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Not Another Tween Tweet: Social Media, Schools, And a Return to Tinker

Benjamin P. Schroff

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NOT ANOTHER TEEN TWEET: SOCIAL MEDIA, SCHOOLS, AND A RETURN TO *TINKER*

BENJAMIN P. SCHROFF*

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* Benjamin Schroff is a Juris Doctor candidate at American University Washington College of Law. He received his B.A. in Social Relations & Policy and Comparative Cultures & Politics from Michigan State University in 2017. Ben would like to thank his editor, Jessica, for all of her support and help, as well as professors, family, & friends who work in schools for sparking his interest in Education Law. He would also like to thank all staffers for their guidance, edits, and support.

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I. INTRODUCTION

In May 2017, a high school student received the news that she made the junior varsity cheerleading squad for her sophomore year.¹ The student then learned that an incoming freshman placed on the varsity squad over her.² In response to this, the student posted a picture of herself and a friend on Snapchat, displaying their middle fingers and saying “f school, f softball, f cheer, f everything.”³

Soon after the student’s post, the coaches of the cheer squad suspended the student for one year, citing the school’s Cheerleading Rules.⁴ After the school board refused to get involved, the student’s father filed suit in the District Court for the Middle District of Pennsylvania, alleging a violation of the student’s First Amendment rights because the student’s speech occurred off-campus.⁵ The District Court ruled in favor of the student because the student’s speech occurred off-campus and could not have created a substantial disruption to the school environment under the standard established in *Tinker v. Des Moines Independent Community School District*.⁶

1. See Debra Cassens Weiss, *Federal Judge Rules for Cheerleader Kicked Off Squad Over Snapchat F-word Post*, ABA Journal (Mar. 26, 2019, 6:30 AM), <http://www.abajournal.com/news/article/federal-judge-rules-for-cheerleader-kicked-off-the-squad-over-snapchat-f-word-post> (explaining that the student hoped to be placed on the varsity squad for the next year).

2. See *id.* (citing *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, 375 F. Supp. 3d 429, 433 (M.D. Pa. 2019)) (explaining that an incoming freshman made the varsity squad).

3. See *id.* ((citing *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 433 (M.D. Pa. 2019)) (explaining that the student and her friend were not on campus at the time she made this statement, but rather out in the community in front of a local store).

4. See *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 432-33 (M.D. Pa. 2019) (explaining that the Cheerleading Rules prohibited cheerleaders from posting negative information about the cheer squad, cheerleaders, or coaches on the Internet as well as enforcing good sportsmanship, specifically precluding “foul language and inappropriate gestures”).

5. See *id.* (explaining the background of the case and the Court’s grounds for its previous temporary restraining order and preliminary injunction in favor of the student).

6. See *id.* at 441 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969)) (holding that the school district’s admission that the speech occurred off-campus is all but fatal to their argument).

School administrators have struggled to adapt to the Internet and social media, especially in regard to students' speech rights.⁷ The Supreme Court has yet to fully adapt First Amendment precedent as it applies to students' off-campus speech and the Internet.⁸ This confusion surrounding the Internet and students' off-campus speech rights leads to inconsistency in the application of students' speech rights under the First Amendment.⁹

In Part II, this Comment will explain the general background of the First Amendment as well as *Tinker* and its various exceptions.¹⁰ Further, Part II will explain the current legal ground in the Third Circuit that favors student speech.¹¹ Part II will also explain the Fifth Circuit's precedent that gives deference to school administrations.¹²

Part III will explain that the Fifth Circuit's precedent parts from *Tinker*.¹³ Part III will then explain why the Third Circuit's jurisprudence correctly protects students' free speech rights under *Tinker* and its exceptions.¹⁴

Part IV will suggest policy proposals to preserve students' First Amendment rights in the form of a Department of Education guidance and the Supreme Court resolving the circuit split in favor of the Third Circuit.¹⁵ Finally, Part V concludes by reiterating that the Third Circuit's holdings that students are free from school regulation in their off-campus speech is true to

7. See Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 125 (2000) (explaining that the Internet provides difficulties in analysis).

8. See *Morse v. Frederick*, 551 U.S. 393, 400-01 (2007) (parsing the difference between off-campus speech as part of a school event and off-campus speech generally).

9. Compare *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 269 (5th Cir. 2019) (holding that student social media speech can be regulated because there is no general rule); with *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 432-33 (M.D. Pa. 2019) (holding that a school cannot punish off-campus speech made by students on social media).

10. See *infra* Part II (explaining that *Tinker* provides First Amendment rights for students and articulates a test upholding limits on speech only in cases where student speech would disturb the learning environment and discussing further precedent that provides narrow exceptions to *Tinker*).

11. See *infra* Part II (explaining Third Circuit precedent that holds that off-campus student speech is an area that school administrators cannot regulate).

12. See *infra* Part II (explaining Fifth Circuit's deferential precedent to school administrations based on reasonableness factors).

13. See *infra* Part III (comparing Fifth Circuit's deferential precedent with the *Tinker* standard that provides an affirmative right to free speech for students).

14. See *infra* Part III (discussing the Third Circuit's precedent and its close reading of *Tinker*'s holding that students maintain First Amendment free speech rights).

15. See *infra* Part IV (recommending a regulatory and legal method to preserve students' free speech rights).

the original holding in *Tinker*.¹⁶

II. BACKGROUND

A. Constitutional Rights and Schools

1. *Tinker*

In *Tinker v. Des Moines Independent Community School District*, a number of students decided to wear black armbands to protest the Vietnam War.¹⁷ When school administrators learned that students would be carrying out this protest, they implemented a policy that prohibited the demonstration.¹⁸ Students would be suspended from school until they came back without the armbands.¹⁹ Despite this, students wore the armbands in protest and, as a result, were suspended from school.²⁰

In *Tinker*, the Supreme Court held that disciplining the students for wearing the armbands in protest violated their First Amendment rights.²¹ The Court reasoned that students' free speech rights are not left "at the schoolhouse gate" and if the speech did not materially disrupt classwork or involve substantial disorder or invasion of the rights of others, it could not be disciplined.²²

2. *Tinker* Exceptions

In the years after *Tinker*, the Supreme Court delineated various exceptions to the *Tinker* test, granting school administrators greater deference in limited circumstances.²³ The Court first recognized an exception to *Tinker* in *Bethel*

16. See *infra* Part V (concluding that the Third Circuit's approach is the closest to *Tinker*).

17. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (highlighting that the decision came after a local meeting aimed at objecting to the war and advocating for a truce).

18. See *id.* (emphasizing that the decision was uniform across the school district).

19. See *id.* (explaining that the students would be given a choice to take the armband off before suspension).

20. See *id.* (highlighting that two of the petitioner students wore the armbands one day and the other petitioner plaintiff wore it the next day).

21. See *id.* at 508 (explaining that the armbands were a passive display of speech rather than raucous).

22. See *id.* at 506, 511 (holding that schools could not be dens of totalitarianism and regulate student speech whenever they like).

23. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that schools may punish student speech that promotes illegal drug use); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 (1988) (holding that schools may prevent student

School District v. Fraser, allowing school administrators to punish a student's obscene speech.²⁴ In *Fraser*, a student gave a speech that was sexually explicit in nature to a school wide assembly.²⁵ As a result, the school district temporarily suspended the student.²⁶ The Court held that this punishment was permissible because school administrators had an interest in preventing obscene speech in the learning environment.²⁷

The second exception comes in *Hazelwood School District v. Kuhlmeier*, allowing school administrators to regulate student newspapers because the school itself is the sponsor and controller of the speech.²⁸ In *Hazelwood*, students sought to publish articles about student pregnancy and the impact of divorce on students.²⁹ When the school refused to publish the material, the students sued in U.S. District Court under the First Amendment.³⁰ On appeal, the Supreme Court held that the school itself was the sponsor of the speech and that the speech was tied to a scholastic purpose, allowing the school to regulate the speech.³¹

Finally, the exception under *Morse v. Frederick* allows punishment for students whose speech promotes the use of illegal drugs.³² In *Morse*, students held up a sign saying "BONG HiTS [sic] 4 JESUS" during a parade

newspaper publications because the school controls and manages the publication); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) (holding that schools may punish a student's obscene speech).

24. *See Fraser*, 478 U.S. at 686 (holding that schools may punish and prohibit a student's obscene speech).

25. *See id.* at 677-78 (explaining that students were required to attend an assembly where most of the students were fourteen years old and Fraser referred to his candidate with a graphic and explicit sexual metaphor).

26. *See id.* at 685 (holding that a two-day suspension is not an unreasonable form of punishment).

27. *See id.* (holding that a two-day suspension is not an unreasonable form of punishment).

28. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that schools may exercise 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).

29. *See id.* at 565 (explaining that although these articles used false names, students could be readily identified through the text).

30. *See id.* at 264 (highlighting that the district court denied an injunction).

31. *See id.* at 271 (holding educators are within their limits to regulate student speech when the student newspaper is a course that encourages student participation and to ensure that the views of the individual speaker are not erroneously attributed to the school).

32. *See Morse v. Frederick*, 551 U.S. 393, 403 (2007) (explaining that preventing student drug use provides a compelling interest).

that went by the school.³³ The Court held that school administrators have a compelling interest in ensuring that speech aimed at promoting illegal drug use be banned from the school environment.³⁴

B. Third Circuit Precedent and Student Rights

The Third Circuit construes *Tinker* and students' speech rights broadly in favor of students.³⁵ In *Saxe v. State College Area School District*, the school district enacted an anti-harassment policy that prohibited any speech that would offend, denigrate, or belittle any student with certain characteristics.³⁶ David Saxe, guardian of the student plaintiffs, filed suit arguing that the student plaintiffs were devout Christians who had a right to state their opinion that homosexuality was sinful and had harmful effects.³⁷

In its opinion, written by then Judge Alito, the Third Circuit held that harassment was not a categorical exception to the protections under the First Amendment.³⁸ The court went on to explain that *Tinker* required a specific and concrete threat of disruption to the school's learning environment.³⁹ On application of the *Tinker* test, the court held that the policy was overbroad.⁴⁰

After this *Tinker* formulation, the Third Circuit discussed off-campus

33. *See id.* at 397 (highlighting that even though the students were across the street from the school, the sign could have been easily read by the students lined up on school property).

34. *See id.* at 407-08 (holding that student drug use is an issue in American schools and Congress has declared that a part of a school's job is educating students about the dangers of illegal drug use).

35. *See generally* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (holding that there needed to be extenuating circumstances to discipline a student for off-campus speech); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011) (holding that because the Myspace profile was created off-campus and was not brought on campus, the student could not be disciplined); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216 (3d Cir. 2001) (holding that a policy was overbroad on application of the *Tinker* test).

36. *See Saxe*, 240 F.3d at 202 (describing specific characteristics such as race and sexual orientation).

37. *See id.* at 203 (alleging that the student plaintiffs felt compelled by their religion to speak out but felt threatened by the new policy).

38. *See id.* at 204 (holding that the policy further prohibits speech that would not be considered harassment under federal or state law).

39. *See id.* at 211 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969)) (explaining that mere speech cannot be regulated but only speech that causes substantial disturbance of the learning environment).

40. *See id.* at 216 (explaining that the policy does not prohibit merely lewd or vulgar speech, but also regular speech that refers to certain characteristics).

speech in *J.S. ex rel. Snyder v. Blue Mountain School District*.⁴¹ In *J.S.*, a student and her friend created a profile on a social media platform, Myspace, that used lewd language to ridicule the principal of their school.⁴² Initially, the profile was available to public view, but was later listed as private which allowed the student to limit its viewing to certain audiences.⁴³ The principal discovered the existence of the profile, but was unable to find the profile due to its privacy restrictions.⁴⁴ Later, a different student told the principal who created the profile and printed out a copy of the webpage at the principal's request.⁴⁵

The principal classified the creation of the profile as a high level violation of student conduct policy, stating that it made false accusations about school staff and violated the copyright of the school through use of the principal's picture.⁴⁶ As a result, the principal suspended the student for ten days and banned her from attending school dances.⁴⁷ Additionally, the school district asserted that the student's Myspace profile caused disruption to the school.⁴⁸

The Third Circuit held that no substantial disruption occurred.⁴⁹ The court stated that *Tinker* could not be applied because the student created the profile as a joke and limited the viewership to her friends only.⁵⁰ Further, students could not access the profile at school and the only copy brought into school

41. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011) (explaining that the digital age creates a new realm of analysis for student speech).

42. See *id.* at 920 (stating that the lewd language included juvenile nonsense humor as well as profane attacks on both the principal and his family).

43. See *id.* at 921 (stating that the student changed the privacy setting due to other students approaching her at school to tell her they found the profile humorous).

44. See *id.* (highlighting the principal's efforts to identify who created the profile: he contacted Myspace directly to discover who created the profile but they would not release that information without a court order; and later asked another student to bring him a copy of the profile to school).

45. See *id.* (explaining that this student was called to the office on an unrelated matter).

46. See *id.* (noting that the principal stated he did not believe the profile contained any actual allegations, contradicting previous statements).

47. See *J.S.*, 650 F.3d at 922 (stating that the students were suspended for ten days and describing the student's verbal and written apologies to the principal and his wife).

48. See *id.* at 922-23 (stating that multiple teachers reported that their students were discussing the profile in class, despite returning to work when they were told).

49. See *id.* at 928 (noting that the parties did not contest that there was not a substantial disruption).

50. See *id.* at 929 (stating that the speech was not pervasive in the school environment under the *Tinker* standard).

was at the principal's request.⁵¹ The court further stated that because the profile was so outrageous and juvenile, the statements could not be believed, and as a result, there could be no reasonably foreseeable disruption.⁵²

On the same day as *J.S.*, the Third Circuit also decided *Layshock v. Hermitage School District* on similar grounds.⁵³ A student created a Myspace profile of his principal.⁵⁴ The student listed other students as friends to the profile and soon after, most students at school had access to it.⁵⁵ After the success of the first profile, other students created more profiles of the principal using more vulgar posts.⁵⁶ Eventually, the principal discovered the existence of the profiles.⁵⁷

Shortly after, the student and his mother were called to a meeting with administrators.⁵⁸ Despite this, the administrators took no disciplinary action at that time.⁵⁹ Weeks later, the school district sent the student a letter of notice for an informal hearing, after which the student received a ten day suspension, placement in an alternative education program, a ban from extracurricular activities, and a ban on participating in the school's graduation ceremony.⁶⁰

The Third Circuit held that there was no extenuating circumstance that

51. *See id.* (stating that the only disruptions caused were minor grumblings and the minor shifting of some officials rearranging their schedules).

52. *See id.* at 930 (explaining that the school district argued that the profile was accusatory in nature, but that no reasonable person would have found the profile to be serious).

53. *See Layshock, v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc) (Jordan, J., concurring) (explaining that the *en banc* decisions were similar in fact and both decided on the same day).

54. *See id.* at 207-08 (explaining that the "parody profile" was created to ridicule the school principal).

55. *See id.* at 208 (stating that the profile "spread like wildfire" causing the student to be approached by classmates during school hours).

56. *See id.* (explaining that three other students created more profiles of the principal and that more students began to discuss the profiles).

57. *See id.* (stating that the principal also informed the co-principal and superintendent, while also asking the Technology Director to block the website on school grounds).

58. *See Layshock, v. Hermitage Sch. Dist.*, 650 F.3d 205, 209 (3d Cir. 2011) (en banc) (stating that the student admitting to creating the profile).

59. *See id.* at 209-210 (following the school's investigation into which students accessed Myspace on school computers to punish those responsible).

60. *See id.* (stating further that the school considered expelling the student and that he was the only student who had apologized for creating one of the profiles and was also the only student to be punished).

allowed the school district to punish the student for his off-campus speech.⁶¹ The Court stated that the student could not be punished for what constituted off-campus speech because the student had merely created a profile that made fun of the principal and that profile did not cause any kind of disruption at the school.⁶² The court held that the social media profile constituted speech that was entirely off-campus and the creation of it could not create a foreseeable substantial disruption to the school's environment.⁶³

C. Fifth Circuit Precedent and Administrative Deference

The Fifth Circuit takes an opposing view to the Third Circuit and advocates for an administrative deference rather than students' free speech rights.⁶⁴ In *Burnside v. Byars*, the principal of the school learned that students planned on wearing freedom buttons and decided to prohibit them because of potential disruption to the learning environment caused by students asking what the buttons were for.⁶⁵ However, some students decided to wear the buttons anyway.⁶⁶ Over the course of a few days, students continued to wear the buttons at school and were suspended.⁶⁷

The parents brought suit against the school on First Amendment grounds.⁶⁸ The Fifth Circuit held that students are protected from unreasonable rules set by school authorities.⁶⁹ Because education is a field

61. *See id.* at 219 (holding that the school district conceded at oral argument that the student's conduct caused no disruption at school, which was fatal to their argument).

62. *See id.* (holding that students found humor in the profile, but it did not interfere with their studies).

63. *See id.* (explaining that the case is utterly unremarkable because the rule is well known).

64. *See generally* Longoria *ex rel.* M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267-68 (5th Cir. 2019) (holding that there are no clear standards for regulating off-campus speech); *see also* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 383 (5th Cir. 2015) (holding that speech directed at the school community is available for regulation by school authorities).

65. *See* *Burnside v. Byars*, 363 F.2d 744, 746-47 (5th Cir. 1966) (explaining that the buttons were called "freedom buttons"); *see also* CIVIL RIGHTS TEACHING, <https://www.civilrightsteaching.org/desegregation/blackwell-issaquena> (last visited July 27, 2020) (explaining that "freedom buttons" were buttons supporting the Student Nonviolent Coordinating Committee and the Civil Rights Movement).

66. *See id.* at 747 (stating that this was in contravention of the principal's announcement).

67. *See id.* (stating that the principal gathered those students in his office to discipline them).

68. *See id.* (filing a suit for injunctive relief for a violation of constitutional rights).

69. *See id.* at 747-48 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624,

that requires an orderly environment, the court reasoned that rules to maintain order are necessary.⁷⁰

The Fifth Circuit's reasoning in *Blackwell v. Issaquena City Board of Education* was similar to its reasoning in *Burnside*, but with a different result.⁷¹ In *Blackwell*, students similarly wore freedom buttons to school.⁷² It was reported that the students were talking noisily in the hallway when they were supposed to be in class, and the principal told students to remove the buttons.⁷³ A week later, more students began wearing the buttons, handed them out to other students, and attempted to pin a button on another student without their approval, leading to a general disruption in the school's educational environment.⁷⁴

The administration brought all students into the gym and told them that if they wore the buttons in the future, they would be suspended.⁷⁵ The day after, the students arrived with the buttons again and were sent home.⁷⁶ However, some of the students went back into the school building to hand out more buttons, convince other students to leave, and throw buttons into the school building through the windows.⁷⁷

The Fifth Circuit restated its rule from *Burnside* and reasoned that the students' conduct was disruptive to the learning environment.⁷⁸ The court

637 (1943)) (explaining that citizens are protected from all state entities).

70. *See id.* at 748 (holding that maintaining public schools is a compelling government interest).

71. *Compare* *Blackwell v. Issaquena Cty. Bd. of Educ.*, 363 F.2d 749, 753 (5th Cir. 1966) (finding a wide disruption at the school due to the buttons) *with* *Burnside*, 363 F.2d at 748 (holding that there was only mild interest in the buttons with no disruption of any school functions).

72. *See* *Blackwell*, 363 F.2d at 750 (identifying the buttons as "freedom buttons"); *see also* CIVIL RIGHTS TEACHING, <https://www.civilrightsteaching.org/desegregation/blackwell-issaquena> (last visited July 27, 2020) (explaining that the buttons were part of a drive to get African Americans registered to vote).

73. *See* *Blackwell*, 363 F.2d at 751 (stating that the principal explained to the students that no one would be allowed to create a disturbance).

74. *See id.* (stating that a younger child began crying when another student attempted to pin the button on them and that the activity caused a general state of confusion).

75. *See id.* (highlighting that the principal explained to the students that banning the buttons was to maintain order and to prevent them from disrupting class time and other students).

76. *See id.* at 751-52 (explaining that classes were disrupted when the students who left encouraged other students to join them).

77. *See* *Blackwell v. Issaquena Cty. Bd. of Educ.*, 363 F.2d 749, 752 (5th Cir. 1966) (highlighting that more students attempted to pin buttons on students who did not ask for them, causing greater disturbance).

78. *See id.* at 753 (holding that the issue in *Burnside* and *Blackwell* are the same but

held that because the buttons were causing wide disorder, undermining the school authority and a lack of decorum, the regulation was justified to maintain order and decorum in the academic environment.⁷⁹

Similarly, in *Bell v. Itawamba County School Board*, the Fifth Circuit considered the case of a student who posted a recording of a rap song he created with lyrics that directly accused the school coaches of sexual misconduct and even threatened them.⁸⁰ The student posted the recording on his Facebook page, making it viewable to the general public.⁸¹ Later, one of the coaches received a text from his wife regarding the recording. As a result, the coach asked the student about its content and later reported the video to the principal who in turn reported it to the superintendent.⁸²

The next day, school administrators questioned the student about the recording.⁸³ The student created a finalized version of the recording and uploaded it to the online video channel, YouTube.⁸⁴ The next school day, the school administration suspended the student, pending a disciplinary hearing, as to whether the student harassed, threatened, or intimidated coaches.⁸⁵ At the school's disciplinary hearing, the student stated that the Facebook version of the recording was for people to listen to locally and that the YouTube version of it was intended for music labels to discover.⁸⁶ When asked about a specific line in the lyrics of his rap that discussed putting a gun in the coach's mouth, the student stated that he did not mean to shoot

the facts are distinguishable in that the students in *Blackwell* created great disturbance in the school).

79. *See id.* (arguing that this regulation was necessary to properly instruct students and prevent disorder at school).

80. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383-84 (5th Cir. 2015) (explaining that three versions of the rap recordings were introduced at trial, each of which referenced a gun in the coach's mouths).

81. *See id.* at 385 (explaining that this was evidenced by a screenshot entered into the record and the public privacy setting was important to show the student's intent).

82. *See id.* (stating that the coach immediately reported the recording to the school's principal after listening to it on a student's smartphone).

83. *See id.* (explaining the seriousness of the allegations he included in his rap and the veracity of the claims).

84. *See id.* (highlighting that the student posted this new version after discussing the original with school officials and the new version still including the allegations against the coaches).

85. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 385 (5th Cir. 2015) (explaining that school policy considered this to be a "severe disruption").

86. *See id.* at 386 (stating that the student acknowledged that he posted the rap recording on Facebook knowing that students would find it).

someone, and he was just foreshadowing an occurrence.⁸⁷ The disciplinary committee upheld the student's suspension and all appeals at the administrative level failed, causing the student to bring the lawsuit in district court.⁸⁸

The Fifth Circuit refused to adopt a rule regarding off-campus speech.⁸⁹ Further, the court stated that the student expected people to listen to his rap recording, and given that all students had access to Facebook, the Court reasoned that the student was directing his recording specifically at the school community.⁹⁰ Additionally, the Court held that *Tinker* applied and gave deference to the school's administration by applying a standard of reasonableness.⁹¹ The Court also explained that this deference is needed in a time of school shootings, and that administrators need only a foreseeable school shooting to satisfy the foreseeable substantial disruption requirement.⁹²

Most recently, the Fifth Circuit decided *Longoria v. San Benito Independent Consolidated School District*.⁹³ There, a student became the head varsity cheerleader at her school and was required to sign the Cheerleading Constitution, which had a social media policy.⁹⁴ Shortly after this promotion, the student was dismissed from the team due to a buildup of demerits from her Twitter activity.⁹⁵ The court listed ten sexually explicit tweets the student had interacted with, each of which constituted a demerit.⁹⁶ The student's account explicitly stated that she was a member of the school's cheer squad; the only direct link between the student's account and the

87. *See id.* (providing another version of the rap at his hearing that did not match the others).

88. *See id.* at 387 (including an appeal to the school board which was immediately denied).

89. *See id.* at 394 (holding that the Court did not have to adopt a general rule because cases like these could be decided on a case-by-case basis).

90. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (holding that the student did not deny this fact).

91. *See id.* at 397 (holding that reviewing issues such as these is delegated to a "neutral corner of reasonableness").

92. *See id.* at 399-400 (explaining that events like Columbine must be prevented).

93. *See Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 261 (5th Cir. 2019) (having been decided on November 4, 2019, showing that the court factually distinguished each case).

94. *See id.* (explaining the duration of the student's period as head cheerleader: remainder of the present school year and the entirety of the next school year).

95. *See id.* at 261-62 (stating that both the student and her mother were called to a meeting with the two coaches of the squad to discuss behavioral issues).

96. *See id.* at 262.

school.⁹⁷

The Fifth Circuit held that there is no clear standard as to students' off-campus speech rights and school discipline, especially extracurricular discipline.⁹⁸ The court also mentioned that both the student and her mother signed the Cheerleading Constitution, that the student mentioned the cheer squad in her Twitter bio, and that the student was suspended from an extracurricular activity rather than the school itself.⁹⁹ The court deferred to the school on this issue because there was no general rule subscribed to the court.¹⁰⁰

III. ANALYSIS

A. The Fifth Circuit's Approach Encroaches on Tinker Because Its Deference to School Officials Reverses the Protections Provided in Tinker.

The Fifth Circuit's pre-*Tinker* precedent drew the line between student speech and administrative regulation by distinguishing that student speech that did not disrupt the classroom would be allowed.¹⁰¹ This framework bears strong similarities to the *Tinker* test that was later adopted by the Supreme Court.¹⁰² *Tinker* broadly held that students maintain their free speech rights while on campus grounds.¹⁰³

Since *Tinker*, however, the Fifth Circuit has developed a system of deference for school administrators, especially regarding off-campus speech

97. *See id.* (stating that the account said she identified herself as a member of "San Benito Varsity Cheer").

98. *See Longoria ex rel. M.L v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 267-68 (5th Cir. 2019) (holding that their precedent is uncertain and sends "inconsistent signals" because there is no clear rule).

99. *See id.* at 268-69 (explaining that these facts heavily distinguished the case from both *Bell* and Supreme Court precedent such as *Tinker* and *Morse*).

100. *See id.* at 269 (holding that because there was no general rule provided by case law, the Court would abstain from declaring a First Amendment violation).

101. *Compare Blackwell v. Issaquena Cty. Bd. of Educ.*, 363 F.2d 749, 753 (5th Cir. 1966) (holding that there was wide disruption at the school due to the buttons) *with Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) (holding that there was only mild interest in the buttons).

102. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (citing *Burnside*, 363 F.2d at 749) (holding that without a substantial disruption school officials cannot regulate student speech and a mere desire to avoid discomfort is not enough to regulate student speech).

103. *See id.* at 508 (explaining that the case at bar involved speech similar to pure speech).

and social media.¹⁰⁴ The Fifth Circuit reasons that without a clear, general rule, administrators should be given deference to ensure an orderly school environment.¹⁰⁵ Despite this reasoning, the *Tinker* test clearly provides a framework for student speech and implies that off-campus student speech follows regular free speech regulation under the First Amendment.¹⁰⁶ Even if *Tinker* did not provide a standard for student speech, it is the job of the judiciary to clarify these constitutional rules under its own precedent for administrators to follow.¹⁰⁷

This deference fundamentally shifts the burden from administrators to students.¹⁰⁸ *Tinker* directly placed this burden on school administrators to show that they were reasonably disciplining students for speech that substantially disturbed the school environment.¹⁰⁹ By stating that there is no clear rule for off-campus speech, and by extension, speech on social media, the Fifth Circuit undermines the protections that *Tinker* provides to students.¹¹⁰ This shifting of the burden is impermissible because students hold First Amendment rights and restricting those rights can only occur if there is a substantial disruption.¹¹¹ This is a high bar that can only be met in limited circumstances.¹¹²

104. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 397, 400 (5th Cir. 2015) (allowing school administrators large latitude through the application of a reasonableness test for administration action and regulation).

105. See *Longoria*, 942 F.3d at 269 (holding that administrators are not on notice and cannot be held to a nonexistent standard).

106. See *Tinker*, 393 U.S. at 506 (holding that students do not lose their free speech rights at the schoolhouse gate, implying that students have clear free speech rights outside of the school setting).

107. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (holding that it is the job of the judiciary to say what the law is).

108. See *Longoria*, 942 F.3d at 269 (holding that administrators cannot be held to a standard that does not exist); *Bell*, 799 F.3d at 397 (highlighting a reasonableness test for school administrators in student speech discipline).

109. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (holding that administrators can punish speech that substantially interferes with order in the school setting).

110. Compare *id.* (stating a rule that there needs to be a substantial interference with the school environment for administrators to punish students for speech); with *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 269 (5th Cir. 2019) (holding that administrators' decisions cannot be overturned without a clear rule).

111. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (stating that student First Amendment rights exist in the school setting, but with a different context in the special environment a school entails).

112. See *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (explaining that if a school could discipline students based on a broad education mission

Tinker's exceptions also follow this framework of preventing school administrators from regulating off-campus speech.¹¹³ The Fifth Circuit instead allows school administrators to regulate off-campus social media speech if that speech is likely to reach the school environment and potentially cause a disruption.¹¹⁴ This contradicts *Tinker* in its purest form.¹¹⁵ *Tinker* allows regulation of in-school speech only when the speech is substantially likely to cause a disruption in the learning environment.¹¹⁶ In dictum, the Court also stated that student speech rights do not end "at the schoolhouse gates;" it follows that full First Amendment rights apply to students off-campus.¹¹⁷

Further, the exceptions to *Tinker* make it clear that they are narrow decisions about very specific categories of speech.¹¹⁸ The broad rulings of the Fifth Circuit open the door for school administrators to not only regulate any kind of student speech, but also allows administrators to regulate speech in any location.¹¹⁹ Even though extracurricular activities offered through schools provide a special context, removal from a team for a student's speech violates *Tinker*.¹²⁰ There is no narrow category in the Fifth Circuit's

statement then the school could conceptually punish any speech).

113. *See Morse v. Frederick*, 551 U.S. 393, 403 (2007) (explaining that the principal was regulating speech at a school event rather than merely off-campus speech); *see also* *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986) (allowing administrators to regulate obscenity during a school rally).

114. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 395, 397 (5th Cir. 2015) (reasoning that a student's intent matters in a *Tinker* analysis, that the student intended the rap to reach the school, and that the 5th Circuit will defer to administrators' interpretation of "substantial disturbance").

115. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that student speech may only be regulated if there is foreseeable substantial disruption).

116. *See id.* at 509 (explaining that schools can ensure proper discipline).

117. *See id.* at 506 (highlighting that students and teachers do not "shed" speech rights).

118. *See Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that student speech regarding illegal drugs may be regulated, even if off-campus but at a school event); *see also* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (holding that school newspapers are an arm of the school and thus can be regulated by the school); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (holding that lewd speech by students can be regulated).

119. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (holding that any off-campus speech aimed at the school is available for discipline).

120. *Compare* *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 268-69 (5th Cir. 2019) (explaining that both student and parent had signed the Cheerleading Constitution and understood what it said); *with* *Levy ex rel. B.L. v.*

precedent of off-campus speech because the current precedent applies a reasonableness standard to off-campus speech rather than the *Tinker* substantial disruption rule.¹²¹

The Supreme Court has held that students in extracurriculars, namely on athletic teams, are role models for other students.¹²² Even if student athletes have this role model effect, their speech cannot be regulated off-campus just because of their place as a student athlete.¹²³ *Tinker* makes no distinction between student speech and student athlete speech.¹²⁴ The special context of extracurriculars is evidenced by the extra contract and rules that students must abide by.¹²⁵ However, there is a split on whether these extra burdens can extend to further curtailing student speech.¹²⁶

This split is entirely without merit because the Supreme Court has not severed student athlete speech rights from student speech rights generally.¹²⁷ Holding that student athletes are subject to lesser constitutional free speech protections further shifts the burden from school administrators to justify their regulations to students to justify why their speech is protected.¹²⁸

Mahanoy Area Sch. Dist., No. 19-1842, 2020 WL 3526130, at *12 (3d Cir. June 30, 2020) (holding that the *Tinker* test does not apply to off-campus speech and the school district's punishment violated the First Amendment).

121. Compare *Morse v. Frederick*, 551 U.S. 393, 409 (2007) (explaining that the Court's ruling is a narrow one); with *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 267 (5th Cir. 2019) (highlighting the necessity to defer to administrators).

122. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) (holding that if student athletes are subject to random drug testing, the athletes would not do illegal drugs and the role model effect would be dispersed).

123. Compare *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 268-69 (5th Cir. 2019) (explaining that the student was bound to the Cheerleading Constitution that she signed); with *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 442-43 (M.D. Pa. 2019) (explaining that a school cannot punish a student athlete based solely on their speech).

124. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (holding broadly that students have First Amendment rights on campus).

125. See *Longoria*, 942 F.3d at 268-69 (explaining that the student took on the extra burdens by signing the Cheerleading Constitution).

126. See *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, No. 19-1842, 2020 WL 3526130, at *15 (3d Cir. June 30, 2020) (holding that speech rights may be waived but there must be a specific waiver).

127. See *Tinker*, at 511. (holding that all students have First Amendment speech rights).

128. Compare *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 270-71 (5th Cir. 2019) (holding that punishing the student was reasonable under the Cheerleading Constitution); with *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, 376 F.

1. The Fifth Circuit's Shift of the Burden to Students Rather Than School Administrators Clearly Violates Tinker's Placement of the Burden on Those Administrators

The shift in the Fifth Circuit's precedent from a student rights focus to administrative deference is especially shocking considering that the Supreme Court used the Fifth Circuit's reasoning in deciding *Tinker*.¹²⁹ The dissent in *Tinker* foresaw issues in the burden placed on school administrators, seeing the majority as placing the burden on the challenging party rather than the school.¹³⁰ However, the majority in *Tinker* held that the administrators can only punish a student if the speech causes a substantial disruption, and that a "mere desire" to prevent unpopular ideas from surfacing in the school environment is not enough to prevent a student's "pure speech."¹³¹

The Fifth Circuit relies on the fact that the Supreme Court has not yet ruled on off-campus speech as it relates to social media.¹³² Because of this, the Fifth Circuit has decided that deference to school administrators is the closest way to follow the *Tinker* standard.¹³³ However, this is a misguided line of reasoning, as the Supreme Court has made it clear that students have First Amendment protections, even at school, and that only very narrow exceptions apply to those protections.¹³⁴

Supp. 3d 429, 442-43 (M.D. Pa. 2019) (holding that a student could not be punished solely on the basis of being an athlete).

129. *Compare* *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (explaining that student speech that does not harm the learning environment must be permitted); *with* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (explaining that schools cannot forbid speech they merely do not want to deal with)).

130. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Harlan, J., dissenting) (explaining that school authorities should have wide latitude to maintain order).

131. *See id.* at 509 (holding that unpopular views can be seen as unpleasant).

132. *See* *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 269 (5th Cir. 2019) (highlighting that the student's rights were debatable due to the lack of a rule).

133. *See id.* (holding that student off-campus speech rights are not clear); *see also* *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (holding that off-campus speech directed at the school is punishable); *Blackwell v. Issaquena Cty. Bd. of Educ.*, 363 F.2d 749, 753 (5th Cir. 1966) (holding that schools may punish disruptive conduct on campus).

134. *See* *Morse v. Frederick*, 551 U.S. 393, 408 (2007) (holding that student speech about illegal drugs can be punished); *see also* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that school newspaper regulations are valid); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (holding that lewd student speech can be punished).

The Court has held that student speech rights at school are lesser than they would be off-campus.¹³⁵ However, this does not aid the Fifth Circuit's approach because if so, student off-campus social media speech would be afforded even greater protection.¹³⁶ Deference in these cases would go against these constitutional protections because the educational nexus is missing.¹³⁷ The Supreme Court has held that an educational nexus allows *Tinker* to come in to play, but *Tinker*'s test would still require a substantial disruption to the learning environment.¹³⁸ Holding that a student's off-campus social media use aimed at disappointment for not making an extracurricular team is sufficient for an educational nexus defeats the Fifth Circuit's reasoning that extracurriculars are a privilege rather than a guarantee of the school.¹³⁹

2. The Fifth Circuit's Prevention of School Shooting Basis for Off-Campus Speech Regulations is Compelling But Overbroad

The prevalence of school shootings over the years makes them a compelling concern for school administrators.¹⁴⁰ While the planning and communication of these shootings generally occur off-campus, this should not protect that speech from discipline when brought to the attention of school administrators.¹⁴¹ However, the Fifth Circuit's ruling that administrators may punish this speech is the exception that swallows the

135. See *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007) (quoting *Bethel Sch. Dist. V. Fraser*, 478 U.S. 675, 682) (explaining that student speech rights in public schools are not coextensive with those of adults in other settings)).

136. See *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (holding that administrators can only punish a student under *Tinker* or its exceptions if the student's off-campus expressive conduct caused a substantial disruption in school, as if the conduct had occurred there).

137. See *id.* at 216 (citing *Morse v. Frederick*, 551 U.S. 393, 404 (2007)) (explaining that a student's conduct on social media outside of school can only be available for punishment unless there is foreseeable substantial disruption at the school itself).

138. See *Morse v. Frederick*, 551 U.S. 393, 400-01 (2007) (holding that this is a school speech case because it was a school sanctioned activity and occurred on school property and across the street from the school).

139. Compare *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 270 (5th Cir. 2019) (holding that there is no rule that would put administrators on notice that extracurricular activities would have the same protection as other school discipline); with *Morse v. Frederick*, 551 U.S. 393, 400-01 (2007) (holding that school discipline can be based on school sanctioned events and activities).

140. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) (explaining that new technologies increase threats).

141. See *id.* (highlighting that the Internet allows this communication from any location).

rule.¹⁴²

Tinker exceptions carve out exceptions to student speech rights to maintain an orderly school environment.¹⁴³ *Morse* even specifically notes that administrators are able to protect their students from illegal activity, or the promotion of illegal activity.¹⁴⁴ While school administrators cannot generally regulate off-campus student speech, the nexus between off-campus speech and the school cannot be parsed when the speech discusses a plan to carry out a school shooting.¹⁴⁵

There is no difficulty in distinguishing between harmless student speech that would have not cause harm on the school environment and speech aimed at harming the school environment.¹⁴⁶ However, certain kinds of speech are open to misinterpretation due to hyperbole, such as the artistic expression in *Bell*.¹⁴⁷ Because *Bell* concerned a rap created by a student, and the student claimed that the rap merely made artistic hyperbole, the court analyzed the intent of the student.¹⁴⁸ In doing so, the court looked to objective factors both inside and outside the school.¹⁴⁹

The student himself stated that he wanted the rap to be viewed by students at the school, and that it foreshadowed what could come to pass.¹⁵⁰ This language in and of itself speaks to a very specific action that would

142. *See id.* at 394 (holding that school administrators could punish a student for his off-campus rap that explicitly discussed shooting a coach).

143. *See Morse v. Frederick*, 551 U.S. 393, 404 (2007) (explaining that administrators must be able to keep order).

144. *See id.* at 394 (holding that a principal may restrict student speech when it is “reasonably viewed as promoting illegal drug use”).

145. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) (highlighting that the Internet creates new considerations with threats to schools).

146. *Compare Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 262 (5th Cir. 2019) (where a student “liked” Twitter posts by third-party users); *with Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015) (when a student posted a rap where he stated he would put a gun in a coach’s mouth).

147. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 391 (5th Cir. 2015) (explaining that the administrators could have reasonably foreseen a substantial disruption).

148. *See id.* at 393 (holding that threats and harassment intentionally directed at the school community are issues administrators need to be able to handle quickly and efficiently).

149. *See id.* at 396 (explaining the student’s admitted intent and dictionary definitions).

150. *See id.* at 386 (claiming that he himself would not shoot someone but that the shooting might happen).

substantially disrupt the education environment.¹⁵¹ Under the *Tinker* test, school administrators are allowed to punish student speech when there is a foreseeable substantial disruption to the learning environment.¹⁵² A foreseeable shooting is enough to satisfy this burden.¹⁵³

Overall, the Court has held that the *Morse* exception to *Tinker* allows school administrators to punish student speech when it promotes illegal drug use.¹⁵⁴ The illegality of school shootings and the massive disruption shootings bring to the school environment preclude this area of off-campus student speech from protection.¹⁵⁵ Students' rights to off-campus speech are not absolute, just as an adult's free speech rights are not absolute.¹⁵⁶

The wide holding in *Bell* allowed administrators to prevent a potential school shooting, but when explained in *Longoria*, the court reasoned that *Bell* was a case that did not create a rule.¹⁵⁷ However, the use of the same deference in *Longoria* as used in *Bell* can hardly be seen as protecting students from school shootings, as it claimed to do.¹⁵⁸ The Fifth Circuit's broad application of deference to school administrators allows this protective rule to apply to an unlimited amount of student speech.¹⁵⁹

151. See *id.* at 382 (holding that threats to teachers could create a foreseeable substantial disruption).

152. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 513 (1969) (holding that student speech rights are not coextensive with adults and that administrators must be allowed to maintain the learning environment).

153. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (holding that school shootings make fast and efficient administrator responses mandatory).

154. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that administrators can restrict speech promoting illegal drug use).

155. Compare *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (explaining that administrators can prevent student speech that promotes illegal drug use); with *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) (explaining that the Internet creates problems with student speech because it can occur anywhere).

156. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506-07 (1969) (holding that students do not shed their First Amendment rights when they enter school, but they are subject to the authority of school administrators to some extent).

157. Compare *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 391 (5th Cir. 2015) (explaining that administrators could reasonably foresee a school shooting from an explicitly violent rap); with *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 266 (5th Cir. 2019) (explaining that administrators can punish student speech without a clear law otherwise).

158. See *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 271 (5th Cir. 2019) (explaining the lack of a clear law protecting the student's rights meant the administrators were not liable).

159. See *id.* at 270 (rebuffing *Bell* as a rule but applying the same level of deference).

B. The Third Circuit's Approach Should be Adopted Because It Is Closer to Tinker's Holding.

There is a lack of clear standards when it comes to regulating off-campus student speech.¹⁶⁰ However, with *Tinker's* clear demarcation between students in the school environment and students in society, the issue becomes more complicated due to the Internet's influence.¹⁶¹ Courts have admitted to the difficulty in parsing between off-campus speech and administrator interests when it comes to Internet speech.¹⁶²

The Third Circuit's approach to student off-campus speech on social media holds tight to the *Tinker* test in assuming that *Tinker* applies.¹⁶³ Exceptions to *Tinker* allow for regulation of off-campus regulation of speech.¹⁶⁴ However, this regulation is tied to the learning environment, and the specific exception that allowed off-campus regulation was tied to a specific nexus.¹⁶⁵ In fact, the Third Circuit has gone further to expressly disclaim the idea that the geographical bounds of school administrator power is without limitation.¹⁶⁶

Recent developments in the realm of social media have again tested Third Circuit precedent.¹⁶⁷ *B.L.* explicitly explained that a school district admitting

160. See *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 269 (5th Cir. 2019) (explaining the lack of a general rule regarding off-campus speech and social media).

161. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (implying that students have clear free speech rights outside of the school setting). *But see Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 269 (5th Cir. 2019) (highlighting that student speech on social media that reaches school grounds provides a novel issue).

162. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) (explaining that the Internet creates new questions with regard to student speech).

163. See *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (affirming the district court's conclusion that the student's punishment was impermissible under *Tinker* because there was no nexus between the student's speech and a disruption in the learning environment of the school).

164. See *Morse v. Frederick*, 551 U.S. 393, 400-01, 403 (2007) (holding that a principal can regulate student speech at a school event that promotes illegal drug use even if not directly on school property).

165. See *id.* at 400-01 (explaining that the students were across the street from the school and were there as part of the school's viewing of a parade).

166. See *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (holding that the school yard concept has boundaries).

167. See *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, No. 19-1842, 2020 WL 3526130, at *12 (3d Cir. June 30, 2020) (explaining that the 3rd Circuit has avoided the issue of student off-campus speech until now).

that a student's speech occurred off-campus is unavailable for punishment.¹⁶⁸ Social media is a forum that can be mobile and even brought into the school, but the mobility of social media does not allow for off-campus speech to become on-campus speech based solely on where the social media is viewed.¹⁶⁹ The Third Circuit's broad rule protecting student off-campus speech follows the spirit of *Tinker* and its exceptions by limiting the administration rather than students.¹⁷⁰

The Third Circuit has widely held that the burden is on the school administrators to justify their punishments for student speech.¹⁷¹ This line of precedent flows from *Tinker* and its exceptions and upholds their essential First Amendment interpretations.¹⁷² The narrowness of the *Tinker* exceptions show an unwillingness from the Court to provide a blank check to school administrators in limiting student free speech rights.¹⁷³ The Court has rather explicitly stated that these exceptions are meant to be narrow in order to preserve as much speech as possible.¹⁷⁴

The Third Circuit's precedent follows this narrowness.¹⁷⁵ The Circuit

168. See *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 441 (M.D. Pa. 2019) (citing *Snyder ex rel. J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932-33 (3d Cir. 2011)) (explaining that merely profane off-campus speech is not enough to discipline a student).

169. See *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, No. 19-1842, 2020 WL 3526130, at *5 (3d Cir. June 30, 2020) (holding that the school district's argument fails because the speech was not on campus).

170. Compare *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, No. 19-1842, 2020 WL 3526130, at *4-5 (3d Cir. June 30, 2020) (explaining that the Third Circuit has adapted free speech standards to the digital age); with *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that student speech may only be regulated if the administrators can reasonably foresee a substantial disruption).

171. See generally *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (holding that because there was no disruption caused by the student's speech he could not be punished); *Snyder ex rel. J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011) (holding that the student could not be disciplined because the school principal could not show that it negatively impacted the school environment).

172. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511-13 (1969) (holding that students are entitled to First Amendment protections unless their speech disrupts the school); see also *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that schools may prevent student speech that promotes illegal drug use); see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) (holding that schools may regulate and prohibit obscene speech).

173. See *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (explaining that allowing a school to regulate speech based on its educational mission would give schools a "license" to suppress speech).

174. See *id.* (stating approval over the Court's narrow holding).

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

often ensures the rights of students to speak because it holds to the substantial disruption test in *Tinker* rather than any standard of reasonableness.¹⁷⁶ When deciding novel cases regarding student speech in the digital age, courts must draw from Supreme Court precedent rather than deferring to school officials.¹⁷⁷ To hold otherwise ignores precedent and narrow rules aimed at preserving constitutional rights.¹⁷⁸

Finally, the Third Circuit upholds that there must be a foreseeable threat to the learning environment for student speech to be regulated.¹⁷⁹ The location of the speech is important for this analysis.¹⁸⁰ However, issues with establishing where the speech occurs on the Internet is a difficult question.¹⁸¹ Unlike the Fifth Circuit, the Third Circuit has held that there must be a sufficient nexus between the Internet speech and the school for punishment to be available.¹⁸²

The Third Circuit's precedent follows *Tinker* and its exceptions' by providing wide latitude to student speech and requiring school administrators to show a foreseeable substantial disruption to the school environment for punishing a student's speech.¹⁸³ The Circuit widely assumes that off-campus

(explaining that the student's speech occurred off-campus and did not constitute significant disruption on campus); *with* *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (explaining that if a school could discipline students based on a broad education mission statement then the school could conceptually punish any speech).

176. *See* *J.S. ex rel. Snyder v. Blue Mount. Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011) (stating that substantial disruption is the correct standard).

177. *See generally* *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 390, 392 (5th Cir. 2015) (highlighting that *Tinker* exceptions are essential to deciding a novel issue regarding social media punishment); *see also* *Snyder ex rel. J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d Cir. 2011) (explaining that an essential part of determining the legal standard is interpreting *Tinker* and its exceptions).

178. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 503 (1969) (holding that student constitutional rights cannot be abridged without the compelling reason of disorder in the school).

179. *See* *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 214 (3d Cir. 2011) (explaining that speech that merely enters the school environment is not enough).

180. *See* *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) (highlighting that the Internet connects people across great distances).

181. *See id.* (holding that student Internet speech can reach into a school and cause issues).

182. *See* *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (explaining that just because speech reaches into the school does not mean that there is a substantial disruption).

183. *See generally* *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (holding that because there was no substantial disruption caused by the student's

speech remains an area where the school has no power of discipline, following closely to *Tinker*'s tie to the "schoolhouse gates."¹⁸⁴ This precedent shows a sound reading of *Tinker* and its exceptions and preserves the rights of students to speak.¹⁸⁵

Ultimately, the Third Circuit's precedent on off-campus student speech correctly follows *Tinker* and its exceptions.¹⁸⁶ The Circuit maintains the broad proposition of *Tinker* and the narrowness of *Tinker*'s exceptions.¹⁸⁷

IV. POLICY RECOMMENDATION

A. The Department of Education Should Issue a Guidance on Student Free Speech on Social Media

The Department of Education releases guidance about vast areas of student interest and welfare.¹⁸⁸ However, the Department of Education only has one guidance about the First Amendment and student speech.¹⁸⁹ This guidance merely assures schools that the Department's regulations are not meant to curtail student speech rights rather than applying any affirmative protections for students.¹⁹⁰

speech he could not be punished); *Snyder ex rel. J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011) (holding that the school principal could not punish the student because he could not show that it negatively impacted the school environment).

184. *See generally* *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (holding that because there was no disruption caused by the student's speech he could not be punished); *Snyder ex rel. J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011) (holding that the student could not be disciplined because the school principal could not show that it negatively impacted the school environment).

185. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that students have First Amendments rights as long as they do not interfere with the learning environment); *see also* *Morse v. Frederick*, 551 U.S. 393 (2007) (holding that student speech involving illegal drug use is not protected); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (holding that lewd speech remains unprotected).

186. *See Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (holding that administrators must have a substantial reason to curb student speech).

187. *See Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, No. 19-1842, 2020 WL 3526130, at *6 (3d Cir. June 30, 2020) (holding that the *Tinker* analysis must be followed closely).

188. *See generally* Gerald A. Reynolds, FIRST AMENDMENT: DEAR COLLEAGUE, U.S. DEP'T OF EDUC. (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html> (explaining the Department's dedication to working within constitutional restraints).

189. *See id.* (confirming the Department's policy position).

190. *See id.* (explaining that while the Department will enforce statutes that prohibit discrimination, none of those regulations should be taken to mean that the Department

In order to more effectively protect student rights before administrators violate their rights, the Department of Education should adopt a guidance that provides examples of how to treat student speech.¹⁹¹ These examples can be taken from case law across the country and provide a reminder about *Tinker* and its exceptions.¹⁹² Off-campus student speech rights could be its own section within this guidance.¹⁹³ Because social media is a new area of the law, the guidance can get ahead of infringements of student rights.¹⁹⁴

B. The Supreme Court Should Adopt the Third Circuit's Formulation of Off-Campus Student Speech Rights

B.L. was recently decided by the Third Circuit, holding specifically that school administrators may not regulate off campus student speech.¹⁹⁵ The school district petitioned for certiorari and the Supreme Court should grant it in this case to resolve the circuit split between the Third and Fifth Circuits and provide a clear rule for off-campus student speech.¹⁹⁶

By resolving a circuit split, the Supreme Court allows for uniformity of federal law.¹⁹⁷ Uniformity is especially important when it comes to Constitutional rights.¹⁹⁸ The Fifth Circuit specifically cites to the lack of a clear rule from the Supreme Court regarding off-campus student speech.¹⁹⁹ The Third Circuit does not see this lack of a rule.²⁰⁰ If the Supreme Court grants certiorari, this split can be remedied.

Further, the Supreme Court should adopt the Third Circuit's precedent.

will curtail First Amendment rights).

191. *See id.* (describing multiple ways that the Department will protect speech).

192. *See id.* (explaining which schools regulations affect and how).

193. *See id.* (showing different sections of enforcement).

194. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) (explaining the novelty of the Internet and the lack of guidance).

195. *See Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, No. 19-1842, 2020 WL 3526130, at *8 (3d Cir. June 30, 2020) (explaining the *Tinker* issue before the Third Circuit).

196. *See generally* Petition for Certiorari Mahanoy Area School District v. B.L. (No. 20-255) (stating that the Supreme Court has not ruled on the issue of student off-campus speech, the circuits would apply a reasonableness standard).

197. *See generally* *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1816) (holding that uniformity of the laws is an important federal interest).

198. *See id.* (holding that uniformity of the Constitution is paramount).

199. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 397 (5th Cir. 2015) (explaining that there is no clear rule on student off-campus speech).

200. *See Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (holding that the *Tinker* test and its exceptions preclude punishment of off-campus speech).

As argued above, the Third Circuit closely follows current Supreme Court precedent.²⁰¹ The Supreme Court has noted that limits on student speech should be narrow.²⁰² The Third Circuit's precedent follows in that line of precedent and holds closely to the *Tinker* test.

V. CONCLUSION

Tinker was decided to protect student free speech from unreasonable discipline from school administrators.²⁰³ Exceptions to *Tinker* follow this broad constitutional goal by providing narrow circumstances where administrators are able to regulate speech.²⁰⁴ Social media complicates this student friendly precedent because it allows off-campus student speech to permeate onto the school's campus.²⁰⁵

However, *Tinker*'s broad constitutional goal remains.²⁰⁶ The Fifth Circuit turns the *Tinker* analysis on its head by shifting the burden from the administrators to the students.²⁰⁷ This defeats the purpose of the First Amendment and student speech rights in the first place.²⁰⁸

Conversely, the Third Circuit maintains that the burden remains on the school administrators to show a substantial cause for discipline when a student's speech is involved.²⁰⁹ Off-campus social media speech remains

201. *See, supra*, Part III-B.

202. *See Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (stating that it is important that the Court's decision is narrow).

203. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (explaining that students have First Amendment rights and administrators need to foresee a substantial effect on the school environment to regulate it).

204. *See Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that schools may punish student speech that promotes illegal drug use); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 (1988) (holding that schools may censor student publications because the school controls and manages it); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) (holding that schools may punish and prohibit obscene speech).

205. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 399 (5th Cir. 2015) (explaining that the student's rap had been viewed and discussed on campus).

206. *See Morse v. Frederick*, 551 U.S. 393, 396 (2007) (reaffirming *Tinker* and explaining that its holding remains important).

207. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 397 (5th Cir. 2015) (allowing school administrators to regulate student speech through reasonableness).

208. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that administrators need to foresee a substantial effect of student speech on school discipline before they can punish student speech).

209. *See Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, 376376 F. Supp. 3d 429, 436 (M.D. Pa. 2019) (holding that school administrators cannot avoid precedent by merely citing their educational mission).

off-campus even though social media is transient in nature.²¹⁰ To rule otherwise is to disregard *Tinker* and First Amendment rights for students.²¹¹

210. *See id.* (explaining that the student's speech on Snapchat was clearly off-campus).

211. *See Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (explaining that allowing a school to regulate speech based on its educational mission would give schools a "license" to suppress speech).