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Mahanoy Area Sch. Dist. V. B. L. 141 S. Ct. 2042 (2021)

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Mahanoy Area Sch. Dist. v. B. L.
141 S. Ct. 2042 (2021)

I. INTRODUCTION

Although the First Amendment guarantees United States citizens freedom of speech, a person's speech may be regulated in certain situations, particularly when that person is a student in a school.[1] Over the years, the Supreme Court has often been called on to determine whether a school has gone too far in restricting a student's speech, and in 2021, the Court issued a decision in one such case, *Mahanoy Area School District v. B. L.*[2] Unlike prior cases, such as the *Tinker v. Des Moines Independent Community School District* decision that concerned the rights of on-campus students, *Mahanoy* attempted to clarify what rights, if any, schools have in regulating off-campus speech.[3]

The case involved B. L., a high school student who filed suit to challenge her suspension from the cheerleading team.[4] Due to her frustration from failing to make the varsity cheerleading team and from not earning her desired position in softball, B. L., on a Saturday while off school grounds, used Snapchat to post disparaging remarks about the school and the extracurricular programs.[5] The Court, with an 8-1 majority, sided with B. L., holding that the school district had overreached in asserting its authority over B. L. while she was off-campus.[6] Although the majority provided no definition for off-campus speech and no test for determining what types of off-campus speech schools might regulate, the Court clearly voiced its hesitancy in allowing schools to punish students for what they say while out of the classroom.[7]

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In the spring of 2017, B. L., a high school freshman, learned that she had not made the varsity cheerleading squad.[8] Instead, she was offered a position

1. U.S. CONST., amend. I.
2. Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2042 (2021).
3. *Id*. at 2042-43; *see generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
4. *Mahanoy*, 141 S. Ct. at 2043.
5. *Id*.
6. Mahanoy Area Sch. Dist. v. B. L., 210 L. Ed. 2d 403, 408 (2021).
7. *Id*. at 407.
8. Adam Liptak, *A Cheerleader's Vulgar Message Prompts a First Amendment Showdown*, N.Y. TIMES (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/us/supreme-court-schools-free-speech.html.

on the junior varsity cheerleading team.[9] B. L. was upset that she was placed on the junior varsity rather than the varsity squad, particularly because another student, an eighth grader at the time, had been selected for the varsity team.[10] About the same time that she tried out for cheerleading, B. L. also tried out for the right-fielder's position on a private softball team; she was denied this spot on the team as well.[11]

On a Saturday when school was not in session, B. L. and a friend went to a local convenience store.[12] At the store, B. L. accessed Snapchat, a social media application, using her smartphone and posted two photos.[13] This posting allowed users of the application who were included in B. L.'s "friend" group to see her photos for a limited amount of time, after which the images would no longer be accessible.[14] At the time of the posting, B. L. had close to 250 persons in her "friend" group.[15]

The first of the two photos that B. L. posted displayed B. L. and her friend extending their middle fingers toward the camera with the caption, "[F]*** school f*** softball f*** cheer f*** everything."[16] The second photo contained a blank image and the caption, "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?"[17] Following the caption in the second image was an emoji of an upside-down smiley face.[18]

Of the roughly 250 members in B. L.'s "friend" group, many were Mahanoy Area High School students, and a few of them also belonged to the cheerleading squad.[19] One of the students took screenshots of B. L.'s photos before they expired and proceeded to share the copies of the Snapchat images with some of the other cheerleaders.[20] A student shared the copies with her mother, who was a cheerleading squad coach.[21] In response to the shared images, several of the cheerleaders expressed their displeasure with B. L.'s photos.[22] The photos were a topic of discussion during an Algebra class taught by one of the cheerleading coaches.[23]

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9. *Mahanoy*, 141 S. Ct. at 2043.
10. *Id*.
11. *Id*.
12. Liptak, *supra* note 8.
13. *Mahanoy*, 141 S. Ct. at 2043.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Mahanoy*, 141 S. Ct. at 2043.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Mahanoy*, 141 S. Ct. at 2043.

The cheerleading coaches approached the school principal about the matter.[24] Based on one post's use of profanity and both posts' relation to a school-based extracurricular activity, the coaches determined that the Snapchat images violated school policy.[25] Due to her infraction, the cheerleading coaches suspended B. L. from the junior varsity squad for her upcoming sophomore year.[26] B. L. apologized for her actions, but the school administrators and the school board upheld B. L.'s one-year suspension.[27]

B. L., along with her parents, filed a lawsuit against the Mahanoy Area School District in Federal District Court.[28] The District Court held in favor of B. L., granting both a temporary restraining order and a preliminary injunction that mandated B. L.'s reinstatement on the cheerleading team.[29] The court granted B. L.'s motion for summary judgment, holding that the shared photos were not the source of a "substantial disruption at the school."[30] Based on the Supreme Court's ruling in *Tinker v. Des Moines Independent Community School District*, the District Court felt that unless the speech in question caused a substantial disruption to school affairs, it should not be prohibited.[31] The District Court ruled that B. L.'s suspension infringed on her First Amendment rights and awarded her nominal damages and attorneys' fees.[32] The court also required that B. L.'s disciplinary record be expunged.[33]

Mahanoy Area School District appealed the decision to the Third Circuit.[34] The Third Circuit affirmed the District Court's ruling but for different reasons than those that the original court offered.[35] The Circuit Court held that because the Snapchat postings occurred off school grounds and were not part of any school-related gathering, Mahanoy Area School District did not have the authority to discipline B. L. for the postings.[36] The Third Circuit emphasized that the *Tinker* ruling does not pertain to speech that was conducted off school property and was not "reasonably interpreted as bearing the school's imprimatur."[37] The Supreme Court granted certiorari in order to decide whether *Tinker* would allow public school officials to

24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Mahanoy*, 141 S. Ct. at 2043.
29. *Id.*
30. *Id*. at 2043-44.
31. *Id.*; *see also Tinker*, 393 U.S. at 509.
32. *Mahanoy*, 141 S. Ct. at 2044.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Mahanoy*, 141 S. Ct. at 2044.

regulate off-campus speech that may be deemed a substantial disruption to the educational process.[38]

III. COURT'S DECISION AND RATIONALE

A. Majority Opinion by Justice Breyer

Justice Breyer delivered the opinion of the Court, joined by Justices Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett and Chief Justice Roberts.[39] The Court began by quoting the holding in *Tinker*: "[S]tudents do not 'shed their constitutional rights to freedom of speech or expression,' even 'at the schoolhouse gate.'"[40] In *Tinker*, a group of students were punished by school officials for wearing black armbands to display opposition to the Vietnam War.[41] The Court said that school officials may regulate students' speech only if it can be shown that the speech would "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[42] In *Tinker*, the Court expanded upon this notion, stating that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[43] The Court found that the students in *Tinker* had not caused a significant disturbance and, therefore, ruled against the school district.[44]

Next, the *Mahanoy* Court discussed three *Tinker*-rule exceptions in which school officials may regulate school speech.[45] First, speech may be regulated to prevent "'indecent,' 'lewd,' or 'vulgar' speech uttered during a school assembly on school grounds."[46] The Court referred to *Bethel School District v. Fraser*, in which a student was disciplined after promoting a fellow student for class office in a speech that contained an extended, explicit sexual metaphor.[47] The *Fraser* Court held that the student's speech was "offensively lewd" and, thus, that the First Amendment does "not prevent . . . school

38. *Id*.
39. *Mahanoy*, 210 L. Ed. 2d at 408.
40. *Mahanoy*, 141 S. Ct. at 2044 (quoting *Tinker*, 393 U.S. at 506).
41. *Tinker*, 393 U.S. at 504.
42. *Id*. at 509 (quoting *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir.1966)).
43. *Tinker*, 393 U.S. at 508.
44. *Id*. at 514; *see also* Justin Driver, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 77 (1st ed. 2018) ("The school witnessed no threats of violence – let alone violent acts – and . . . schoolwork had not been compromised. The virtually nonexistent record of actual disruption could hardly justify the schools' decision to silence student speech.").
45. *Mahanoy*, 141 S. Ct. at 2045.
46. *Id*.; *see also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).
47. *Fraser*, 478 U.S. at 677-78.

officials from determining that . . . a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."[48]

A second exception to *Tinker* is for speech "uttered, during a class trip, that promotes "illegal drug use."[49] In *Morse v. Frederick*, at an event sanctioned and supervised by a high school in Alaska, a student displayed a banner reading "BONG HiTS 4 JESUS."[50] The principal of the school asked the student to remove the banner, and when he refused, the principal suspended the student.[51] The *Morse* Court found that the banner arguably promoted a pro-drug message.[52] Because of the recognized dangers of drug-related abuse and since the speech was at a school-related event, the *Morse* Court held that school boards may "restrict student expression that they reasonably regard as promoting drug use."[53]

The third and final exception discussed by the *Mahanoy* Court involved a school district's ability to restrict speech that "others may reasonably perceive as 'bear[ing] the imprimatur of the school.'"[54] In *Hazelwood School District v. Kuhlmeier*, the issue was whether school officials could forbid the printing of two stories in a school newspaper.[55] The principal of the high school publishing the paper determined that the two articles were inappropriate and not in accordance with journalistic ethics.[56] The *Kuhlmeier* Court held that the *Tinker* standard did not apply in this situation and that the First Amendment would not be violated by school officials "exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[57]

Following the discussion of the *Tinker* exceptions, the *Mahanoy* Court affirmed its general disagreement with the Third Circuit, which held that "special characteristics that give schools additional license to regulate school

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48. *Id*. at 685; *see also* Driver, *supra* note 44, at 94 (It may be worth noting that Chief Justice "Burger stopped shy of concluding that Fraser's speech substantial disrupted or materially interfered with school activities, evidently because – even according to the testimony of Bethel's educators – raucous speeches and boisterous conduct were hardly unknown at Bethel's student assemblies.").

49. *Mahanoy*, 141 S. Ct. at 2045; *see also* Morse v. Frederick, 551 U.S. 393, 410 (2007).

50. *Morse*, 551 U.S. at 397.

51. *Id*. at 398.

52. *Id*. at 402.

53. *Id*. at 408; *see also* Driver, *supra* note 44, at 116 (The author of the majority opinion, Chief Justice "Roberts took pains to emphasize that *Frederick* should not be construed as authorizing schools to punish students for speech that could not rationally be viewed as pro-drug.").

54. *Mahanoy*, 141 S. Ct. at 2045 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).

55. *Kuhlmeier*, 484 U.S. at 262.

56. *Id*. at 263.

57. *Id*. at 273; *see also* Driver, *supra* note 44, at 104 ("The students produce[d] the newspaper as part of Journalism II, a graded academic class held during regular school hours, but educators oversaw the entire endeavor, exercising ultimate editorial authority.").

speech always disappear when a school regulates speech that takes place off campus."[58] The Court recognized several circumstances, contained within parties' and amici briefs, in which a school district may still have an interest in regulating speech.[59] These circumstances involve "serious or severe bullying or harassment"; "threats aimed at teachers or other students"; a failure to adhere to rules or instructions concerning assignments, including those involved in "online school activities"; and, finally, "breaches of school security devices."[60]

The Court in *Mahanoy* acknowledged that the above examples may constitute situations in which off-campus speech may be regulated.[61] However, the Court refused to say that this is the complete list and also avoided giving a specific rule for determining what types of off-campus speech schools may restrict.[62] In fact, due to the increase in online and hybrid types of schooling, the Court refrained from even defining the term "off-campus speech."[63] Instead, the Court delineated "three features of off-campus speech that often . . . distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech."[64]

First, the Court explained that in situations involving off-campus speech, the school will "rarely stand *in loco parentis*."[65] Under the doctrine of *in loco parentis*, school officials are charged with acting as the students' absent parents.[66] Off-campus speech often falls within the parents' usual realm of control, meaning that the parents are not knowingly ceding any of their parental rights to the school.[67] Thus, off-campus speech would normally be considered the responsibility of the parents and not that of school officials.[68]

Second, since the ruling in *Tinker*, a student's on-campus speech may be subject to restrictions not necessarily applicable if the student were off-campus.[69] If the Court were to allow school officials to regulate off-campus speech with the same guidelines as on-campus speech, a student would essentially have all twenty-four hours of his or her speech under the control of school officials.[70] The Court acknowledged that this would be a less-than-

58. *Mahanoy*, 141 S. Ct. at 2045.
59. *Id*.
60. *Id.*
61. *Id*.
62. *Id*.
63. *Mahanoy*, 141 S. Ct. at 2045.
64. *Id*. at 2046.
65. *Id*.
66. *Id*.
67. *Id*.
68. *Mahanoy*, 141 S. Ct. 2046.
69. *Id*.; *Morse*, 551 U.S. at 405.
70. *Mahanoy*, 141 S. Ct. at 2046.

ideal position for the nation's students.[71] Because of the potential for over-regulation, the Court cautioned that school officials' attempts to regulate off-campus speech must meet a higher level of scrutiny.[72] School districts seeking to censor students' off-campus speech must meet more stringent requirements than when they regulate on-campus speech.[73]

Lastly, the Court emphasized that schools have "an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[74] Schools are meant to foster, not hamper, an environment for the free exchange of ideas and opinions.[75] The Court described schools as having a responsibility to cultivate all types of speech, both popular and unpopular, in order to train well-rounded citizens for the future.[76]

In Part III of the Court's opinion, B. L.'s actual words were examined.[77] The Court said that while B. L.'s speech may be made up of "vulgar language," the words and images could neither be considered "fighting words" ("those by which their very utterance inflict injury or intend to incite an immediate breach of the peace")[78] nor be classified as "obscene" (words that "must be, in some significant way, erotic").[79] Instead, the Court described B. L.'s speech as "pure speech," saying that if B. L. had posted the same images and language as an adult, the "First Amendment would provide strong protection."[80]

The Court also considered the time and place in which B. L.'s speech occurred.[81] The Snapchat posts occurred after official school hours at a location that was not on school grounds.[82] The Court specifically detailed the information that was missing from B. L.'s post: B. L. neither included the name of the school, nor identified any specific member of the school faculty.[83] The Court also emphasized the importance of the fact that B. L. intended the posts for her group of "friends" and not a public audience.[84]

The Court next assessed the school's interest in "prohibiting students from using vulgar language to criticize a school team or its coaches."[85] The

71. *Id*.
72. *Id*.
73. *Id*.
74. *Id*.
75. *Mahanoy*, 141 S. Ct. at 2046.
76. *Id*.
77. *Id*.
78. *Id*. (citing Chaplinsky v. N.H., 315 U.S. 568, 572 (1942)).
79. *Mahanoy*, 141 S. Ct. at 2046 (citing Cohen v. California, 403 U.S. 15, 19-20 (1971)).
80. *Mahanoy*, 141 S. Ct. at 2046-47 (citing Snyder v. Phelps, 562 U.S. 443, 461 (2011)).
81. *Mahanoy*, 141 S. Ct. at 2047.
82. *Id*.
83. *Id*.
84. *Id*.
85. *Id*.

analysis of this interest comprised three parts.[86] First, the Court evaluated the school's need to discipline bad-mannered language directed against school-related groups.[87] While school officials may have considered B. L.'s language vulgar, their interest in punishing this language diminished because the speech occurred off campus.[88] Here the Court referred again to *Bethel School District v. Fraser*.[89] In that case, a concurring opinion from Justice Brennan indicated that although a student delivered a speech with an inappropriate sexual innuendo, if the student 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."[90]

In addition, the Court held that the school had not been given disciplinary control by B. L.'s parents; thus, school officials did not stand *in loco parentis*.[91] The Court also noted that the school district did not put forth evidence of a widespread effort to curb students' vulgar language off school grounds.[92] Because of the off-campus nature of the speech, the lack of disciplinary standing, and the missing evidence of a concerted effort to prevent offensive speech outside of the classroom, the Court found "that the school's interest in teaching good manners is not sufficient . . . to overcome B. L.'s interest in free expression."[93]

Following its examination of the school's interest in discouraging vulgar language, the Court analyzed the school's interest in attempting to prevent disruptions within the school.[94] The Court could find no evidence of substantial disruption during the school day or during any school extracurricular activities.[95] Although there was a reported discussion during an Algebra class in which some of B. L.'s fellow cheerleaders discussed being "upset" by her posts, the Court interpreted this interaction as a minimal distraction.[96] To have reached the level of *Tinker*, a disruption would have had to have been substantial, and the Court found that the Algebra discussion did not qualify as such.[97]

Finally, the school district brought forth evidence that school officials acted to prevent a decline in "team morale."[98] The Court found very little to

86. *Mahanoy*, 141 S. Ct. at 2047.
87. *Id*.
88. *Id*.
89. *Id*.; *Fraser*, 478 U.S. at 688 (Brennan, J., concurring).
90. *Fraser*, 478 U.S. at 688 (Brennan, J., concurring).
91. *Mahanoy*, 141 S. Ct. at 2047.
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*.
96. *Mahanoy*, 141 S. Ct. at 2047-48.
97. *Id*. at 2048; *Tinker*, 393 U.S. at 509.
98. *Mahanoy*, 141 S. Ct. at 2048.

suggest a weakening in team morale and discovered no significant evidence that any dip in team morale would create a disruption in the educational process.[99] Again, the Court pointed to *Tinker*, which stated that "'undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression.'"[100]

The Court held that the school's interests, whether to promote good manners, to prevent or quash a substantial disruption, or to protect team morale, were not strong enough to justify censoring B. L.'s speech.[101] As the majority acknowledged, although B. L.'s speech may be described as "superfluous," it is still worthy of protection under the First Amendment.[102] The Court affirmed the Third Circuit's judgment, though for different reasons, and agreed that B. L. should not have been punished.[103]

B. Concurring Opinion by Justice Alito, with Whom Justice Gorsuch Joins

Justice Alito began by acknowledging that B. L.'s case was the first in which the Court was asked whether school officials can regulate off-campus speech.[104] He emphasized that *Tinker* did not settle any matters regarding off-campus speech.[105] Justice Alito agreed with the majority's holding that at times a school district might find it essential to restrict off-campus speech, and, like the majority, he also found it unnecessary to make a rule concerning application of the First Amendment to off-campus speech cases.[106]

Justice Alito examined how this case turned on the fact that B. L. was a public-school student rather than a private-school student.[107] In *Tinker*, the Court held that "when a public school regulates student speech, it acts as an arm of the State in which it is located."[108] Justice Alito concluded that had B. L. been a private-school student, the Commonwealth of Pennsylvania would have had no legal standing in suppressing her speech or disciplining her for it.[109]

Justice Alito agreed with the majority's opinion that public schools should be able to regulate on-campus speech, recognizing that teachers' and administrators' jobs would be incredibly difficult if they were not able to

99. *Id*.
100. *Id*. (quoting *Tinker*, 393 U.S. at 508).
101. *Mahanoy*, 141 S. Ct. at 2048.
102. *Id*.
103. *Id*.
104. *Mahanoy*, 141 S. Ct. at 2048 (Alito, J., concurring).
105. *Id*. at 2048 n.1.
106. *Id*. at 2049.
107. *Id*. at 2049-50.
108. *Id*. at 2050 (citing *Tinker*, 393 U.S. at 509).
109. *Mahanoy*, 141 S. Ct. at 2050.

control, to some extent, what type of speech occurred in schools.[110] However, Justice Alito questioned why a student enrolled in a public school must accept that this type of regulation should occur.[111] He answered this question by stating that when parents enroll a student in public school, they implicitly "consent on behalf of the child to the relinquishment of some of the child's free-speech rights."[112] This relinquishment of rights causes public school officials to be *in loco parentis*.[113] Justice Alito emphasized that the scope of a parent's delegation of rights over a child depends on the scope of an educator's charged duties.[114] He illustrated that the assigned rights of an educator at a boarding school may differ from those of an educator in a lesser role, such as a part-time tutor.[115] The boarding school teacher would likely be tasked with more responsibility for monitoring and correcting a live-in student than a part-time tutor would.[116]

In Part III of his concurring opinion, Justice Alito discussed the potential scope of delegated school authority over modern public school students.[117] He explained that the doctrine of *in loco parentis* applies throughout the school day, both when students are receiving instruction and when they are on school grounds but not engaged in a lesson (for example, eating lunch, sitting in study hall, or transitioning to classes).[118] However, in Part IV, Justice Alito emphasized that, while parents may delegate some rights for school officials to restrict off-campus speech, it is not "a complete transfer of parental authority."[119] He examined several different types of off-campus speech that school officials may have the authority to regulate.[120]

First, he found that speech that relates to a "temporal or spatial extension of the regular school program," such as hybrid learning, online learning, school assignments meant to take place after class, and also school-provided transportation to and from school, would all fall under the authority of the school district.[121] In this category, Justice Alito included extracurricular events, field trips, and other school-sanctioned trips or occasions that may take place off school grounds during or outside school hours.[122] He agreed

110. *Id*.
111. *Id*. at 2050-51.
112. *Id*. at 2051.
113. *Id*.
114. *Mahanoy*, 141 S. Ct. at 2051.
115. *Id*.
116. *Id*.
117. *Id*. at 2052.
118. *Id*. at 2053.
119. *Mahanoy*, 141 S. Ct. at 2053.
120. *Id*. at 2054.
121. *Id*.
122. *Id*.

with the majority that this type of speech likely falls under a school district's ability to regulate.[123]

However, Justice Alito distinguished that type of speech from speech that does not concern or relate to school officials, students, or the school itself and that "addresses matters of public concern . . . like politics, religion, and social relations."[124] He argued that school officials trying to suppress this type of off-campus speech would likely be trying only to avoid disruptions, and while a "school may suppress the disruption . . .[,] it may not punish the off-campus speech that prompted other students to engage in misconduct."[125] Justice Alito found speech pertaining to these public issues outside of the authority of school officials.[126]

Justice Alito acknowledged that there are categories of speech that fall between the type that occurs in some school-related fashion and the kind that does not relate to school but that involves some matter of public concern.[127] One such example is speech involving a threat to either a school official or a student.[128] Another category is "speech that criticizes or derides school administrators, teachers, or other staff members."[129] The final category listed is speech that involves derogatory remarks that a student makes toward other students.[130] Justice Alito admitted that each of these "in-between" categories creates difficult issues for deciding whether or not off-campus speech may be regulated.[131]

In Part V of his concurring opinion, Justice Alito concluded that B. L.'s speech did not fall into one of the "in-between" categories.[132] While B. L.'s posts were critical of the school and of the cheerleading program, they were not "speech that criticizes or derides particular individuals."[133] In fact, the posts were meant to stay private; they were sent via an application that allowed them to be viewed for only twenty-four hours, and they would not have reached school officials if one of the recipients of the original posts had not informed the school.[134] In addition, like the majority, Justice Alito agreed that B. L.'s language and images did not cause any significant school

123. *Id*. at 2054-55.
124. *Mahanoy*, 141 S. Ct. at 2055; *see also* Lane v. Franks, 573 U.S. 228, 235 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment").
125. *Mahanoy*, 141 S. Ct. at 2056.
126. *Id*.
127. *Id*.
128. *Id*.
129. *Id*. at 2057.
130. *Mahanoy*, 141 S. Ct. at 2057.
131. *Id*. at 2056.
132. *Id*. at 2057.
133. *Id*. at 2058.
134. *Id*.

disruption.[135] When examining B. L.'s specific language, he admitted that some readers may have found the language upsetting or crude.[136] However, also like the majority, Justice Alito found no evidence of the school district trying to curb offensive language and gestures for all students either on or off campus.[137]

In the end, Justice Alito agreed with the majority's finding that off-campus speech may be regulated only under specific circumstances and that those unique situations should be limited.[138] Although, like the majority, he did not create a clear rule, Justice Alito stressed that, because of the weighty First Amendment issues, school officials should "proceed cautiously" when looking to regulate off-campus speech.[139]

C. Dissenting Opinion by Justice Thomas

Justice Thomas agreed with the majority that on-campus student speech may be regulated under the doctrine of *in loco parentis*.[140] He also found, as the majority did, that schools have less authority in restricting speech that occurs off campus.[141] However, Justice Thomas asserted that the majority ignored a historical rule, which would allow school officials to discipline B. L. for her speech disparaging the school and the cheerleading team.[142]

For the most part, Justice Thomas relied on a Vermont Supreme Court ruling from 1859, *Lander v. Seaver*.[143] In *Lander*, after school dismissed, a student riding by the home of one of his teachers referred to the teacher as "Old Jack Seaver."[144] The teacher and several other students were present when the student uttered the statement.[145] The following day, the teacher whipped the student with a piece of rawhide as punishment for his actions.[146] The Vermont Supreme Court held that the student's language had a "direct and immediate tendency to injure the school and bring the master's authority into contempt."[147] Because of this language, the Vermont Supreme Court found that the teacher had a right to discipline the student for his speech.[148]

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135. *Mahanoy*, 141 S. Ct. at 2058.
136. *Id*.
137. *Id*.
138. *Id*. at 2059.
139. *Id*.
140. *Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting).
141. *Id*.
142. *Id*.
143. *Id.*
144. Lander v. Seaver, 32 Vt. 114, 115 (1859).
145. *Id*.
146. *Id*.
147. *Id*. at 120.
148. *Id*.

Justice Thomas described the rule in *Lander* as "widespread" and said that it has been applied as "not only the basis for schools to discipline disrespectful speech but also to regulate truancy."[149] He discussed *Lander*'s impact on truancy, noting that courts in the 1800s did not clearly distinguish between a student's speech and his or her conduct.[150] Because of this ambiguity, courts used *Lander* as a means to punish students for their off-campus truancies' negative impacts on the "'good order and discipline of the school.'"[151] Following the example of *Lander*, Justice Thomas firmly concluded that the historical rule has consistently allowed the regulation of off-campus speech that directly and immediately harmed "the school, its faculty or students, or its programs."[152]

Justice Thomas claimed that the majority offered no reason to abandon the historical rule; thus, he argued that it should apply in B. L.'s case.[153] He found that B. L.'s language was vulgar and meant to damage the reputation of the cheerleading program, its staff, and its participants.[154] Because of the nature of her posts, Justice Thomas would have applied the historical rule, allowing the cheerleading coach to have suspended B. L. for her off-campus speech.[155] He also suggested that if B. L. had disagreed with the severity of the punishment, she could have sought a remedy in state court. Justice Thomas declared that he did not believe that federal courts had any authority to "police the proportionality of school disciplinary decisions in the name of the First Amendment."[156]

Justice Thomas further discussed the doctrine of *in loco parentis*, saying that the Court had failed to apply the principle appropriately since its ruling in *Tinker*.[157] He asserted that the Fourteenth Amendment was ratified at a time when public school officials were widely considered "delegated substitutes of parents" and that this doctrine allowed them to be unbound by "the constraints the Fourteenth Amendment placed on other government actors."[158] Justice Thomas explained his frustration with the *Tinker* ruling, writing that when the Court said that "it 'ha[d] been the unmistakable holding . . . for almost 50 years' that students have free-speech rights inside schools,"

149. *Mahanoy*, 141 S. Ct. at 2060.
150. *Id*.
151. *Id*. (quoting Deskins v. Gose, 85 Mo. 485, 489 (1885)); *see also* Burdick v. Babcock, 31 Iowa 562, 567 (1871) ("If the effects of acts done out of school-hours reach within the schoolroom during school hours and are detrimental to good order and the best interest of the pupils, it is evident that such acts may be forbidden.").
152. *Mahanoy*, 141 S. Ct. at 2061.
153. *Id*.
154. *Id*.
155. *Id*.
156. *Id*.
157. *Mahanoy*, 141 S. Ct. at 2061-62.
158. *Id*. at 2061.

it did not point to cases that actually supported this claim.[159] Instead, Justice Thomas stressed that the *Tinker* majority referred to cases that primarily dealt with "the rights of parents and private schools, not students."[160] He argued that, like the *Tinker* majority, the current Court also failed to show how or if the doctrine of *in loco parentis* may be applied to off-campus speech.[161]

The *Tinker* decision's lack of a "solid foundation" made deciding this case very difficult in Justice Thomas's opinion.[162] He acknowledged that B. L.'s use of technology to produce speech that was "made in one location but capable of being received in countless others" was a problem that really could not have been predicted at the time of the *Tinker* decision.[163] However, Justice Thomas opined that the Court should have recognized the need to better explain *Tinker* and, in B. L.'s case, should have formed an opinion that would have analyzed the historical issues around free speech regulation by school officials and that would have described how and why these issues were being modified or left alone.[164]

Justice Thomas concluded that the majority should have given more weight to the facts that B. L. had chosen to participate in an extracurricular activity and that her speech concerned that activity.[165] He said that in the *Lander* case, the focus of the analysis was on the "effect of the speech, not its location."[166] Because B. L. was a member of the cheerleading team and because part of her Snapchat posts specifically targeted that organization, in Justice Thomas's opinion, B. L.'s language was more damaging to the cheerleading squad than if the same posts had been made by someone not on the team.[167] Therefore, in his view, B. L.'s speech carried more weight than similar speech made by a non-cheerleader, and the majority missed this detail in its analysis.[168]

Justice Thomas also posited that the majority should have discussed the type and scope of authority schools may have in disciplining students for speech posted on social media.[169] He recognized that language and images transmitted through social media have a wider impact and reach greater numbers of people than regular speech.[170] He emphasized that off-campus speech shared through social media "will have a greater proximate tendency

159. *Id*. at 2062 (quoting *Tinker*, 393 U.S. at 506).
160. *Mahanoy*, 141 S. Ct. at 2062.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*.
165. *Mahanoy*, 141 S. Ct. at 2062.
166. *Id*.
167. *Id*.
168. *Id*.
169. *Id*.
170. *Mahanoy*, 141 S. Ct. at 2062.

to harm the school environment than will an off-campus in-person conversation."[171] He wrote that the majority should have discussed whether school officials should have more authority in disciplining off-campus speech distributed through social media than in disciplining in-person, off-campus speech.[172]

Finally, Justice Thomas found that the majority did not delve into the issue of whether B. L.'s speech could actually be described as off campus.[173] Although B. L. certainly authored the Snapchat posts at an off-campus location, their impact could possibly be felt on campus.[174] He compared this situation to that of a student who might pass out vulgar fliers on campus after having created the fliers off campus.[175] In that scenario, Justice Thomas affirmed that a school would be acting *in loco parentis* in disciplining the student for distributing the fliers.[176] As Justice Thomas stated, "[W]here it is foreseeable and likely that speech will travel onto campus, a school has a stronger claim to treating the speech as on-campus speech."[177]

Justice Thomas conceded that, ultimately, it is probably more reasonable to consider B. L.'s speech as off campus in nature due to a lack of meaningful evidence that the original posts were received on campus.[178] Only a copy of B. L.'s posts were seen on school grounds.[179] However, he chastised the majority for simply assuming that the speech had to be considered off campus and not analyzing the location label in greater depth.[180]

In Justice Thomas's view, the majority stated only one rule: "Schools can regulate speech less often when that speech occurs off campus."[181] He declared that this rule is "untethered from anything stable," saying that "courts (and schools) will almost certainly be at a loss as to what exactly the Court's opinion today means."[182] Because the majority neither based its ruling on a historical perspective of free speech regulation by schools nor explained its choice to deviate from these historical rules, Justice Thomas disagreed with the Court's holding.[183]

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171. *Id*.
172. *Id*.
173. *Id*. at 2063.
174. *Id*.
175. *Mahanoy*, 141 S. Ct. at 2063.
176. *Id*.
177. *Id*.
178. *Id*.
179. *Id.*
180. *Mahanoy*, 141 S. Ct. at 2063.
181. *Id*.
182. *Id*.
183. *Id*.

IV. ANALYSIS

A. Introduction

In *Tinker*, the Supreme Court made it clear that school officials do not have free license to regulate all displays of speech in schools.[184] Specifically, the Court held that speech could not be restricted unless it "'materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.'"[185] This ruling clearly impacted the suppression of on-campus speech; however, it did little to resolve the matter of schools' authority over off-campus speech.[186] In *Mahanoy*, the Court attempted to pour the foundation for a rule dealing with off-campus speech, but it failed to offer a solid test or process for applying this rule. It is difficult to imagine how courts and schools will implement this ambiguous and elusive holding from *Mahanoy* when confronted with off-campus First Amendment disputes. Instead of a solid precedent for future issues, the Court leaves several unanswered questions.

This analysis will discuss why the Court correctly held that B. L.'s speech was protected and will examine some of the questions that the Court left unanswered.

B. Based on Tinker, B. L.'s Speech Should be Protected

Simply based on the *Tinker* holding, it would seem that the majority opinion is correct and that B. L.'s speech should be protected. While B. L.'s speech concerned the school and two of its extracurricular programs, *Tinker* demands more than just critical speech to enable a school district to punish a student; the speech must "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[187] The *Tinker* test mandates that student speech may "only be suppressed or regulated by school authorities if the expression would (1) substantially interfere with the work of the school, or (2) obstruct the rights of other students."[188] Neither of these two prongs was satisfied in *Mahanoy*. According to the majority, the school presented no evidence of any substantial disruption or interference.[189] The Court found an Algebra class discussion that lasted at most "5 to 10 minutes" inadequate to constitute a

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

185. *Id*. at 509 (quoting *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir.1966)).

186. Joshua Rieger, *Digitizing the Schoolhouse Gate: Protecting Students' Off-Campus Cyberspeech by Switching the Safety on* Tinker*'s Trigger*, 70 FLA. L. REV. 695, 703 (2019).

187. *Tinker*, 393 U.S. at 509 (quoting *Burnside*, 363 F.2d at 749).

188. John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939, 947-48 (2012).

189. *Mahanoy*, 141 S. Ct. at 2047 (majority opinion).

serious disruption of the educational process.[190] Although some students complained that B. L.'s language bothered them, when a coach was asked whether she thought the posts would cause any type of disruption, she said they would not.[191] Justice Alito, in his concurring opinion, agreed with the majority, saying that "[t]he freedom of students to speak off-campus would not be worth much if it gave way in the face of such relatively minor complaints."[192] Based on the lack of a substantial interference and no clear impingement of any other students' rights, the *Tinker* standard is simply not satisfied, and, thus, the Court rightly affirmed the overturning of B. L.'s punishment.

In addition to the lack of a serious disruption, the Court also spent a great deal of its opinion discussing the doctrine of *in loco parentis* and its applicability in off-campus speech cases. The Court has held that parents delegate some of their parental duties to schools while students are present on campus.[193] However, the majority asserted that in situations involving off-campus speech, it is less reasonable to believe that parents have ceded their responsibilities to a school district.[194] In his concurring opinion, Justice Alito emphasized that, although there are some instances in which off-campus speech may be regulated, "enrollment [in a public school] cannot be treated as a complete transfer of parental authority over a student's speech."[195]

In B. L.'s case, the speech did not just occur off campus; it also occurred outside the school's hours of operation, specifically on the weekend.[196] Historically, the doctrine of *in loco parentis* has tended to pertain "under circumstances where the children's actual parents cannot protect, guide, and discipline them."[197] The Court elaborated upon this application when it said, "Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[198] Since the school provided no evidence of participating in some widespread program to prevent students from using vulgar or critical language when off school grounds, school officials had no reason to act on the behalf of the parents for activities that occurred completely outside of the school's setting.[199] The majority bluntly stated that "there is no reason to believe B. L.'s parents had delegated to school officials their own control of B. L.'s behavior at the

190. *Id*. at 2047-48.
191. *Id*. at 2048.
192. *Mahanoy*, 141 S. Ct. at 2058 (Alito, J., concurring).
193. *Mahanoy*, 141 S. Ct. at 2044-45 (citing *Fraser*, 478 U.S. at 684) (majority opinion).
194. *Mahanoy*, 141 S. Ct. at 2046.
195. *Mahanoy*, 141 S. Ct. at 2053 (Alito, J., concurring).
196. *Mahanoy*, 141 S. Ct. at 2043 (majority opinion).
197. *Id*. at 2046.
198. *Id*.
199. *Id*.

Cocoa Hut," the location where B. L. created the Snapchat posts.[200] B. L.'s parents, not the school, stood in the best position to punish her for her actions, if they so chose.

Because B. L.'s speech did not satisfy the *Tinker* standard and because there was no indication that her parents had delegated, explicitly or implicitly, their parental rights to govern B. L.'s off-campus behavior, the Court correctly held that B. L.'s speech was protected.

C. Unanswered Questions

Perhaps the biggest omission in the Court's opinion was any definition of off-campus speech. At the end of his dissent, Justice Thomas rightly took issue with the majority's failure to give a reliable test for determining what constitutes off-campus speech.[201] In fact, in the majority opinion, Justice Breyer wrote, "[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech."[202]

The majority opinion, instead of trying to define off-campus speech, merely assumed that B. L.'s speech was, indeed, considered off-campus since it originated after school hours and off school grounds.[203] However, as Justice Thomas discussed in his dissent, what if B. L. created the posts after hours and off campus but students received them during school and on campus?[204] To Justice Thomas, this scenario was avoided in this case since the only known versions of the posts that reached campus during school hours were copies of the original Snapchats.[205] If students received and read B. L.'s original Snapchat posts on school grounds during school hours, would the Court have still maintained that this was off-campus speech?

The majority chose to forgo this question and instead decided to deal with B. L.'s situation specifically. Declaring B. L.'s speech to be off campus, the majority then made clear its hesitancy to allow school officials to regulate off-campus speech.[206] However, the Court disagreed with the Third Circuit's majority ruling that dismissed *Tinker* as having any applicability over off-campus speech.[207] Justice Breyer, in his majority opinion, indicated certain types of off-campus speech that school districts should have the authority to regulate.[208] The Court listed four situations in which school officials may

200. *Mahanoy*, 141 S. Ct. at 2047.
201. *Mahanoy*, 141 S. Ct. at 2063 (Thomas, J., dissenting).
202. *Mahanoy*, 141 S. Ct. at 2045 (majority opinion).
203. *Id*. at 2047.
204. *Mahanoy*, 141 S. Ct. at 2063 (Thomas, J., dissenting).
205. *Id*.
206. *Mahanoy*, 141 S. Ct. at 2046 (majority opinion).
207. *Id*. at 2045.
208. *Id*.

justifiably intervene and discipline students for their off-campus speech: (1) "severe bullying or harassment targeting particular individuals;" (2) "threats aimed at teachers or other students;" (3) "the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities;" and (4) "breaches of school security devices, including material maintained within school computers."[209] The Court did not explain why it chose these categories or if there are other potential situations in which a school might seek to censor or to restrict off-campus speech.[210] If the Court had described its rationale better, lower courts and schools would likely have better positions in the future to recognize scenarios in which off-campus speech may not be tolerated.

In his concurring opinion, Justice Alito also discussed the different types of off-campus speech that school officials may encounter.[211] Like the majority, he admitted that he had no intention of constructing a "test to be used in judging the constitutionality of a public school's effort to regulate such speech."[212] However, Justice Alito gave more detail as to why he felt B. L.'s speech required protection.

In addition to the categories listed by the majority, Justice Alito introduced the category of derisive or critical speech aimed at school staff members.[213] Later in his opinion, he determined that B. L.'s speech did not fall into any of the categories he discussed, including the one about restricting critical or derisive speech toward school staff.[214] However, he then expressed his belief that B. L.'s speech was merely "criticism (albeit of a crude manner) of the school and an extracurricular activity."[215] In his next sentence, he wrote that "unflattering speech about a school or one of its programs is different from speech that criticizes or derides particular individuals."[216] Thus, according to Justice Alito, the school could not regulate B. L.'s speech because, rather than criticizing the cheerleading coach or any other staff member, she simply criticized the program as a whole.[217] Although the majority opinion does not note this distinction, should lower courts and schools attempt to differentiate between speech made about programs and speech made about staff members when deciding the appropriateness of regulating off-campus speech?

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209. *Id*.
210. *Id*.
211. *Mahanoy*, 141 S. Ct. at 2056 (Alito, J., concurring).
212. *Id*.
213. *Id*. at 2057.
214. *Id*.
215. *Id*.
216. *Mahanoy*, 141 S. Ct. at 2057-58.
217. *Id*.

In his dissent, Justice Thomas raised another important issue that the majority completely sidestepped: What is the effect of speech transmitted through social media? Justice Thomas questioned whether the fact that B. L. distributed her speech via social media would give school officials even more authority to regulate her speech.[218] As he said, given social media's ability to impact, both positively and negatively, large numbers of people, it may be worth asking whether school officials should receive greater leeway in punishing students for their potentially offending speech.[219] Justice Thomas indicated that speech posted on social media likely will "have a greater proximate tendency to harm the school environment than an off-campus in-person conversation."[220] If this view is true, when regulating speech delivered through social media as opposed to speech communicated in person, should schools exercise more vigilance in their methods?

For schools dealing with off-campus speech issues, the majority and concurring opinions gave very little instruction as to when off-campus speech is protected and when it may be punishable. The majority listed its four categories for regulating speech, and Justice Alito indicated that critical speech involving programs or the school as a whole require protections whereas the same language directed at school officials may not necessarily have any protections.[221] While Justice Thomas questioned the impact of social media on off-campus speech, the majority was silent on the issue.[222] Unfortunately for school officials, while the Court armed them with slightly more guidance than they had in the past, the difficulties of knowing when and how they may regulate off-campus speech are still very present.

D. Conclusion

Tinker held that students do "not shed their constitutional rights to freedom of speech at the schoolhouse gate" while providing certain conditions under which student speech may be controlled.[223] *Mahanoy*, while providing very little as far as tests or definitions go, did attempt to provide some clarification as to whether school officials have authority over off-campus speech. The majority confirmed the existence of several categories of regulatable off-campus speech.[224] Justice Alito, in his concurring opinion,

218. *Mahanoy*, 141 S. Ct. at 2062 (Thomas, J., dissenting).
219. *Id*.
220. *Id*.
221. *Mahanoy*, 141 S. Ct. at 2045 (majority opinion); *Mahanoy*, 141 S. Ct. at 2057-58 (Alito, J., concurring).
222. *Mahanoy*, 141 S. Ct. at 2062 (Thomas, J., dissenting).
223. *Tinker*, 393 U.S. at 506.
224. *Mahanoy*, 141 S. Ct. at 2045 (majority opinion).

added a distinction between critical statements made toward a school or its programs and those made toward school officials.[225]

Typically, an 8-1 majority clearly indicates a strong statement about what the Court believes and how lower courts should act on certain issues. However, in this case, it will likely be difficult for future courts and schools to draw much guidance from *Mahanoy* in deciding similar free speech controversies involving off-campus speech. Perhaps Justice Thomas was correct when he said that, in the end, the majority provided just one rule: "Schools can regulate speech less often when that speech occurs off campus."[226] How much less has yet to be determined.

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225. *Mahanoy*, 141 S. Ct. at 2057-58 (Alito, J., concurring).
226. *Mahanoy*, 141 S. Ct. at 2063 (Thomas, J., dissenting).