeves in *Tennessee v. Cardona*.[154] Judge Reeves ruled, among other things, that the 2024 Title IX regulations exceeded the DOE's statutory authority for rulemaking and violated the First Amendment by compelling speech related to a student's "asserted gender identity."[155] *Cardona* offered no opinion on *Mahanoy* or the scope of off-campus speech regulation in bullying and harassment law.[156] Under the new Trump Administration, the DOE did not appeal *Cardona*.[157]

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149. *Id.* at 30203.

150. *See id.* at 30202 (noting that the DOE's 2020 Title IX regulations are not necessarily contrary to DOE's 2010 guidance that "harassing conduct may include 'use of cell phones or the internet'" and that the DOE's position remained the same under a "substantial control" analysis (quoting Office of Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Harassment and Bullying, 2 (Oct. 26, 2010)). *But cf.* Updated 2010 Harassment and Bullying Guidance, *supra* note 34, at 1 (noting that the DOE's 2010 Dear Colleague Letter on Harassment and Bullying "expresses policy that is inconsistent in some respects" with the DOE's interpretation of Title IX, without specifying which portions of the 2010 guidance remain in effect).

151. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33474 (Apr. 29, 2024).

152. *See* Tennessee v. Cardona, 762 F. Supp. 3d 615, 627–28 (E.D. Ky. 2025) (collecting cases).

153. Nondiscrimination on the Basis of Sex in Education, 89 Fed. Reg. at 33515 (noting that under *Mahanoy*, secondary schools have "sufficient authority to address conduct that creates a hostile environment even when the conduct occurs online and outside of a specific school activity").

154. 762 F. Supp. 3d at 628. *But cf.* Trump v. CASA, Inc., 606 U.S. 831, 837 (2025) (stating that "universal injunctions," enforced beyond the parties of the lawsuit, likely "exceed the equitable authority that Congress has granted to federal courts").

155. *Cardona*, 762 F. Supp. 3d at 622, 624–25.

156. *Id.* at 622 (noting in passing that under the 2024 Title IX regulations "harassment is not limited to speech occurring on school campuses and may capture conduct that occurs on social media or 'other platforms,'" without offering any opinion on its interpretation of *Mahanoy* (quoting Nondiscrimination on the Basis of Sex in Education, 89 Fed. Reg. at 33535)).

157. *See Cardona* Dear Colleague Letter, *supra* note 32 (indicating the DOE's intent not to appeal because that decision rested with the Department of Justice). By operation of law, the 2020 Title IX regulations went back into effect in January of 2025. *See id*. at 2; *Cardona*, 762 F. Supp. 3d at 627 (ruling the "Final Rule and corresponding regulations are invalid and must be set aside").

Following *Cardona*, DOE's interpretation of Title IX shifted back to its 2020 pre-*Mahanoy* approach.[158] Without specifically addressing *Mahanoy*, or any of the circuit court cases in Part IV, the DOE clarified in a guidance document that under its 2020 Title IX regulations, it followed the "substantial control" rule for assessing online harassing speech.[159] Thus, the "substantial control" test remains a "jurisdictional condition" that is highly fact-specific, especially in the assessment of online harassment,[160] but can still extend online to "email, texts . . . apps, or other technologies," such as social media platforms.[161]

B. The Regulation of Bullying Under State Law

There is no doubt that "bullying among students is a complicated problem."[162] While there certainly is "no constitutional right to be a bully,"[163] unless student speech fits into one of the categories identified in Section III.A, the regulation of bullying speech is primarily governed by state law. [164] To date, all fifty states have anti-bullying laws designed to protect students in the learning environment.[165] Generally, anti-bullying statutes prohibit cyberbullying and include the following regulatory components: (1) a specific definition of bullying conduct, (2) a requirement that public schools prohibit bullying in schools, and (3) a directive for public school districts to effectuate

158. *See Cardona* Dear Colleague Letter, *supra* note 32, at 2; JANUARY 2025 TITLE IX GUIDANCE, *supra* note 133, at 6 n.2.

159. *See* JANUARY 2025 TITLE IX GUIDANCE, *supra* note 133, at 2–5 (analyzing the scope of the 2020 Title IX regulations related to online speech without reference to *Mahanoy*); *cf.* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30574 (May 19, 2020) (interpreting, contemporaneously, the 2020 Title IX regulations to incorporate the "substantial control" test).

160. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30202.

161. JANUARY 2025 TITLE IX GUIDANCE, *supra* note 133.

162. Suski, *supra* note 121, at 710.

163. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264 (3d Cir. 2002).

164. *See* Nondiscrimination on the Basis of Sex in Education, 85 Fed. Reg. at 30202 ("[E]ven if a [school] is not required to address certain misconduct under [Title IX's] final regulations, [the Title IX] final regulations expressly allow a [school] to address such misconduct under its own code of conduct."); *id.* at 30460 ("[I]f a State law requires a [school] to investigate and address conduct that [Title IX's] final regulations do not address, then these final regulations do not prevent a [school] from doing so."); Suski, *supra* note 121.

165. *Laws, Policies, and Regulations*, STOPBULLYING.GOV (May 17, 2023), https://www.stopbullying.gov/resources/laws [https://perma.cc/QJA2-YNN7]; Suski, *supra* note 121, at 711 ("Every state has heeded the call to respond to the problem of bullying by passing anti-bullying laws").

the law by enacting and implementing policies at the district level.[166] Like with harassment under federal law, in some circumstances a school's regulation of bullying can extend online through social media.[167] However, the scope of a school's regulation for off-campus bullying speech varies by state and the breadth of policy language enacted at the school level.[168] Some of the variance embedded within state anti-bullying laws was streamlined through DOE's longstanding 2010 Harassment and Bullying Guidance, which was rescinded, in part, at the start of the second Trump Administration.[169]

In short, secondary public schools must balance multiple conflicting layers of statutory law and policy when choosing how to regulate Middle Ground speech.[170] On the one hand, schools have affirmative duties to address student speech that could constitute bullying or harassment under both state and federal law.[171] A school's response to bullying or harassment must also consider separate procedures for "students with disabilities" under Section 504[172] and "sexual harassment" grievance procedures under Title IX.[173] On the other hand, the First Amendment is a "bedrock" constitutional principle.[174] The Supreme Court issued a clear directive in *Mahanoy* (a non-bullying or harassment case) for administrators to show caution when disciplining student speech that originated off-campus, outside of the traditional school day.[175]

166. *See Common Components in State Anti-Bullying Laws, Policies and Regulations*, STOPBULLYING.GOV (May 17, 2023), https://www.stopbullying.gov/resources/laws/key-components [https://perma.cc/4E25-58L8].

167. *See supra* Part III (analyzing cases affirming a school's discipline for off-campus speech under *Mahanoy*'s "serious or severe bullying or harassment" category); Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (affirming discipline for off-campus bullying speech under "nexus" test prior to Supreme Court's decision in *Mahanoy*).

168. *See Common Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 166; *cf.* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999) (reiterating that "courts should refrain from second-guessing the disciplinary decisions made by school administrators" (citing New Jersey v. T.L.O., 469 U.S. 325, 342–43 n.9 (1984)); Suski, *supra* note 121, at 733–35 (analyzing "overbreadth" concerns in the application of anti-bullying laws); L.M. v. Middlesborough, 103 F.4th 854, 885 (1st Cir. 2024) (finding that the Court "has emphasized post-*Tinker* . . . that public schools require flexibility in the drafting and administration of disciplinary codes."); *cf. id*. (noting that school administrators should consider "overbreadth" concerns in school policies).

169. *See* Updated 2010 Harassment and Bullying Guidance, *supra* note 34; Exec. Order No. 14168, 90 Fed. Reg. 8615, 8617–19 (June 3, 2025).

170. *See supra* Part II; Suski, *supra* note 121; Haile, *supra* note 49.

171. *See supra* notes 163–164 and accompanying text.

172. *See supra* Section III.A.

173. *See supra* Section III.A.

174. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 205–06 (2021) (Alito, J., concurring).

175. *See supra* Section II.B; Mahmoud v. Taylor, 606 U.S. 522, 557 (2025) ("The public school imposes rules and standards on conduct on its students and holds a limited power to discipline them for misconduct." (citing Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 187–88 (2021))).

Furthermore, at least in the category of "sexual harassment," the DOE's prior interpretation of *Mahanoy* in the Middle Ground was not renewed after *Cardona*.[176] Rather, public schools were issued general guidelines with no analysis of *Mahanoy* and with a renewed focus on "substantial control."[177]

However, as the cases in Part IV demonstrate, even if the regulatory focus shifts to the traditional on-campus setting in years to come, modern student speech quickly veers off-campus in the social media era, only to return to the "schoolhouse gate"[178] in viral form for administrators to address as a disruption in the learning environment.[179]

IV. PLOWING NEW TERRAIN IN THE MIDDLE GROUND

As discussed in Part II, the Middle Ground of the off-campus student speech spectrum was left barren after *Mahanoy*. Part IV examines how the First, Tenth, Ninth, and Sixth circuits have begun to analyze the Middle Ground since *Mahanoy*.[180]

A. Doe v. Hopkinton Public Schools*: First Circuit*

The first circuit court to address off-campus student speech under *Mahanoy* was the First Circuit. In *Doe v. Hopkinton Public Schools*,[181] two parents reported that their minor child (Roe) had been bullied within the school's hockey team.[182] Like all other states,[183] Massachusetts had enacted an "anti-bullying statute" which required, among other things, that public schools implement a bullying policy at the school-level.[184] In their complaint, Roe's parents alleged that one of the hockey team members videoed Roe during hockey team activities without his permission and posted messages

176. *See* JANUARY 2025 TITLE IX GUIDANCE, *supra* note 133.

177. *Id*.

178. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *see* Hudson, *supra* note 66, at 105 (noting the "possibility that speech created off campus might come on campus or be treated as on-campus speech").

179. *See infra* Part III; Singer, *supra* note 1; *see also* Chemerinsky, *supra* note 26 (positing that under *Mahanoy* there must be an "actual disruption of school activities" to regulate off-campus speech); Denning & Taylor, *supra* note 66, at 880 ("Technology enables putatively off-campus speech to come into the school with little effort on the student's part.").

180. For additional reading on the post-*Mahanoy* circuit court environment, see Erickson & Bunker, *supra* note 40, at 1017–18, 1039–40, 1045–46; Creeley, *supra* note 37.

181. 19 F.4th 493 (1st Cir. 2021).

182. *Id.* at 498.

183. *Common Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 166.

184. *Hopkinton*, 19 F.4th at 498.

about Roe in a group chat.[185] The group chat included messages that were "demeaning and expletive-laced" discussing the student's "appearance, voice, intimate anatomy, parents, and grandmother."[186] Some of the videos recorded were shared with other players on the hockey team via private group messages on Snapchat.[187] Roe was made "aware of the existence of the Snapchat group," when several team members "discussed it in front of him." [188] However, he "never saw" any of the messages "circulated" by his teammates about him.[189] Roe later "obtained counseling," "declined to try out for the lacrosse team," and entered formal mental health treatment," because of the bullying he experienced.[190]

Following an investigation under the school district's anti-bullying policy, eight students were found responsible for bullying and subjected to discipline.[191] Two of those students sued the school district, claiming that their conduct was protected under the First Amendment.[192] Neither of these two students took pictures of Roe, but they were part of the group chat, "participated in, and encouraged the bullying" that occurred as a part of the school's extra-curricular program.[193]

In its opinion, the First Circuit affirmed that under *Tinker*, public schools have a "special interest" in regulating student speech in two distinct areas: speech that was substantially disruptive *or* speech that involved the "invasion of the rights of others." [194] Then, the First Circuit discussed *Mahanoy*, reiterating that the school's "special interest" in regulating student speech was "significant" when addressing "serious or severe bullying or harassment" in the off-campus setting. [195]

However, the First Circuit distinguished the "general statement of discontent" in *Mahanoy* by affirming that "bullying [was] the type of conduct that implicate[d] . . . [a] protecti[on] against the invasion of the rights of others . . . in *Tinker*."[196] Thus, for the First Circuit, regulating "bullying"

185. *Id*.
186. *Id.* at 500.
187. *Id*.
188. *Id.* at 499.
189. *Id.* at 500, 508.
190. *Id.* at 502.
191. *Id.* at 497.
192. *Id*.
193. *Id.* at 499–501*,* 506–07.
194. *Id.* at 505 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)); *see also* L.M. v. Town of Middleborough, 103 F.4th 854, 868–72 (1st Cir. 2024) (collecting cases).
195. *Hopkinton,* 19 F.4th at 505–06.
196. *Id.* at 506 (quoting Norris *ex rel.* A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 29 (1st Cir. 2020).

speech was framed as a "pedagogical interest," one that remained strong "even in *off-campus* circumstances."[197]

Ultimately, the First Circuit distinguished *Mahanoy*, holding that Levy's "general statement of discontent" about the cheerleading team, "not directed at any individual," was "qualitatively different" from "encouragement" of bullying "that target[ed] and invade[d] the rights of an individual student."[198] Therefore, the First Circuit concluded that if a "causal connection" existed between the students' speech and the bullying, it could properly be disciplined by the school as an "invasion of rights."[199] Because both students "encouraged" the bullying that occurred, the First Circuit held a causal connection existed, and the school's discipline did not violate the First Amendment.[200]

B. CI.G. v. Siegried*: Tenth Circuit*

The Tenth Circuit has addressed off-campus speech too. In *C1.G v. Siegried*,[201] a high school student (C.G.) went to a local thrift store with several friends on a Friday evening.[202] During the outing, C.G. took pictures of his friends wearing "wigs and hats," one of which "resembled a foreign military hat from the WWII period."[203] C.G. posted the picture, along with an antisemitic caption about the Jewish community on Snapchat.[204] Before the Snapchat post was deleted by C.G., one of his classmates took a screenshot of the post, which was later forwarded to the school's principal by his classmate's parent.[205]

The school district commenced a school-level investigation, concerned that the post had been "widely circulated throughout the area's Jewish community," and that the post had "scared, angered, and saddened a family who said their son was worried about having a class with C.G."[206] Thereafter, C.G. was suspended from school pending the outcome of a school-level investigation.[207] Ultimately, C.G. was expelled for violating policies prohibiting "verbal abuse" as well as "intimidation, harassment . . . insulting . . . or threatening" behavior."[208] However, no specific harassment policy was

197. *Hopkinton*, 19 F.4th at 506 (emphasis added).
198. *Hopkinton*, 19 F.4th at 506.
199. *Id.* at 506.
200. *Id.* at 509.
201. 38 F.4th 1270 (10th Cir. 2022).
202. *Id.* at 1274.
203. *Id*.
204. *Id*.
205. *Id*.
206. *Id.* at 1274, 1278.
207. *Id.* at 1274.
208. *Id.* at 1274–75.

applied in the decision.[209] C.G.'s father then brought a lawsuit against the school district under the First Amendment.[210]

In its opinion, the Tenth Circuit analyzed C.G.'s off-campus speech under both *Tinker* and *Mahanoy*.[211] Like *Mahanoy*, the Tenth Circuit found C.G.'s digital speech was transmitted "outside of school hours from a location outside the school" on a "personal cellphone" to a "private circle" of his online friends.[212] Like *Mahanoy*, the court found that no one at C.G.'s school was specifically "target[ed] . . . with vulgar or abusive language" either.[213] Unlike the First Circuit, which relied just on *Tinker's* "invasion of rights" prong, the Tenth Circuit just applied *Tinker's* "substantial disruption" test to resolve the case.[214]

On balance, the Tenth Circuit held that one "email chain with one family," without evidence of any "specific threats" or speech "directed toward the school or its students," fell short of meeting "'*Tinker's* demanding standard.'"[215] The Tenth Circuit said "simply invoking the word[] 'harass'" when the speech did not "constitute harassment," did not transform otherwise constitutionally protected speech into harassment.[216] Accordingly, the Tenth Circuit reversed the school district's decision, holding that the First Amendment was violated in C.G.'s case.[217]

C. Chen *ex rel.* Chen v. Albany Unified School District*: Ninth Circuit*

Like the First and Tenth Circuits, the Ninth Circuit has addressed off-campus student speech since *Mahanoy*. In *Chen ex rel. Chen v. Albany Unified School District*,[218] two high school students were expelled for speech directed at fellow students captured within a private group chat on Instagram.[219] The private account was used by a group of students to make "cruelly insulting posts" about their fellow classmates.[220] Content posted to the account ranged from "immature" topics, such as "braces" or "weight," to "targeted vicious

209. *See id.* at 1275.
210. *Id.* at 1275–76.
211. *Id.* at 1276–78.
212. *Id.* at 1277 (quoting Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 191 (2021)).
213. *Id.* (quoting *Mahanoy*, 594 U.S. at 191).
214. *See id.* at 1276–78.
215. *Id.* at 1278–79 (quoting *Mahanoy*, 594 U.S. at 193).
216. *Id.* at 1279.
217. *Id.* at 1274, 1279.
218. 56 F.4th 708 (9th Cir. 2022).
219. *Id.* at 711–15.
220. *Id.* at 711.

invective" with "deeply offensive" "racist and violent themes" about fellow classmates at their school.[221]

Although the Instagram account was "intended to [remain] private," several photos from the account were shown to one of the targeted students during a weekend outing.[222] When classes resumed the following week, chaos ensued at the school.[223] Although the school's principal believed speech in the group chat constituted "harassment and bullying based on race and gender," no specific bullying or harassment policy was applied in the disciplinary process.[224] Ultimately, two students from the group chat were expelled from the school and later filed lawsuits claiming that the private Instagram posts were protected as off-campus speech under *Mahanoy*.[225]

Like the Tenth Circuit, the Ninth Circuit recognized that *Tinker* governed in two domains: "substantial disruption," or a "'colli[son] "with the rights of other students to be secure and to be let alone."'"[226] Although the Ninth Circuit concluded that "[t]he precise scope of *Tinker's* interference with the rights of others language [was] unclear," it held that students have no First Amendment right to "'target' specific classmates . . . with 'vulgar or abusive language.'"[227] In that same regard, the Ninth Circuit turned to *Fraser* and *Hazelwood* for guidance.[228] Under these precedents, the Ninth Circuit reasoned that a school was not required to "tolerate student speech that [was] inconsistent with its basic educational mission"[229] and that "schools may insist on 'civil discourse' in the school context," because it reinforces "the shared values of a civilized social order."[230] Thus, the Ninth Circuit "readily"

221. *Id.* at 711, 717.

222. *Id.* at 712. For an analysis on the role of intent in post-*Mahanoy* cases, see Erickson & Bunker, *supra* note 40, at 1045–46 (discussing the lack of intent in post-*Mahanoy* circuit court cases, proposing a reasonable expectation standard for the transmission of electronic speech in the learning environment).

223. *See Chen*, 56 F.4th at 712–13. The court noted in its opinion that groups of students "gathered at the school" "yelling or crying," and significant class time was taken up dealing with the topic at the school. *Id*. Many of the targeted students were "devasted," or "scared" with their "grades suffering" as a result. *Id.* at 713.

224. *See id*. at 713–16.

225. *Id.* at 714–16.

226. *Id.* at 716–17 (quoting Wynar v. Couglas Cnty. Sch. Dist., 728 F.3d 1062, 1070 (9th Cir. 2013)).

227. *Id.* at 717 (first quoting C.R. v. Eugene School District 4J, 835 F.3d 1142, 1152 (9th Cir. 2016) (first alteration in original); and then quoting Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 191 (2021)).

228. *See id.* at 716–17.

229. *Id.* at 716 (quoting LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988 (9th Cir. 2001) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988))).

230. *Id.* at 717 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683, 685 (1986)).

concluded that if the speech at issue had occurred on-campus, the school was justified in regulating it under the *Tinker* doctrine.[231]

The question presented in *Chen* was different: could "private" speech rendered off-campus be regulated under the First Amendment?[232] Rather than applying *Fraser*, *Hazelwood*, or either of *Tinker's* two-prongs directly, the Ninth Circuit employed its own "nexus" test to resolve the case.[233] To be sure, the Ninth Circuit's "nexus" test incorporated *Tinker's* "substantial disruption" test but added its own "additional standards" for the off-campus context.[234] While the Ninth Circuit agreed that under *Mahanoy*, the student's parents "ha[d] the primary responsibility" of "policing his off-campus use of social media," it found that the school still had a "responsibility" to protect *other students* "maltreated by their classmates."[235] Therefore, although the regulation of *some* off-campus student speech had been "diminished" by *Mahanoy*, it was not eliminated in all areas.[236] The Ninth Circuit concluded that once the Instagram posts "hit their targets," affected students became subjected to "severe bullying or harassment," which was one of the "off-campus circumstances" where "'[t]he school's regulatory interests remain[ed] significant.'"[237]

The Ninth Circuit also confronted how the harassing nature of the off-campus speech implicated more than just First Amendment concerns.[238] The Ninth Circuit pointed out that the school's "*failure*" to adequately respond to the type of speech it had become aware of by other students, could have "exposed it to potential [litigation]" under a "racially hostile environment"

231. *Id.* 717–18.

232. *Id.* at 711.

233. *See id.* at 719–21.

234. *See id.* at 718–20.

235. *Id.* at 721–22. The *in loco parentis* aspect of Justice Alito's concurrence plays a part in wider parents' right discussions unfolding in the United States. *See, e.g.*, S. Ernie Walton, *In Loco Parentis, the First Amendment, and Parental Rights Can They Coexist in Public Schools?*, 55 TEX. TECH L. REV. 461, 482–500 (2023) (analyzing constitutional cases to argue for a legal framework that is more reliant on traditional "in loco parentis" principles, which "construes the delegation of authority by parents narrowly" to "reassert basic parental rights"); Hudson, *supra* note 66, at 107 (noting that *Mahanoy* may also be "viewed as a victory for parental rights"); Haile, *supra* note 49, at 141–44 (discussing the relationship between the deference-based model used in K-12 education and the doctrine of *in loco parentis*).

236. *See Chen*, 56 F.4th at 719.

237. *Id.* at 721 (first alteration in original) (quoting Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 188 (2021)); *cf.* Erickson & Bunker, *supra* note 40, at 1045–46 (criticizing the "reasonable foreseeability" standard employed for student speech disseminated through social media platforms, proposing a "contextual analysis" to "determine if a reasonable student would expect that his or her message would reach and affect the school").

238. *See id.* at 717–18, 722.

theory of liability.[239] In that regard, the Ninth Circuit stated that "severe targeted harassment" based on "physical characteristics," like the speech on the Instagram account, "vilifie[d]" the students based on their race, which "threaten[ed]" their "'sense of physical . . . emotional and psychological, security.'"[240] The same legal liability would be evident, according to the Ninth Circuit, if the harassment was based on sex, which is governed by Title IX.[241] Ultimately, the Ninth Circuit concluded that the student's off-campus speech had a sufficient "nexus" to the school environment to warrant discipline.[242] Thus, the Ninth Circuit held that the First Amendment was not violated.[243]

D. Kutchinski v. Freeland Community School District*: Sixth Circuit*

The Sixth Circuit has also interpreted *Tinker* in a post-*Mahanoy* case. In *Kutchinski v. Freeland Community School District*,[244] a high school student, H.K., created a fake Instagram account to "impersonate his biology teacher."[245] H.K.'s initial post to the account was a "photograph of a gas pump" embedded with a "hypodermic needle" and a caption that read: "[w]atch out guys, I am concerned for everyone's safety!"[246] H.K. then shared the fake account with two other students, who began posting their own content about the biology teacher, as well as comments about other teachers and a disabled student at the school.[247] Unlike H.K.'s initial post, subsequent posts to the account were sexually "graphic, harassing, and threatening."[248]

When school resumed on Monday, rumors began to "spread around" the campus about the fake account.[249] Following a school-level investigation and disciplinary hearing, the school district's superintendent imposed a suspension on H.K. for "gross misbehavior" in "posting a fake Instagram account impersonating a teacher."[250] No specific bullying or harassment policy was

239. *Id.* at 722; *see supra* note 80 (noting the Seventh Circuit's analysis in *Kluge* on the school district's Title IX exposure argument in an employee religious accommodation case brought under Title VI); *cf. supra* Section III.A (outlining the scope of liability for off-campus speech under federal anti-discrimination statutes).

240. *Chen*, 56 F.4th at 718 (quoting C.R. v. Eugene Sch. Dist., 835 F.3d 1142, 1152 (9th Cir. 2016)).

241. *See supra* note 80. In such an instance, harassing speech "positions the target as a sexual object" for exploitation. *Chen*, 56 F.4th at 718 (quoting *C.R.*, 835 F.3d at 1152).

242. *Chen*, 56 F.4th at 720.

243. *Id.* at 711.

244. 69 F.4th 350 (6th Cir. 2023).

245. *Id.* at 353–54.

246. *Id.* at 354.

247. *Id*.

248. *Id*.

249. *See id.* at 355. The student speech reportedly made one of the targeted teachers "feel incredibly humiliated," and one student observed her "crying in one of her classes." *Id.*

250. *See id*.

followed by administrators at the school level.[251] The school's decision was later challenged in federal district court by the student's father on free speech grounds.[252]

The Sixth Circuit took yet another approach to regulating off-campus speech. Like the First, Tenth, and Ninth Circuits before it, the Sixth Circuit concluded that *Mahanoy* allowed schools to regulate off-campus speech involving "serious or severe harassment."[253] The Sixth Circuit concluded that the "student speech at issue" amounted to "serious or severe harassment" of teachers and a student.[254] However, it did not undertake any specific inquiry to fully evaluate how the speech fit within this category.[255] Rather, in analyzing *Tinker* and *Mahanoy* together, the Sixth Circuit applied a two-step framework for off-campus student speech cases.[256] This approach posed two questions: Did the student bear "responsibility" for the off-campus speech?[257] And if so, was it an "actual" or "reasonably forecast[ed]" that it would cause a "substantial disruption"?[258] On the question of "responsibility," the Sixth Circuit held that if "a student causes, contributes to, or affirmatively participates in harmful speech," then the student "bears responsibility" for it.[259] Because H.K. created the Instagram account and made it accessible to other students, his behavior satisfied the "responsibility" prong.[260]

The Sixth Circuit then turned to *Tinker's* "substantial disruption" test.[261] Like the Tenth and Ninth Circuits,[262] the Sixth Circuit understood the "substantial disruption" test to be a "demanding standard."[263] However, the Sixth Circuit acknowledged that school officials still need "flexible authority

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251. *See id.* at 355.

252. *Id*. at 354.

253. *Compare*, *id.* at 358 (relying on *Mahanoy* to allow discipline for speech considered "serious or severe harassment" that "substantially disrupted classwork" without reference to its location), *with* Doe v. Hopkinton Pub. Schs, 19 F.4th 493, 506 (1st Cir. 2021) (concluding that *Mahanoy* allows schools to regulate off-campus speech involving severe harassment), *and* C1.G. *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1277 (10th Cir. 2022) (concluding that *Mahanoy* allows schools to regulate off-campus speech involving severe harassment), *and* Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 721 (9th Cir. 2022) (concluding that *Mahanoy* allows schools to regulate off-campus speech involving severe harassment).

254. *Kutchinski*, 69 F.4th at 358.

255. *See id*.

256. *See id.* at 358–60.

257. *Id.* at 358.

258. *Id.* at 359.

259. *Id.* at 358.

260. *See id*.

261. *Id*.

262. *See* Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 717 (9th Cir. 2022) (citing Mahanoy Area Sch. Dist. v. B.L. *ex rel*. Levy, 594 U.S. 180, 192–93 (2021)); C1.G. *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1277 (10th Cir. 2022) (citing *Mahanoy*, 594 U.S. at 192–93).

263. *Kutchinski*, 69 F.4th at 359 (quoting *Mahanoy*, 594 U.S. at 192–93).

to respond to disciplinary challenges"[264] and should be afforded a "high degree of deference in the exercise of their professional judgment."[265] With that deference in mind, the Sixth Circuit had little trouble seeing that a fake online account, "impersonat[ing] [one] teacher" and "direct[ing] sexual and violent posts" at other teachers and a student, could "substantially disrupt" the learning environment.[266] Accordingly, the Sixth Circuit held that H.K.'s "off-campus" speech was not protected by the First Amendment.[267]

E. Circuit Court Summary

In sum, the circuit court cases discussed in Part IV begin to fill the void that *Mahanoy* left behind on the student speech spectrum. For the most part, circuit courts have concluded that *Mahanoy* means what it says: regulation of off-campus student speech is limited in secondary schools, except in one area, targeted forms of "serious or severe bullying and harassment."[268] Within this domain, the regulation of off-campus speech is *Limited – Not Eliminated*.[269] Circuit courts have mostly taken notice that *Tinker* should be interpreted as a "demanding standard" too.[270] However, except for the First Circuit, no other post-*Mahanoy* circuit court in Part IV has effectively connected off-campus speech to any specific definition of "serious or severe bullying or harassment,"[271] critically analyzed a school's administrative bullying or

264. *See id.* at 360 (quoting Morse v. Frederick, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part and dissenting in part)). In analyzing "deference" to school officials within a student speech analysis, the Sixth Circuit relied not only on First Amendment precedent, but also on precedent from Supreme Court Fourth Amendment and IDEA cases. *See id.* (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982) (IDEA) and Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377 (2009) (Fourth Amendment)). It remains to be seen how the Supreme Court's interpretation of *Tinker* as a "demanding standard" in *Mahanoy* comports with traditional notions of "deference" to school officials in education law. *Contrast Mahanoy*, 594 U.S. at 192–93 (interpreting *Tinker*'s substantial disruption test as a "demanding standard"), *with Kutchinski*, 69 F.4th at 360 (explaining that Courts provide educators with a "high degree of deference").

265. *Kutchinski*, 69 F.4th at 360.

266. *Id.* at 359. In addition, the Sixth Circuit found that an "actual disruption" occurred. *Id.* at 359–60.

267. *See id.* at 360.

268. *See supra* Sections IV.A–D.

269. *See supra* note 30 and accompanying text.

270. *See supra* Sections IV.B–D.

271. Notably, the difficulty of defining "serious or severe bullying or harassment" was not lost on Justice Alito. Mahanoy Area Sch. Dist. v. B.L. *ex rel*. Levy, 594 U.S. 180, 209 (2021) (Alito, J., concurring) ("Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech.").

harassment process, or fully reconciled off-campus student speech with the current regulatory scope of anti-discrimination statutes outlined in Part III.[272]

As Part V argues, differing post-*Mahanoy* approaches to *Tinker's* two-component parts—the "invasion of rights" and the "substantial disruption" tests—along with the emergence of *Fraser* and *Hazelwood*, re-ignite old debates, challenge the jurisdiction for off-campus speech regulation, and highlight the need for a post-*Mahanoy* framework aligned with the current Middle Ground apparatus outlined in Part III.

V. WHERE *TINKER* CONTINUES TO LINGER IN OFF-CAMPUS STUDENT SPEECH FOR THE MIDDLE GROUND

Tinker was affirmed by the Supreme Court in *Mahanoy*,[273] and it is still the leading constitutional inquiry for secondary student speech issues occurring in traditional *on-campus* settings.[274] However, *Tinker's* application to *off-campus* student speech was *Limited—Not Eliminated* by *Mahanoy*. Since *Mahanoy*, scholars have recognized the "enormous[] difficult[y]" in "balanc[ing] free speech rights, with the "need to create a conducive learning environment."[275] However, as First Amendment scholar Dean Chemerinsky put it: "The crucial question moving forward will be how that line is to be drawn."[276] To help refine this practical problem, Part V begins by analyzing different circuit court approaches discussed in Part IV, as well as the doctrinal problems they create for the First Amendment.

A. Circuit Court Approaches to Off-Campus Speech in the Middle Ground.

As explained in Part IV, *Tinker* has two independent parts: "invasion of rights" and "substantial disruption."[277] Each of *Tinker's* components are

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272. *Compare supra* Section IV.A (discussing the First Circuit's approach to regulating off-campus speech), *with supra* Sections IV.B–D (surveying other post-*Mahanoy* circuits that did not engage in such analysis), *and* S.C. v. Metro. Gov't of Nashville, 86 F.4th 707, 719–23 (6th Cir. 2023) (Bush, J., concurring) (acknowledging technological changes affect the harassment analysis but failing to extend Title IX to govern off-campus electronic misconduct).

273. *See Mahanoy,* 594 U.S. at 186–87.

274. *See, e.g.*, N.J *ex rel.* Jacob v. Sonnabend, 37 F.4th 412, 425 (7th Cir. 2022) (stating that *Tinker* is the governing authority in a challenge to a secondary school's dress code enforcement).

275. Chemerinsky, *supra* note 26, at 27; Papandrea, *supra* note 26, at 68 ("Calibrating the authority schools should have over harassment, threats of violence, and expressions of disrespect is not an easy task."); Hudson, *supra* note 66, at 106 (questioning what type of speech is considered "serious or severe" under *Mahanoy*).

276. *Id.* at 24.

277. *See supra* Section IV.A.

visible in the circuit court opinions discussed in Part IV. However, those components are being pulled in different directions.

1. "Invasion of Rights" - The First Circuit's Singular Approach

Under *Tinker*, speech that is "an invasion of the rights of others" to "be secure and to be let alone" is not speech protected by the First Amendment.[278] However, as scholars[279] and courts have noted, the Supreme Court has never clarified the scope of *Tinker's* "invasion of rights" prong.[280] Nor has it explained precisely how it operates in relation to the "substantial disruption" test.[281]

Nevertheless, in *Hopkinton*, the First Circuit resolved an off-campus bullying case entirely under *Tinker*'s "invasion of rights" prong without evidence of a "substantial disruption" to the learning environment.[282] For the First Circuit, this singular approach was consistent with the First Amendment because the State of Massachusetts adopted an "anti-bullying" statute.[283] and "bullying [was] the type of conduct that implicate[d] . . . [a] protecti[on] against the invasion of the rights of others . . . in *Tinker*."[284] Thus, under the First Circuit's rule, if a student violates a state's anti-bullying statute, a school can lawfully restrict off-campus speech through *Tinker's* "invasion of rights"

278. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 513 (1969).

279. *E.g.*, Papandrea, *supra* note 26, at 72; Erickson & Bunker, *supra* note 40, 1046 ("[T]he Supreme Court's jurisprudence has unfortunately avoided entirely a difficult aspect of *Tinker* by providing no guidance on when speech invades the interests of others."); *see* sources cited *supra* note 66.

280. *See, e.g.*, L.M. v. Town of Middleborough, 103 F.4th 854, 867 (1st Cir. 2024) ("*Tinker* also did not elaborate on the contents of 'the rights of other students to be secure and to be let alone.'" (quoting *Tinker*, 393 U.S. at 508)); Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 717 (9th Cir. 2022) ("'[T]he precise scope of *Tinker's* interference with the rights of others language is unclear,' but the speech must still be more than 'merely offensive to some listener.'" (alteration in original) (quoting C.R. v. Eugene School District 4J, 835 F.3d 1142, 1152 (9th Cir. 2016)); Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 571 (4th Cir. 2011) (explaining, pre-*Mahanoy*, that the "Supreme Court has [never] dealt specifically with a factual circumstance where student speech targeted classmates for verbal abuse" under *Tinker's* invasion of rights prong).

281. *See L.M.,* 103 F.4th at 867 ("The Supreme Court . . . affirmed schools' authority to regulate 'severe bullying and harassment' without specifying whether schools may do so pursuant to the rights-of-others limitation." (citing Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 188 (2021))).

282. *See* Doe v. Hopkinton Pub. Schs, 19 F.4th 493, 506–07 (1st Cir. 2021).

283. *Id.* at 511–12.

284. Norris ex. rel. A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 29 (1st Cir. 2020); *see also Hopkinton*, 19 F.4th at 506 (citing *Norris*, 969 F.3d at 29) (discussing bullying that "targets and invades the rights" of other students).

prong, "even if it does not necessarily cause substantial disruption to the school community more broadly."[285]

The First Circuit is the only circuit since *Mahanoy* to resolve a Middle Ground case without applying a "substantial disruption" test, or a comparable inquiry, such as a "nexus" test.[286] Unlike *Chen* and *Kutchinski*, in *Hopkinton* the off-campus speech never "hit its target[]."[287] While the victim was "aware" that a group chat about him existed, he "never saw" any of the messages.[288] This is not to say that those messages had no impact on him—they certainly did.[289] However, "'impact[]' does not necessarily equal substantial disruption."[290] The rationale for the discipline in *Hopkinton* was simply "invasion of rights," not "substantial disruption."[291] This outcome makes an "invasion of rights" amounting to "serious or severe bullying or harassment" operate more like *Fraser*, *Hazelwood*, and *Morse*, where no "substantial disruption" is required.[292]

The problem with the First Circuit's approach is more than semantics. The phrase "serious or severe bullying or harassment" was just a passive

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285. *See* Doe v. Hopkinton Pub. Schs., 490 F. Supp. 3d 448, 458 (D. Mass. 2020) (quoting *Norris*, 969 F.3d at 29), *aff'd*, 19 F.4th 493 (1st. Cir 2021); *L.M.*, 103 F.4th at 868 ("[The First Circuit has] held that the rights-of-others limitation applies in the case of bullying, even when there is no physical invasion of any kind -- seemingly without regard to whether the state separately makes such bullying a source of tort liability.").

286. *See supra* Section IV.A; *L.M.*, 103 F.4th at 868 ("[R]egardless of whether *Tinker's* rights-of-others limitation applies . . . we conclude that *Tinker's* material-disruption limitation does.").

287. *Compare* Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 717 (9th Cir. 2022) (victim became aware of leaked group chat photos that included insulting posts directed at them), *and* Kutchinski *ex rel.* H.K. v. Freeland Cmty. Sch. Dist., 69 F.4th 350, 359–60 (6th Cir. 2023) (teacher found crying after learning about fake Instagram account imitating her), *with Hopkinton,* 19 F.4th at 508 (victim was not aware of the existence of a Snapchat group targeting him).

288. *Hopkinton*, 19 F.4th at 500, 508.

289. *See id.* at 502 (noting that the victim received "counseling" and entered "formal mental health treatment").

290. C1.G. *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1278 (10th Cir. 2022) (alteration in original) (citation omitted).

291. *See Hopkinton*, 19 F.4th at 508–09.

292. *See supra* Section II.A; Chemerinsky, *supra* note 26 (arguing that under *Mahanoy* and *Tinker*, "students can be punished for their off-campus speech only if there is an actual disruption of school activities."); Suski, *supra* note 121, at 722, 733–35 ("To impose any consequences for bullying that is speech, schools then must satisfy First Amendment constraints."); Lindsay Dial, Note, *When Pixels Hurt: A Categorical Exclusion to* Tinker *for Cyber-Abuse*, 10 BELMONT L. REV. 143, 144–45 (2022) (arguing that speech which amounts to "discrimination, harassment, and bullying" should form an "exclusion" from *Tinker*); *cf.* Saxe v. St. Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause.").

reference in *Mahanoy*, not a term of art.[293] There is no definition for this category of speech in *Mahanoy* or any of the circuit court opinions in Part IV interpreting *Mahanoy*. As *Hopkinton* demonstrated, the regulation of "bullying" speech primarily turns on the substance of state law.[294] Thus, a reliance on the "invasion of rights" prong likely hinges on the language of state specific anti-bullying laws,[295] the breadth of policy language enacted at the school level,[296] and federalism principles like the Supremacy Clause.[297] Ultimately, at least in the First Circuit, *Tinker's* "invasion of rights" prong is a sufficient way to address off-campus bullying speech without the need for a "substantial disruption" to the learning environment.[298]

2. "Substantial Disruption" & its Permutations – Tenth, Ninth and Sixth Circuit Approaches

The application of *Tinker's* "substantial disruption" test is more complicated since *Mahanoy*. Although *Tinker* was decided in 1969, *Mahanoy* is the only Supreme Court case to apply the "substantial disruption" test in the

293. *Mahanoy*'s majority referenced "serious or severe" forms of "bullying or harassment" as an issue. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 188 (2021) (referencing "serious or severe bullying" as one of several "off-campus behavior[s] that may call for school regulation"). But, the concurrence moved the word "serious" and flipped the "severe" modifier to "harassment"—not bullying. *See id.* at 208–09 (Alito, J., concurring) (acknowledging that "[b]ullying and severe harassment are serious (and age-old) problems," but noting that "these concepts are not easy to define with precision required for regulation of speech."); Haile, *supra* note 49, at 168 ("Until the Court defines the 'serious or severe' harassing speech that schools can lawfully regulate or explicitly affirms that Title IX's sexual harassment standard includes suppressing free speech, schools must err on the side of robustly protecting First Amendment guarantees."). *Compare* Hudson, *supra* note 66, at 105–06 (noting that courts maintain "regulatory authority" over "serious or severe bullying and harassment targeting particular individuals"), *with* Erickson & Bunker, *supra* note 40, at 1029–30 (arguing that the First Circuit erred in deciding *Hopkinton*, in part, because the bullying and harassment phrase from *Mahanoy* was "not explicitly adopted" by the Supreme Court in the majority opinion).

294. *See* Doe v. Hopkinton Pub. Schs, 19 F.4th 493, (1st Cir. 2021); *supra* Section III.B (discussing state law as a basis for bullying regulation).

295. *See Hopkinton*, 19 F.4th at 511–12 (holding that Massachusetts's anti-bullying statute, which was co-extensive with the school policy, allowed schools to discipline students based on bullying as an "invasion of rights of others").

296. *See, e.g.*, *id.* at 509–11 (rejecting plaintiff's overbreadth challenge to the school's anti-bullying policy); *Saxe*, 240 F.3d at 217 (holding that portions of a school's anti-harassment policy violated the First Amendment because it was overbroad).

297. *See* Haile, *supra* note 49, at 167 (arguing that policy makers "should expressly subordinate their school policies to the Constitution" by including "clauses that expressly state, inasmuch as their policy conflicts with constitutional precedent, that the constitutional standard reigns supreme").

298. *See Hopkinton*, 19 F.4th at 506.

majority opinion of a student speech case.[299] *Mahanoy* found *Tinker* to be a "demanding standard," but the Court mostly just reflected on the "substantial disruption" test's components, with only a brief application to the off-campus facts leading to Levy's discipline.[300] Except for the First Circuit, every other circuit court has held that "substantial disruption," in some form, is still required under the First Amendment.[301] The Tenth Circuit resolved *C1.G* by applying a run-of-the mill "substantial disruption" test.[302] The Ninth Circuit decided *Chen* by applying a pre-existing "nexus" test that contained portions of the "substantial disruption" test and "additional standards" for the "off-campus" settings.[303] Similarly, the Sixth Circuit applied a slightly different two-step equation – but defaulted to a traditional "substantial disruption" test to resolve the case.[304]

Nomenclature aside, the Tenth, Ninth and Sixth circuit court approaches all aim towards the same mark: determining whether off-campus speech connects to harm, and if so, whether that harm substantially disrupted the learning environment.[305] However, if other circuits choose to follow the First Circuit's singular "invasion of rights" approach, then the "substantial disruption" test could become just another tool in the toolbelt—not a necessary component of the *Tinker* analysis.[306] Similarly, if other circuits continue to add their own "additional standards," like the Ninth Circuit did in *Chen*,[307] then the "substantial disruption" test could be destined for the same fate as other balancing tests disfavored by the Supreme Court in recent memory.[308]

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299. *See supra* Section II.B. *But see* Denning & Taylor, *supra* note 66, at 860–61 (arguing that "*Fraser* could easily be read as an application of *Tinker*").

300. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 192–93 (2021).

301. *See supra* Part IV.

302. *See* discussion *supra* Section IV.B; C1.G. *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1278 n.5 (10th Cir. 2022) (addressing "only their substantial disruption arguments").

303. *See* Chen *ex rel.* v. Albany Unified Sch. Dist., 56 F.4th 708, 719–21 (9th Cir. 2022).

304. *See* Kutchinski v. Freeland Cmty. Sch. Dist., 69 F.4th 350, 358–60 (6th Cir. 2023).

305. *See supra* Sections IV.B–E.

306. To date, the scope of bullying and harassment speech regulation within the *Tinker* analysis remains an open issue in the Supreme Court. *See* L.M. v. Middlesborough, 145 S.Ct. 1489, 1489 (2025) (denying certiorari in a First Circuit on-campus student speech case which analyzed both the "substantial disruption" test and "invasion of rights" analysis in a speech decision based on the application of a bullying and harassment policy).

307. *See Chen*, 56 F.4th at 720.

308. *See, e.g.*, New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19 (2022) (rejecting a "means-end" balancing test in the Second Amendment context); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535 (overturning the *Lemon* test and the "endorsement test"); *cf.* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024) (overturning *Chevron* deference).

The Ninth Circuit's application of the "nexus" test also raises new (and renewed) questions for the off-campus analysis.[309] In *Chen*, the Ninth Circuit determined it was not constrained by either *Tinker* or *Mahanoy*.[310] Therefore, it applied its own "nexus" test to resolve the case, not just *Tinker*'s traditional "substantial disruption" test.[311] The Ninth Circuit recognized that the "nexus" test possessed many of the same factors as *Tinker*'s "substantial disruption" test—which it does.[312] But this just begs another question: if the Ninth Circuit's "nexus" test incorporates the "substantial disruption" test, then is the "nexus" test a "demanding standard" too?

This is an important question. Prior to *Mahanoy*, there was no consensus on the legal framework for addressing online student speech.[313] Like the Ninth Circuit, as the internet proliferated, many other circuits developed "nexus" tests, or something similar, to combat cyberbullying.[314] There is nothing inherently wrong with these approaches. The real problem is that these circuit court approaches were just a means to an end – not the end itself. The entire line of cases following *Morse* emerged out of necessity because the Supreme Court did not grant certiorari in another student speech case for fifteen years.[315]

The Supreme Court could have adopted a "nexus" test, updated the "substantial disruption" test, or abandoned it altogether when it decided *Mahanoy*. This outcome could have resulted in a more uniform approach for off-campus student speech issues for the information age. But that's not what happened.[316] The *Mahanoy* Court reversed the Third Circuit's "categorical" approach[317] and explicitly declined the invitation to articulate a "broad, highly general" rule.[318] As a result, several "highly general" rules have emerged from circuit courts instead.[319] Therefore, if other circuits with pre-existing "nexus"

309. *See supra* Section IV.C.

310. *See Chen*, 56 F.4th at 718–20.

311. *See id.* at 720.

312. *See id*.

313. *See* Caudle, *supra* note 16, at 175–79 (surveying pre-*Mahanoy* circuit split of in off-campus speech cases from 2007 to 2021).

314. *See id.* at 178–79.

315. *See id.* at 174; s*ee, e.g.*, Kowalski, v. Berkeley Cnty. Sch., 565 U.S. 1173, 1173 (2012) (denying certiorari in the United States Supreme Court in an "off-campus" cyberbullying case).

316. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 189, 191–93 (2021).

317. Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 719 (9th Cir. 2022); *see Mahanoy*, 594 U.S. at 188.

318. *Mahanoy*, 594 U.S. at 189; *see also* Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 506 n.11 (1st Cir. 2021) (noting that the Supreme Court rejected the Third Circuit's "on-campus/off-campus speech distinction" in *Mahanoy*).

319. *See, e.g.*, *Chen*, 56 F.4th at 719–20 (applying a multi-factored "nexus" test that is "flexible and fact-specific," based on the "totality of circumstances"); *Hopkinton*, 19 F.4th at 506 (declining to apply the "substantial disruption" test, relying only on the "invasion of the

tests follow the Ninth Circuit's lead, another circuit split of authority is inevitable.

Ultimately, if the "substantial disruption" test is to be interpreted as a "'demanding standard,'" then "[s]atisfying" it will be "no easy lift" for courts.[320] Thus, some courts may opt to avoid the "substantial disruption" test altogether, by just relying on *Tinker's* "invasion of rights" prong, which is less clear.[321] Courts may also turn to *Tinker's* "offshoot,"[322] the "nexus" test, where unanswered questions continue to persist. For now, the Ninth Circuit's distinction on *Tinker's* "invasion of rights" prong raises more doubt about the First Circuit's approach and reinforces the overriding need for "substantial disruption" in the speech analysis.[323]

3. The Extension of Fraser and Hazelwood

Hopkinton and *Chen* bring the scope of *Fraser* and *Hazelwood* into focus for the Middle Ground. In *Fraser*, the Court reasoned that schools were responsible for teaching "shared values of a civilized social order."[324] In *Hazelwood,* the regulation of speech was justified because of the school's "pedagogical concerns."[325] In both cases, the Court held that schools were not required to "tolerate" student speech that didn't align with its "basic educational mission."[326] Taken together, *Fraser* and *Hazelwood* have proven to be integral in combatting bullying and harassment issues in the traditional *on-campus* setting.[327] The same premise has not been extended into the *off-campus* setting.[328]

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rights" prong from *Tinker*); C1.G *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1278 n.5 (10th Cir. 2022) (applying the "substantial disruption" test only); Kutchinski v. Freeland Cmty. Sch. Dist., 69 F.4th 350, 359 (6th Cir. 2023) (applying the "substantial disruption" test but adding its own factual framework for determining if the plaintiff bears "responsibility" for the "off-campus" speech).

320. M.F. v. Carroll Indep. Sch. Dist., No. 23-cv-01102, 2023 U.S. Dist. LEXIS 199351, at *11–12, 18 (N.D. Tex. Nov. 4, 2023) (quoting *Mahanoy*, 594 U.S. at 193).

321. *See supra* note 280 and accompanying text; Hudson, *supra* note 66, at 106 (noting that the "rights of others" prong "remains the 'forgotten' part of *Tinker*").

322. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (citing Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 48–52 (2019)) (referring to the "endorsement test" as the *Lemon* test's "offshoot").

323. *See* Chemerinsky, *supra* note 26.

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

325. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988).

326. *Fraser*, 478 U.S. at 685; *Hazelwood*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685).

327. *See, e.g.*, L.M. v. Town of Middleborough, 103 F.4th 854, 867, 878 (1st Cir. 2024) (referencing both *Fraser* and *Hazelwood* in discussing bullying and harassment issues on campuses).

328. *See supra* Sections II.A, IV.B.

Recall that in *Hopkinton*, the First Circuit relied on *Tinker's* "invasion of rights" prong to resolve its off-campus bullying case.[329] *Hopkinton* framed the regulation of off-campus bullying speech as a "pedagogical interest,"[330] which was the basic premise in *Hazelwood*, not *Tinker*.[331] Similarly, the Ninth Circuit found *Fraser* and *Hazelwood* "readily" applicable to combatting the harassing speech in *Chen* if it had originated on-campus, but the court still defaulted to applying the "nexus" test because the speech originated off-campus.[332] The Ninth Circuit toed the line with good reason. *Tinker* applies "in class or out of it."[333] *Fraser* and *Hazelwood* do not.[334] Therefore, reliance on *Fraser* and *Hazelwood* outside the on-campus setting may still run afoul of the principle in *Mahanoy* – that a student's off-campus speech is presumptively protected.[335] Thus, it remains an open question whether combatting "serious or severe bullying and harassment" is so fundamental to a school's twenty-first century "educational mission," that *Fraser* and *Hazelwood* will be extended by the Supreme Court into the Middle Ground analysis with *Mahanoy*.[336]

329. *See* Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 505–06 (1st Cir. 2021).

330. *See id.* at 506.

331. *See Hazelwood*, 484 U.S. at 272–73.

332. *See* Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 716–17 (9th Cir. 2022).

333. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 513 (1969).

334. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986); *id.* at 688 (Brennan J., concurring) (noting that if Fraser "had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate," and the Court's majority "[did] not suggest otherwise"); *Hazelwood*, 484 U.S. at 266 (recognizing that schools may regulate speech inside the school building, even when "the government could not censor similar speech outside the school"); Morse v. Frederick, 551 U.S. 393, 396–97, 405 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."); *cf. Chen*, 56 F.4th at 716–17 (analyzing *Fraser* and *Hazelwood* but deciding the case under the "nexus" test).

335. *See* Mahanoy Area Sch. Dist. v. B.L *ex rel.* Levy, 594 U.S. 180, 190 (2021).

336. *Compare Chen*, 56 F.4th at 716–17 (recognizing that "[a] school need not tolerate speech that is inconsistent with its basic educational mission" (quoting LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988 (9th Cir. 2001))), *with* L.M. v. Town of Middleborough, 103 F.4th 878, 878 (1st Cir. 2024) (stating, in an on-campus speech case, that "[p]art of a public school's mission must be . . . teach[ing] students . . . to engage each other in civil terms rather than in . . . 'terms of debate highly offensive or highly threatening to others" (first alteration in original) (quoting West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1233–34 (D. Kan. 1998))).

B. Balancing Bullying and Harassment Laws in Off-Campus Student Speech

As explained in Part III, regulating bullying and harassment is not just a laudable goal for school districts—it is an "affirmative duty."[337] However, the impact of social media, the role of institutional policy, and the scope of overlapping legal standards – were not comprehensively addressed in *Mahanoy*. Nevertheless, these practical concerns still face school officials each day.

1. The Impact of Social Media

A basic premise in *Tinker* is that students have a right to be "secure" in the school setting.[338] Being "secure" means "not only freedom from physical assaults" but also from "psychological attacks that cause young people to question their self-worth."[339] In that same regard, post-*Mahanoy,* some circuit courts have recognized that "serious or severe bullying and harassment" based on "physical characteristics" like race, sex or disability, "threatens" a student's "'sense of . . . emotional and psychological[] security.'"[340]

Although Congress "did not enact" anti-discrimination laws "with cell phones in mind,"[341] digital devices infused with social media applications are readily available to secondary students.[342] Consequently, a student's online speech can go "viral" in an instant.[343] Online speech is then accessible to a wider audience, which could include same-age peers, teachers, or even casual consumers of digital content.[344] These factors extend the reach of bullying or harassing speech, significantly increasing the likelihood that the speech will

337. T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 308 (E.D.N.Y. 2011) ("Title IX, IDEA, and Section 504 of the Rehabilitation Act place upon schools the affirmative duty to address bullying and harassment.").

338. *Tinker*, 393 U.S. at 508; *see supra* Section II.A.

339. *L.M.*, 103 F.4th at 869 (quoting Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated as moot sub nom.*, Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007)).

340. *Chen*, 56 F.4th at 718, 721 (quoting C.R. v. Eugene Sch. Dist. 4J, 853 F.3d 1142, 1152 (9th Cir. 2016)).

341. *See* S.C. v. Metro. Gov't of Nashville, 86 F.4th 707, 720 (6th Cir. 2023) (Bush, J., concurring) (discussing Title IX).

342. *See* HAIDT, *supra* note 38, at 115.

343. *See Metro. Gov't*, 86 F.4th at 721 (Bush, J., concurring) (comparing landline telephones' ability to "enable only conversation between people" to smartphones that can "spread digital content almost instantaneously to anyone, anywhere in the world, who wants access to it"); HAIDT, *supra* note 38; Creeley, *supra* note 37.

344. *See Metro. Gov't*, 86 F.4th at 721 (Bush, J., concurring); HAIDT, *supra* note 38.

eventually "hit its target[]" in the real world[345] and make its way back to the "schoolhouse gate."[346] Once a school becomes aware of Middle Ground speech impacting the school setting, as it did in *Chen*, even if it originated "off-campus," the school's "*failure*" to adequately respond could "expose[] it to potential liability."[347]

Still, the regulation of Middle Ground speech is not limitless.[348] If a student's off-campus conduct doesn't fit into the "serious or severe bullying or harassment" category, "simply invoking the word[] 'harass,'" as the Tenth Circuit concluded in *C1.G*, is insufficient to meet "*Tinker's* demanding standard."[349] Indeed, the First Amendment protects "unpopular" and offensive speech too.[350] *C1.G* and *Mahanoy* affirm these "bedrock" First Amendment

345. *See Chen*, 56 F.4th at 720–21, 723; D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 762 (8th Cir. 2011) ("[A] reasonable person should be aware that electronic communications can now be easily forwarded.").

346. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 39 U.S. 503, 506 (1969); Mahanoy Area Sch. Dist., v. B.L. *ex rel.* Levy, 594 U.S. 180, 185 (2021) (another cheerleader at the school forwarded Levy's Snapchat post to the coach); *Chen*, 56 F.4th at 712 (a follower of private Instagram account showed messages to a targeted student).

347. *See Chen*, 56 F.4th at 722; Doe v. Morehouse Coll., Inc., 622 F. Supp. 3d 1279, 1287 (holding that, post-*Mahanoy*, schools may be subject to "deliberate indifference" claims by students under Title IX for "off-campus" speech); *cf. supra* Section III.A (outlining the "substantial control" limits of "program or activity" as defined under the DOE's current interpretation of Title IX); *supra* note 79 and accompanying text (noting the Seventh Circuit's recent analysis of a Title IX exposure to liability argument in an employee on-campus religious accommodation case).

348. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 689–90 (1986) (Brennan, J., concurring) ("The authority school officials have to regulate [disruptive] speech by high school students is not limitless."); Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2nd Cir. 1979) (Newman, J., concurring) ("[S]chool officials . . . [do not] have limitless discretion to apply their own notions of indecency."); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3rd Cir. 2001) (holding that absent a "substantial disruption," speech that is "merely offensive to some listener" is still protected by the First Amendment); 85 C.F.R. § 106.6(d) (2025) ("Nothing in [Title IX regulations] requires a recipient to: (1) Restrict any rights that would be protected from governmental action by the First Amendment . . . .").

349. C1.G. *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1279 (10th Cir. 2022) (final quotation quoting *Mahanoy*, 594 U.S. at 188).

350. *See id.* at 1276 (quoting *Mahanoy*, 594 U.S. at 195); *Mahanoy*, 594 U.S. at 205–06 (Alito, J., concurring) ("[It] is a 'bedrock principle' that speech may not be suppressed simply because it expresses ideas that are 'offensive or disagreeable'" (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)); Counterman v. Colorado, 600 U.S. 66, 87 (2023) ("Yet '[m]ost of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from Government regulation.'" (alteration in original) (quoting United States v. Stevens, 559 U.S. 460, 479 (2010))); C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1152 (2016) (recognizing that speech that "'is merely offensive to some listener,'" is insufficient to fall "within *Tinker*'s scope" (quoting Saxe v. State Coll. Area Sch. Dist., 241 F.3d 200, 217 (3rd Cir. 2001))).

principles,[351] although *CI.G* pushes the limits of permissible off-campus speech much further than *Mahanoy* did.[352]

In the end, the real takeaway is this – if the Middle Ground *can* be regulated under *Mahanoy*, then it *must* be regulated.[353] *Hopkinton*, *Chen*, and *Kutchinski* all suggest that when regulating Middle Ground speech, *Mahanoy* is not really a caution light—it's a green light.[354] This is because of affirmative duties to prohibit bullying and harassing speech, as well as the "significant interest"[355] at stake in protecting *other students* from harm.[356] However, the scope of a school's "affirmative duty" under federal law remains the critical issue in 2026.[357] Each of the circuit court cases analyzed in Part IV were decided before *Cardona* was issued and the DOE's interpretation of Title IX shifted in 2025. Thus, in the wake of *Cardona*, schools must weigh a broad interpretation of *Mahanoy* in the Middle Ground by circuit courts with systematic policies shifting into neutral by DOE.[358] For now, school districts

351. *Mahanoy*, 594 U.S. at 205–06 (Alito, J., concurring) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)) (collecting cases); *see* C1.G, 38 F.4th at 1277.

352. *Contrast Mahanoy*, 594 U.S. at 209 (prohibiting regulation of speech that was considered a "crude" "criticism" of a cheerleading program), *with C1.G.*, 38 F.4th at 1274–76 (prohibiting regulation of overt antisemitism that was not targeted at any specific member of the school community).

353. *See* Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 722 (9th Cir. 2022) (reasoning that "the school's authority and responsibility . . . also includes the role of *protecting other students* from being maltreated by their classmates"); Doe v. Morehouse Coll., Inc., 622 F. Supp. 3d 1279, 1287 (N.D. Ga. 2022) (holding that in the college and university context, "schools are significantly constrained in their regulation of students' social media use," except in the areas of "'severe bullying [and] harassment'" (quoting *Mahanoy*, 594 U.S. at 188)); *cf. supra* notes 141–161 and accompanying text (explaining the DOE's interpretation of Title IX jurisdiction under the "substantial control" analysis); Mahmoud v. Taylor, 606 U.S. 522, 557 (2025) (noting that a "public school imposes rules and standards of conduct on its students" but "holds a limited power to discipline them for misconduct").

354. *See* cases cited *supra* note 30.

355. *See* Doe v. Hopkinton Pub. Sch., 19 F.4th 493, 505–06 (1st Cir. 2021).

356. *See Chen*, 56 F.4th 708, 721–22. (9th Cir. 2022).

357. *Compare supra* Parts III, IV (discussing current regulation of harassment under state and federal law along with case law that governs student speech and social media prompted administrative reaction), *with* Updated 2010 Harassment and Bullying Guidance, *supra* note 34 (identifying inconsistency in prior interpretations of bullying and harassment guidance regarding off-campus speech). Although outside of the harassment context, during the October 2024 term the Court decided a Fourteenth Amendment Equal Protection Clause case implicating the scope of the term "sex," which is embedded in federal harassment definitions discussed herein. *See* United States v. Skrmetti, 605 U.S. 495, 559 (2025) (Alito J., concurring in part and concurring in judgment) (arguing that Equal Protection Clause claims based on "sex" do not include "distinction[s] on the basis of 'gender identity'"). In the Court's 2025 term, it will decide a case centering around the interpretation of "sex" under Title IX. *See* West Virginia v. B.P.J., 222 L. Ed. 2d 1154, 1554 (2025) (granting certiorari).

358. *Cf.* S.C. v. Metro. Gov't. of Nashville, 86 F.4th 707, 721–22 (6th Cir. 2023) (Bush, J., concurring) ("Perhaps Congress could come up with ways to impose responsibility on school

remain on the "razor's edge"[359] of liability each time a new social media post is made from a student's cellphone.

2. The Role of Institutional Policy & Regulatory Jurisdiction

In each of the circuit court cases discussed in Part IV, the basis for regulating off-campus speech was *Mahanoy*'s carveout for "serious or severe bullying and harassment."[360] However, neither *Mahanoy*, nor any of the circuit court cases interpreting *Mahanoy*, defined the "serious or severe bullying and harassment" category with precision.[361] Furthermore, the First Circuit is the only circuit where a specific bullying or harassment policy was critically analyzed against Middle Ground speech to decide the case.[362] This raises practical concerns for school officials and trial courts. Mainly, if schools premise their regulation of off-campus speech on the "serious or severe bullying and harassment" justification in *Mahanoy*, then the jurisdictional scope of bullying and harassment laws must also be considered in the legal inquiry.[363]

For the most part, post-*Mahanoy* circuit courts have not been this exacting in their review.[364] *C1.G* highlights an alternative analysis that courts could undertake in future cases.[365] As more case lines emerge in the wake of *Mahanoy* and *Cardona*, fact-patterns closer to *CI.G* could result in a more granular judicial approach—one more focused on policy implementation and the scope of regulatory jurisdiction. This outcome is most likely to arise in "sexual harassment" cases brought under Title IX, which has a recognized "substantial control" jurisdictional limit, defined terms, and robust grievance

districts to monitor and control all student cell phone and other device usage in ways to prevent student-on-student harassment").

359. *See* Kluge v. Brownsburg Cmty. Sch. Corp., 150 F.4th 792, 810 (2025) (quoting Jackson v. Methodist Health Servs. Corp., 121 F.4th 1122, 1127 (7th Cir. 2024)).

360. *See Hopkinton*, 19 F.4th at 505–06; *Chen*, 56 F.4th at 721; Kutchinski v. Freeland Cmty. Sch. Dist., 69 F.4th 350, 357 (6th Cir. 2023). *But see* C1.G *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1279 (10th Cir. 2022) (determining that the off-campus speech at issue did not meet *Mahanoy*'s carve out for "serious or severe bullying and harassment").

361. *See supra* Section II.B, Part IV.

362. *See Hopkinton*, 19 F.4th at 498–99.

363. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 210–11 (3d Cir. 2001) (analyzing a school's bullying and harassment policy in its legal analysis).

364. *See Hopkinton*, 19 F.4th at 501 (finding that Snapchat messages repeatedly targeted a member of the hockey team with pictures and comments "regarding [the student's] appearance, voice, and anatomy"); *Chen*, 56 F.4th at 711–15 (finding that messages in private Instagram account included overtly racial and sexual overtones, targeted at individual students); *Kutchinski*, 69 F.4th at 354–56 (finding that a group chat housed targeted speech based on sex and a student's disability).

365. *See C1.G.*, 38 F.4th at 1276–79.

procedures.[366] For now, neither DOE guidance nor the post-*Mahanoy* case law in Part IV fully reconcile the bullying and harassment apparatus outlined in Part III with *Mahanoy*, re-enforcing the need for the more global approach proposed in Part VI.

VI. A POST-*MAHANOY* FRAMEWORK FOR ANALYZING OFF-CAMPUS STUDENT SPEECH IN THE MIDDLE GROUND

To fill the void on the off-campus speech spectrum created by *Mahanoy*, Part VI offers a framework for analyzing the Middle Ground in the new post-*Mahanoy* and *Cardona* era. The proposed framework navigates student free speech rights within the labyrinth of education laws that make up the twenty-first century public education system.[367] This proposed framework balances individual free speech rights and Dean Chemerinsky's call for balance in the implementation of federal and state laws designed to protect students.[368] Application of this multi-tiered decision matrix encourages institutional policy compliance and promotes equity in student speech rights for the education community at large.

A. Question One: Is the Off-Campus Speech Considered "Harassment" Under Federal Law?

The first question to answer is whether the off-campus student speech is "harassment" under federal law. As set forth, although *Mahanoy* diminishes a school's regulation of off-campus speech, it does not *eliminate* the regulation of "targeted" forms of off-campus speech that amount to "serious or severe bullying or harassment."[369] Rather, *Mahanoy* recognized the "significant" interest that public schools have in regulating this type of speech—which circuit courts have begun to capture in case law.[370] Still, neither *Mahanoy* nor any of the circuit court cases interpreting *Mahanoy* in Part IV, defined the scope of the "serious or severe bullying or harassment" category, considered jurisdictional limitations, or critically analyzed the overlap with federal anti-discrimination laws like Title VI, Title IX, and Section 504.

366. *See supra* Section III.A.2.

367. *See supra* Part III.

368. *See* Chemerinsky, *supra* note 26 (calling for balance by questioning how administrators should "balance speech rights, even if it is ugly speech, with the need to create a conducive learning environment"); *cf.* Haile, *supra* note 49 (arguing for First Amendment supremacy when student speech intersects bullying and harassing laws).

369. *See supra* Section II.B, Part IV; sources cited *supra* note 30 and accompanying text.

370. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 188 (2021) (noting that schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"); *see supra* Section V.A.1.

However, public schools still have an "affirmative duty" to prohibit "harassment" under federal law.[371] Thus, once a school becomes aware of speech that could constitute harassment under federal law, it must respond to address the existence of a "hostile environment" in the school environment.[372] The highly factual nature of this inquiry creates tension in the practical application of bullying and harassment policies for off-campus speech implemented at the school level.[373] Therefore, Question One should be addressed first, and may be answered by following a two-step process.[374]

1. Step One

The first step in answering Question One is to identify what category of off-campus speech could be implicated under federal law—race, sex, or disability. To answer this threshold question, school officials should first evaluate whether the off-campus speech allegations could meet any applicable definition of harassment recognized under federal law. If the answer to Step One is "no," then the answer to Question One is "no." In this instance, school officials should proceed to Question Two.[375] If the answer to Step One is "yes," then school officials should proceed to Step Two.

2. Step Two

If off-campus speech could be considered harassment under any category recognized under federal law, a deeper investigation into the factual circumstances is required.[376] Note, several important distinctions exist within Step Two based on the category of speech at issue. First, if the allegations

371. *See supra* Part III; T.K. v. N.Y.C. Dept. of Educ., 779 F. Supp. 2d 289, 308 (E.D.N.Y. 2011).

372. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 (3d Cir. 2001).

373. *See id.* at 209.

374. Note, the threshold issue of whether student speech is considered "on-campus" or "off-campus" is outside the scope of this article. For additional reading into this analysis, see *Mahanoy*, 594 U.S. at 189–90 (analyzing the "features" that distinguish "on-campus" from "off-campus" speech); Erickson & Bunker, *supra* note 40, at 1009–12, 1038; Hudson, *supra* note 66, at 105–06. *See generally* Caudle, *supra* note 16 (examining the contours of "on-campus" versus "off-campus speech").

375. Note, school officials may also need to take additional steps to coordinate "supportive measures" to comply with Title IX requirements, regardless of whether the allegations meet the requirements for "sexual harassment." *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Recipient's Response to Sexual Harassment, 85 Fed. Reg. 30026, 30574–75 (May 19, 2020) (providing requirements for "supportive measures" in a school's response).

376. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 195, 203–09 (2021) (Alito, J., concurring) (discussing the student speech on-campus, off-campus "spectrum"); Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 505 (1st Cir. 2021).

involve "sexual harassment," a school district's jurisdiction is guided by the DOE's "substantial control" analysis, and its overall response is governed by Title IX's 2020 regulations.[377] Second, if the allegations involve "disability-related harassment," modifications to a student's Section 504 plan may be necessary to remedy bullying and harassment or address broader speech issues for the provision of a FAPE.[378] In addition, if the speech at issue was rendered by a "student[] with a disabilit[y]," school officials must be mindful of separate MDR requirements.[379]

At the conclusion of the administrative process outlined in Step Two, if the answer to Question One is "no," then school officials should proceed to Question Two. If the answer to Step Two is "yes," then school officials may also analyze under Question Two (depending on applicable state law and the breadth of school policy language) but must ask Question Three to satisfy the First Amendment.[380]

B. Question Two: Is the Off-Campus Speech Considered "Bullying" Under State Law?

The second question is whether the off-campus speech is considered bullying under state law. Again, not all off-campus speech will fit within the definition of "harassment" under federal law.[381] Nevertheless, some off-campus speech may still be considered bullying under applicable state law.[382] Overall, restrictions on speech will hinge on the scope of applicable state law, specific definitions of bullying (which vary by jurisdiction),[383] and federalism principles – like the Supremacy Clause.[384] However, critical administrative decisions will be made without reliance on the full scope of DOE's longstanding 2010 Harassment and Bullying Guidance, as it was significantly modified in 2025.[385] Still, like with harassment, any determinations made on the issue of bullying that impacts a "student[] with a disabilit[y]" must comply with separate Section 504 requirements.[386]

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377. *See supra* Section III.A.2; *supra* note 31 and accompanying text.

378. *See* October 2014 Section 504 Guidance, *supra* note 125, at 4–5; *supra* Section III.A.1.

379. *See supra* Section III.A.1.

380. *See supra* Section IV.B; *infra* Section VI.C; Suski, *supra* note 121, at 722, 733–35 ("To impose any consequences for bullying that is speech, schools then must satisfy First Amendment constraints.").

381. *See supra* Section III.B; *Suski*, *supra* note 121, at 712.

382. *See id*.

383. *See id.*; Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 509–12 (1st Cir. 2021) (analyzing post-*Mahanoy* student speech under Massachusetts anti-bullying statute).

384. Haile, *supra* note 49.

385. *See* sources cited *supra* note 34.

386. *See supra* Section III.A.1.

At the conclusion of the school-level bullying inquiry, if the answer to Question Two is "yes," school officials should then ask Question Three to satisfy the First Amendment.[387] However, if the answers to Questions One and Two are "no," then a student's off-campus speech likely does not fit into the Middle Ground category, and it is presumptively protected under *Mahanoy*.[388]

Nevertheless, regulation of off-campus speech was *Limited – Not Eliminated* by *Mahanoy*. Although "serious or severe bullying and harassment" was a phrase embedded in the Court's opinion, those terms were not defined by the Court.[389] The vagueness in *Mahanoy*, along with the aggregate of circuit court case law in Part IV, and the significance of the interest at stake, leave space on the margins of the Middle Ground for reasonable decision-making that must be counterbalanced with the DOE's shifting interpretation of bullying and harassment law in 2025. Furthermore, nothing in *Mahanoy* categorically prohibited schools from regulating off-campus speech that *doesn't* amount to "serious or severe bullying or harassment" more broadly through a general code of student conduct. [390] However, this type of broader regulation of off-campus speech poses significant constitutional and statutory risks for school officials post-*Mahanoy* and *Cardona*. [391]

C. Question Three: Did the Off-Campus Speech Cause a "Substantial Disruption" to the Learning Environment?

As set forth *supra*, if off-campus speech qualifies as bullying or harassment under state or federal law, it likely fits within *Mahanoy's*

387. *See supra* Part IV (discussing *Tinker* in post-*Mahanoy* circuit court cases); *infra* Section VI.C.

388. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 189–94 (2021); C1.G *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1279 (10th Cir. 2022); *cf.* Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 720–27 (9th Cir. 2022) (holding that off-campus speech satisfied *Mahanoy* where school officials did not follow a specific bullying or harassment policy); Kutchinski v. Freeland Cmty. Sch. Dist., 69 F.4th 353–56, 360 (6th Cir. 2023) (holding that off-campus speech satisfied *Mahanoy* where school officials did not follow a specific bullying or harassment policy).

389. *See Mahanoy*, 594 U.S. at 188.

390. *See id.* (noting that "the leeway the First Amendment grants to schools" to regulate student speech is "diminished" in the off-campus context but noting that Levy's off-campus speech was just "one example"); Tennessee v. Cardona, 762 F. Supp. 3d 615, 622 (E.D. Ky. 2025) (explaining that nothing under Title IX regulations prohibited a school district from regulating speech under state law or through a student code of conduct).

391. *See Mahanoy*, 594 U.S. at 211 (Alito, J., concurring); Mahmoud v. Taylor, 606 U.S. 522, 557 (2025) (recognizing the public school's "limited power" to discipline students for misconduct despite "imposing rules and standards of conduct" upon them").

undefined "serious or severe bullying and harassment" category. [392] However, to satisfy the First Amendment, school officials must still ask a final baseline question: did the off-campus speech cause a "substantial disruption" to the learning environment?[393]

Although the First Circuit's "invasion of rights" analysis aligns with *Tinker*, most post-*Mahanoy* circuit courts have concluded that the "substantial disruption" test is still the "better fit" for all student speech issues. [394] Satisfying the "substantial disruption" test is a "demanding standard" for school officials. [395] Moreover, the Supreme Court has never answered fundamental questions about the "invasion of rights" prong, leaving the scope of this analysis "unclear."[396] Similarly, *Mahanoy* offered no opinion on the application of the "nexus" test, or any other equivalent test akin to the "substantial disruption" test. Therefore, it remains an open question whether inquiries like the "nexus" test update, replace, or work in tandem with – the "substantial disruption" test. [397] For now, lower courts reviewing off-campus speech cases are likely to just continue applying either a traditional "substantial disruption" test, or a permutation recognized in their jurisdiction like the "nexus" test, interchangeably, to evaluate the impact of off-campus speech on the learning community.[398]

With these doctrinal factors in mind, on balance, if the answer to Question Three is "yes," then the student's off-campus speech is not protected by the First Amendment under *Tinker* and *Mahanoy*.[399] If the answer to Question Three is "no," then the student's off-campus speech is protected by the First Amendment.[400] Regardless of the outcome, in the absence of greater precedent directly from the Supreme Court, education stakeholders must

392. *See supra* Parts IV–V.

393. *See* Chemerinsky, *supra* note 26 (concluding that *Mahanoy* still requires application of *Tinker's* substantial disruption test for off-campus speech); Suski, *supra* note 121, at 722 (noting in a pre-*Mahanoy* article that "First Amendment constraints" must be "satisf[ied]"); *see also* Part IV (explaining that a majority of circuit court cases turn on a "substantial disruption" test or some recognized permutation).

394. *See* L.M. v. Town of Middleborough, 103 F.4th 854, 867, 874 (1st Cir. 2024) ("The Supreme Court has recently affirmed schools' authority to regulate 'severe bullying and harassment,' but the Court did so without specifying whether schools may do so pursuant to the rights-of-others limitation."); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) (noting that even if the speech "intrudes upon . . . the rights of other students," it is still protected under *Tinker* "when it does not pose a realistic threat of substantial disruption" (first quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969))).

395. *See Mahanoy*, 594 U.S. at 192–93.

396. *See* Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 717 (9th Cir. 2022); *L.M.*, 103 F.4th at 874.

397. *See supra* Section V.A.2.

398. *See supra* Part IV, Section V.A.

399. *See Tinker*, 393 U.S. at 512–13.

400. *See id*.

continue to navigate discipline issues emanating from online social media applications with care in the evolving post-*Mahanoy* speech paradigm.[401]

VII. CONCLUSION

Tinker continues its march towards sixty years as precedent. Each of the Supreme Court's landmark cases from the twentieth century still heavily influence the current off-campus speech analysis.[402] *Mahanoy* builds on to these cases but ultimately just leaves space for new off-campus case lines to continue to emerge—and intersect—with shifting interpretations of the statutory framework.[403] In the trenches, circuit courts are still "working-it-out"[404] in the Middle Ground.[405] *Tinker* leads the charge, but differing approaches to *Tinker's* component parts have re-emerged, which signals more litigation on the horizon.[406] School districts need a more uniform approach to manage the myriad legal issues that the Middle Ground presents to the learning community.[407] The proposed framework provides a comprehensive matrix to guide stakeholders through the post-*Mahanoy* and *Cardona* student speech inquiry.[408]

In the end, the Middle Ground isn't just an abstract point on a hypothetical spectrum – it's where the most critical speech issues are occurring in the twenty-first century. [409] The "sad truth" is not that our public schools are no longer "temples of learning teaching the lessons of good will, civility, and wisdom that are central to the fabric of American life." [410] It is that the fabric *itself* is being worn thin by the effects of social media. [411] The unprecedented

401. *See Mahanoy*, 594 U.S. at 211 (Alito, J., concurring) ("If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory."); Erickson & Bunker, *supra* note 40, at 1047 ("Although the lower courts' reception of *Mahanoy* is still in its early stages, developments thus far are less than reassuring").

402. *See* Morse v. Frederick, 551 U.S. 393, 396–97 (2007); *supra* Parts III–IV.

403. *See supra* Sections II.B, IV, V.A.2.

404. The phrase "working it out" is commonly used to refer to stand-up comedians workshopping new, untested material to live audiences. *See* Mike Birbiglia, *Mike Birbiglia's Working It Out,* APPLE PODCASTS, https://podcasts.apple.com/au/podcast/mike-birbiglias-working-it-out/id1515419751 [https://perma.cc/3QD8-JL76].

405. *See supra* Part IV.

406. *See supra* Part IV.

407. *See supra* Part V.

408. See supra Part VI.

409. *See* Sections II.B, IV, V.A.3.

410. New Jersey v. T.L.O., 469 U.S. 325, 378, n.19 (1985).

411. *See id. See generally* HAIDT, *supra* note 38, at 114 (examining evidence of harm from the "Great Rewiring" affecting children in schools because of a dramatic increase in social media use).

growth of social media continues to impact us all, but it has the greatest impact on our most impressionable groups: school-age children.[412]

There is no reason to think American society has reached its apex of social media use yet.[413] Artificial intelligence, along with wearable products like "Apple Vision Pro" [414] and Ray-Ban's "Meta Smart Glasses" [415] are still in their infancy. These cutting-edge technologies allow users to integrate social media into the physical experience of life in ways that would make Marty McFly jealous. [416] With the release of each new technology, students will find innovative ways to speak – some with deep impact [417] – like in Malvern, Pennsylvania. [418] To combat this growing threat to the administration of public education, and to protect individual student rights, the Supreme Court must remain vigilant in defining the boundaries of off-campus speech. [419] *Tinker* continues to linger there—*Limited, Not Eliminated*—for now.

412. *See id*.

413. *See* HAIDT, *supra note* 38, at 115–18.

414. *Apple Vision Pro*, APPLE, https://www.apple.com/apple-vision-pro/ [https://perma.cc/R3CQ-5QTS].

415. *Meta AI Glasses*, META, https://www.meta.com/smart-glasses [https://perma.cc/6M9P-U8D9].

416. *See* BACK TO THE FUTURE: PART II, IMDB (Universal Pictures 1989), https://www.imdb.com/title/tt0096874/ [https://perma.cc/VQB7-XKAC] (featuring fictional protagonist Marty McFly).

417. *See* Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th, 708, 712–13 (9th Cir. 2022) (noting that students "gathered at the school "yelling or crying" with some of the targeted students "devasted" and "scared"); Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 502 (1st Cir. 2021) (noting that the bullied student "obtained counseling . . . and entered formal mental health treatment").

418. *See* Singer, *supra* note 1.

419. *See supra* Section II.B.