NOTE

TINKER STAYS HOME: STUDENT FREEDOM OF EXPRESSION IN VIRTUAL LEARNING PLATFORMS

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ABSTRACT

Following the COVID-19 outbreak of March 2020, states imposed mandatory "lockdowns," forcing schools throughout the country to move to virtual learning platforms. With this unprecedented shift came many unforeseen challenges for school officials, including assessing what First Amendment rights students retain in virtual learning platforms. Falling into an unusual gray area where students are technically "in school" because they are attending school-run classes, and yet off campus as they are doing so from the privacy of their homes, school officials have little guidance from the currently established student speech categories to make these determinations. While this issue originally arose out of the unique circumstances surrounding the COVID-19 pandemic, schools will likely continue to face this problem in the future, whether by the uncertain prospect of further school closings as new COVID-19 variants emerge or by schools and students continuing to take advantage of the convenience and safety provided by online platforms.

This Note focuses on the intersection of existing student First Amendment rights both on and off campus and the constitutional protections afforded to speech and expression within the home. Ultimately, this Note concludes that there is no one-size-fits-all test that can be applied to all aspects of the virtual learning platform. While schools arguably must have some authority to limit student expression within virtual learning platforms, that authority must be

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balanced with students' First Amendment rights. The two central problems posed by virtual learning platforms, virtual backgrounds and physical backgrounds, require a unique solution to balance protection of students' rights and respect for a school's authority. This Note argues that schools should wield far more authority over students' virtual backgrounds and less authority over their physical backgrounds. To control physical backgrounds, school officials must presume students are entitled to First Amendment protection over student expression subject to only few exceptions in specific categories of speech. Virtual backgrounds, on the other hand, do not exist outside of the virtual class, and thus do not implicate the same First Amendment and privacy concerns. This bifurcated solution thus accounts for the nature of virtual learning environments and balances school authority with not only students' First Amendment rights but also students' privacy rights, students' autonomy, and the authority of students' parents to control their homelife.

CONTENTS

INTRODUCTION

On September 11, 2020, Ka'Mauri Harrison, a fourth grader at a Jefferson Parish School in Louisiana, did the unthinkable: he brought a gun to class. Well, that is how the Jefferson Parish School Board characterizes the incident on Harrison's permanent record. But did he? According to the American Civil Liberties Union ("ACLU"), the National Rifle Association ("NRA"), the Louisiana Attorney General, the Louisiana legislature, and those with common sense, he did not.

The full story paints a very different picture: on September 11, 2020, Ka'Mauri Harrison was home, taking a test in his online class,[1] when his younger brother tripped over a BB gun[2] left on the floor nearby.[3] To prevent future incident, Harrison picked up the BB gun from the floor and put it on his desk, inadvertently placing it within the view of his computer's camera, and thus within the view of his teacher.[4] The teacher, upset at seeing the unloaded BB gun in Harrison's background, ended the class and contacted the principal of the school to report the incident.[5] As a result, Harrison was suspended from school for "bringing a gun to school."[6]

How could a student who, at the time of his suspension, was attending classes virtually be charged with physically bringing a gun to his classroom? The school board adopted the view that the BB gun in Harrison's virtual background is equivalent to the child's bringing the actual object to the school's physical campus—a breach of school policy.[7] Outrage at the school board's decision to

[1] Due to the worldwide COVID-19 pandemic in March 2020, schools across the country closed their doors in an attempt to control the spread of the virus. Schools overwhelmingly switched to virtual learning platforms such as Zoom to instruct students and continue their educations. Jennifer Crockett, *Jefferson Parish School Board Sides with Principal, Hearing Officer in BB Gun Virtual Violations*, WDSU NEWS (Dec. 4, 2020, 6:27 PM), https://www.wdsu.com/article/jefferson-parish-school-board-sides-with-principal-hearing-officer-in-bb-gun-virtual-violation/34877909 [https://perma.cc/59YG-8MCG].

[2] For a detailed explanation of a BB gun, see *BB Guns*, FINDLAW (June 20, 2016), https://www.findlaw.com/injury/product-liability/bb-guns.html [https://perma.cc/8NBW-NHS8].

[3] Jarvis DeBerry, *In the Case of Ka'Mauri Harrison, It's the Jefferson Parish School Board Versus Everybody with Sense*, LA. ILLUMINATOR (Dec. 11, 2020, 7:00 AM), https://lailluminator.com/2020/12/11/in-the-case-of-kamauri-harrison-its-the-jefferson-parish-school-board-versus-everybody-with-sense/ [https://perma.cc/U6DU-WLMH].

[4] *Id.*

[5] *Id.*

[6] Ashe Schow, *4th Grader Who Briefly Showed BB Gun During Virtual School Session Can't Get Suspension Taken Off Permanent Record*, DAILY WIRE (Dec. 10, 2020), https://www.dailywire.com/news/4th-grader-who-briefly-showed-bb-gun-during-virtual-school-session-cant-get-suspension-taken-off-permanent-record [https://perma.cc/2VQ2-92UT].

[7] Faimon A. Roberts III, *Tempers Flare in Six-Hour Jefferson School Board Hearing for Ka'Mauri Harrison*, NOLA.COM (Dec. 4, 2020, 6:28 PM),

punish Harrison poured in quickly from the NRA, the ACLU, the Louisiana Attorney General, and the Louisiana Legislature.[8] The groups argued that the school board overstepped its authority by "reach[ing] into private homes" and violated Harrison's due process rights by suspending him.[9] Despite these protests, the school board reaffirmed its charge against Harrison.[10]

Inspired by the injustice of Harrison's suspension and the backlash that followed, Louisiana Governor John Bel Edwards signed the Ka'Mauri Harrison Act into law only two months after Harrison's initial suspension.[11] This statute is the first law that addresses student discipline based on conduct in virtual learning platforms in Louisiana.[12] It provides students who are participating in remote learning an avenue to appeal the disciplinary decisions against them by requesting a hearing with the school board.[13] Furthermore, schools across Louisiana must develop new policies to account for the unique challenges virtual learning environments pose for student discipline.[14] In light of the new statute, Harrison's family demanded a hearing with the school board to reconsider the suspension.[15] After a heated six-hour hearing, the school board generously reduced Harrison's suspension from six days to three days.[16]

Harrison's story sadly mirrors two other incidents that also took place during the COVID-19 virtual learning transition. The first, occurring in a different Jefferson Parish school located in Grand Isle, Louisiana, involved sixth-grader and student-of-the-year Tomie Brown, who was suspended from school for three days and later placed on probation after showing his friend a BB gun during his

https://www.nola.com/news/education/article_6fc8d660-3681-11eb-af9d-0b6be993cb95.html [https://perma.cc/8JHP-8234].

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Ka'Mauri Harrison Act, No. 48, 2020 La. Sess. Law Serv. 2nd Ex. Sess. Act 48 (West) (to be codified at LA. STAT. ANN. § 17:416(C)(4)-(5), (K)); Greg Hilburn, *BB Gun Suspension Prompts New Student Discipline Law in Louisiana*, NEWS STAR (Nov. 9, 2020, 11:15 AM), https://www.thenewsstar.com/story/news/2020/11/09/bb-gun-suspension-prompts-new-student-discipline-law-louisiana/6219090002/ [https://perma.cc/C3ZR-7M5E].

[12] Candace J. Semien, *Ka'Mauri Harrison, 9, Takes Fight to Stay in School to the Louisiana Legislature*, N.Y. AMSTERDAM NEWS (Nov. 3, 2020), http://amsterdamnews.com/news/2020/nov/03/kamauri-harrison-9-takes-fight-stay-school-louisia/ [https://perma.cc/W5JX-3PXE].

[13] No. 48, § (2)(a).

[14] *Id.* § (4).

[15] Roberts, *supra* note 7.

[16] *Id.* While the school board was originally planning to expel Harrison, they instead implemented a six-day suspension. Even though the school board reduced Harrison's original six-day suspension to just three days, Harrison had already served his full six-day suspension by the time the mandatory hearing took place. After the school board barred Solicitor General Elizabeth Murrill from testifying during Harrison's hearing, Murrill described the school board's decision to uphold Harrison's suspension as a "travesty." *Id.*

virtual class.[17] As a result, he now has a weapons violation on his previously impeccable permanent record.[18] The second involves seventh-grader Isaiah Elliot, who was suspended from his Colorado Springs middle school for handling a toy Nerf gun during his virtual class. The principal called the police on Elliot. He now has a record with the local sheriff's office and a mark on his school record because he "brought a 'facsimile of a firearm to school.'"[19]

Widespread virtual learning, particularly for grades K-12, is a recent phenomenon arising out of the COVID-19 global pandemic.[20] Beginning in March 2020, the country saw an unprecedented shift to virtual learning platforms such as Zoom,[21] after states announced "lockdowns" in an effort to control the spread of the virus.[22] This shift to online learning has affected students in a number of different ways. Mental health concerns, for example, are on the rise for countless students around the world due to the isolating nature of virtual learning.[23] From declines in grades and class participation, to an uptick in youth suicides, the switch to virtual classes has resulted in many terrible consequences for children, from kindergarten to high school and beyond.[24] Along with the many social, educational, and political disputes that have emerged during the

[17] Chad Calder, *Father of Suspended Grand Isle Student Sues Jefferson Parish Schools in BB Gun Incident*, NOLA.COM (Dec. 15, 2020, 4:30 PM), https://www.nola.com/news/education/article_37df81d6-3f00-11eb-a07a-6744bf2edd5d.html [https://perma.cc/VN64-A69M].

[18] Jennifer Crockett, *WDSU Investigates: Second Jefferson Parish Family Fighting School System*, WDSU NEWS (Oct. 14, 2020, 6:42 PM), https://www.wdsu.com/article/wdsu-investigates-second-jefferson-parish-family-fighting-school-system/34375456 [https://perma.cc/3Q4T-6R2H]. Brown's case may be demonstrative of the school-to-prison pipeline continuing in the virtual classroom—for a description of this phenomenon, see *School-to-Prison Pipeline*, ACLU, https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline (last visited Dec. 4, 2021).

[19] Jaclyn Peiser, *A Black Seventh-Grader Played with a Toy Gun During a Virtual Class. His School Called the Police.*, WASH. POST (Sept. 8, 2020), https://www.washingtonpost.com/nation/2020/09/08/black-student-suspended-police-toy-gun/.

[20] *Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG., https://www.who.int/health-topics/coronavirus#tab=tab_1 [https://perma.cc/MSL3-8782] (last visited Dec. 4, 2021).

[21] *About Us*, ZOOM, https://zoom.us/about [https://perma.cc/39MH-GHQL] (last visited Dec. 4, 2021) (describing the company's mission as "[m]ak[ing] video communications frictionless and secure").

[22] Lee Hawkins & Yoree Koh, *In-Person Learning Threatened*, WALL ST. J., Nov. 14, 2020, at A1.

[23] Athul K. Balachandran, Subburaj Alagarsamy & Sangeeta Mehrolia, Letter to the Editor, *Hike in Student Suicides—Consequence of Online Classes?*, 54 ASIAN J. PSYCH. 102,438, 102,438 (2020).

[24] *Id.* ("An increase in the number and thus the rate of suicide among students is a disturbing reality of mental instability caused by this new situation. . . . [The m]ajority of the reported incidents of suicides were in the age group of 13–17 years. Stress generated by day long classes implying increased screen time and piled up homework which otherwise while in school will be much less are some of the other reasons being pointed out.").

pandemic, novel legal issues have sprung up, implicating both the education system and the U.S. Constitution.

Stories such as Harrison's are fraught with due process and privacy concerns. However, they also raise another, arguably more pressing issue: When are a student's First Amendment rights violated by their school in a virtual learning environment? The virtual learning environment provides unique and unprecedented scenarios for student speech. From questions surrounding students' virtual backgrounds to their actual physical backgrounds, the balancing of students' First Amendment rights has never been more complicated.

Obviously, virtual learning environments are not completely removed from the school; Harrison *was* technically "in class" when his incident occurred. However, he was not actually physically present on his school's campus either. There is certainly a difference between being physically on school grounds and being virtually in class via a computer camera. This hybrid in-class but off-campus environment poses novel and highly sensitive questions about students' abilities to express themselves within their own homes.

While this issue is a unique phenomenon arising out of COVID-19, we will likely continue to face this problem in the future, whether by the uncertain prospect of further school closings as new COVID-19 variants emerge, or by schools and students continuing, to some extent, to take advantage of the convenience and safety provided by online platforms. The impressive technological advances made to secure virtual platforms in the wake of the pandemic may give students more opportunities to "log on" to school moving forward, thus ensuring that hybrid First Amendment questions will continue to arise.

Despite an extensive litigation history surrounding school authority over students' on-campus freedom of speech, the question of what level of First Amendment rights students retain in virtual learning scenarios is not readily answerable.[25] Falling into an unusual gray area in which the student is technically "in school" in the sense that she is attending school-run classes, and yet off campus as she is still in privacy of her home, this issue does not easily fall into the on-campus category. The landmark Supreme Court case *Tinker v. Des Moines Independent Community School District*[26] controls questions of student First Amendment rights on campuses,[27] while the Court's newest decision, *Mahanoy Area School District v. B.L.*,[28] seeks to provide guidance for off-campus student speech issues.[29] Despite many landmark decisions from the Court articulating *Tinker*'s application, numerous smaller issues falling under

[25] *See infra* Part II.

[26] 393 U.S. 503 (1969).

[27] *Id.* at 506.

[28] 141 S. Ct. 2038 (2021).

[29] *Id.* at 2046.

the *Tinker* umbrella remain open and heatedly debated by circuit courts and scholars alike.[30]

The arrival of the internet era, and with it social media, has further complicated matters, leaving schools and courts questioning how to balance students' First Amendment right to freedom of expression with the need to guard and maintain control over the learning environment.[31] The question now for schools and students across the country is what standard should control this hybrid in-school but off-campus student expression. This Note uses Harrison's story, along with several other similar stories, as a backdrop to focus on how the First Amendment's right to freedom of expression interplays with students in virtual learning environments. More specifically, it considers whether the *Tinker* standard applies to these situations, and if it does not, how courts should handle these situations. Although Harrison may not have intended the BB gun to be "speech" in the usual sense, the BB gun in his Zoom background was an expression within the meaning of the First Amendment.[32] Thus, our question boils down to just how far schools may reach into students' homelives to censor them for expression that occurs in their own bedrooms.

Part I of this Note provides a brief history of student First Amendment rights both on campus and off campus. It begins by laying the foundation of student First Amendment rights with a brief review of *Tinker* and its progeny, followed by an analysis of both the Court's off-campus ruling in *Mahanoy* as well as three off-campus circuit court tests. Part II discusses the important constitutional protections provided to the home by way of the First and Fourth Amendments to fully contextualize the Court's rationale behind imposing higher

[30] *See* David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1115 (2020).

[31] *See, e.g.*, *School District Addresses First Amendment Rights in Regards to Video Classes*, PASO ROBLES DAILY NEWS (Aug. 26, 2020, 5:00 AM), https://pasoroblesdailynews.com/school-district-addresses-first-amendment-rights-in-regards-to-video-classes/113516/ [https://perma.cc/PAU8-TVKB] ("[D]uring the first few days of school some issues arose that begged the question of what materials can be displayed in the video backgrounds of our students during distance learning. . . . [This] question[] involve[s] an analysis of the First Amendment rights of students while participating at school . . . .").

[32] While the protection of the First Amendment is most often associated with spoken words, it is not limited to them. "[O]ur cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even '[m]arching, walking or parading' in uniforms displaying the swastika." Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) (second alteration in original) (citations omitted) (quoting Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 43 (1977)). Harrison's story calls to mind *Tinker*, where the Court held that black armbands worn by protesting students were "speech" within the meaning of the First Amendment and thus protected. *See* 393 U.S. at 514. For a more thorough look at the distinction between speech and conduct within the meaning of the First Amendment, see James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1 (2008).

constitutional protection to the home, and the limitations and implications of these protections. Part III discusses why neither *Tinker* nor *Mahanoy*, nor any of the circuit courts' off-campus tests, are applicable to this hybrid issue. And finally, Part IV offers insight into how courts and schools should view school authority in this new virtual learning world and what sectors of student speech in virtual classrooms the school may control. Ultimately, this Note concludes that there is no one-size-fits-all test that can be applied to all aspects of the virtual learning platform. Rather, schools should wield far more authority over students' virtual backgrounds than their physical backgrounds where there must be a presumption of First Amendment protection that can only be overridden by certain, specific categories of speech.

I. THE HISTORY OF STUDENT FIRST AMENDMENT RIGHTS

This Part looks at the history of student First Amendment rights, its evolution over the years, and the ambiguity still present within off-campus speech in light of *Mahanoy*. It analyzes the Court's holding in the seminal case *Tinker* and progresses through the Court's defining cases that helped shape and clarify on-campus speech regulation. It then focuses on the Court's rationale behind granting First Amendment rights to students in *Tinker*, and explains why certain, specific limits have been imposed on those rights later on. This Part also analyzes *Mahanoy* and determines how it might apply to the issue at hand. Lastly, it examines how the prior circuit court tests for off-campus speech may still be utilized.

A. Tinker*'s Substantial Disruption Test*

On December 16, 1965, high school and junior high students in Des Moines, Iowa wore black armbands to school to signal their protest of the United States' involvement in the Vietnam War.[33] This simple protest resulted in one of the most important First Amendment cases in history. Upon hearing of the students' planned protest, the principals of the schools announced policies stating that any student refusing to remove their black armband would be suspended until they returned to school without it.[34] Despite this warning, high school students John F. Tinker and Christopher Eckhardt, along with junior high student Mary Beth Tinker, wore black armbands to class.[35] True to their word, the schools suspended all three students, directing them not to return to school until they removed the armbands.[36] The students' suspensions sparked national outrage and ultimately led to the students' families filing suit against the school district for violating the students' First Amendment rights.[37]

[33] *Tinker*, 393 U.S. at 504.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 505.

By today's standards, the students' method of protest may seem tame. However, in 1965, students were thought to have few First Amendment rights while on campus, which explains why this simple act of self-expression in a public school resulted in such harsh punishments for the students—and such intense controversy for the courts.[38] Although several important cases were brought to bear before the Court in the years leading up to *Tinker*, only one had resulted in a win for student freedom of speech.[39]

Twenty-six years before *Tinker*, in *West Virginia State Board of Education v. Barnette*,[40] the Court established the basic proposition that the First Amendment did indeed constrain the power of public schools.[41] However, the Court failed to provide any further guidance for determining *when* public schools violated students' right to free expression, and the doctrine remained undeveloped in the years between *Barnette* and *Tinker*.[42] As a result of the uncertainty surrounding the free speech rights of students, many schools exercised strict control over what students said, wore, and did while on campus.[43]

The Court took the opportunity provided by *Tinker* to push back on this school of thought, announcing instead that students do *not* "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[44] Acknowledging that students are indeed "persons" under the Constitution and, as such, they retain their fundamental rights, the Court clarified that public school students are not "confined to the expression of those sentiments that are officially approved"; rather, they are "entitled to freedom of expression of their views."[45] Described as a "marketplace of ideas," the Court acknowledged that the beliefs and views shared in the classroom are vital to the development of free-thinking leaders.[46]

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[38] *See* DAVID L. HUDSON, LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREE EXPRESSION IN AMERICAN SCHOOLS 1-46 (2011) (detailing cases regarding students' free speech leading up to *Tinker*).

[39] *See id.* at 7-43.

[40] 319 U.S. 624 (1943).

[41] *See id.* at 637 ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual . . . .").

[42] *See* HUDSON, *supra* note 38, at 45-46.

[43] *See id.* (explaining that "[i]n many schools, students still possessed few rights of free expression").

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

[45] *Id.* at 511.

[46] *Id.* at 512 ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" (alteration in original) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967))).

The Court did not, however, take away all control over students' in-school expression, reserving some authority to the schools so that they might maintain order in learning environments.[47] Rather than finding that students possessed unfettered First Amendment rights on campus, the Court noted that student rights must be "applied in light of the special characteristics of the school environment."[48] This meant that students would enjoy some level of free speech rights, so long as the expression of those rights did not interfere with school affairs or the rights of other students.[49]

To assist lower courts in determining when schools have gone too far in their regulation of student speech, the Court announced the "substantial disruption" test, which mandates that, before silencing or disciplining a student's on-campus speech, a school must show that the student's speech would "materially and substantially disrupt the work and discipline of the school."[50] Determining that no such disruption occurred or could reasonably be forecasted by students simply wearing black armbands to school, the *Tinker* Court held the students' expression to be protected by the First Amendment.[51]

It took nearly twenty years for next seminal case involving student speech to appear.[52] *Bethel School District No. 403 v. Fraser*[53] clarified what constitutes protected speech for students—importantly, what is not protected speech for students.[54] Namely, the Court held there was no First Amendment protection for vulgar, lewd, or indecent speech on campus.[55] In *Bethel*, high school student Matthew Fraser was suspended for three days after giving a campaign speech in front of his school assembly.[56] According to the school, Fraser's speech

[47] *See id.* at 511 (explaining that schools can curb freedom of expression for constitutionally permissible reasons).

[48] *Id.* at 506.

[49] *Id.* at 513 ("[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.").

[50] *Id.* at 513; *see also id.* at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that . . . . the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . .'" (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[51] *See id.* at 514 ("They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.").

[52] *See* Morse v. Frederick, 551 U.S. 393, 404-06 (2007) (analyzing *Tinker* line of cases).

[53] 478 U.S. 675 (1986).

[54] *See id.* at 685.

[55] *See id.* ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

[56] *Id.* at 677-79.

contained "elaborate, graphic, and explicit sexual metaphor[s]" and thus fell under their disciplinary rule prohibiting obscene speech.[57]

Fraser won in the district court and again in the Ninth Circuit, with both courts applying the *Tinker* test and agreeing that the school's disciplinary action violated his First Amendment rights because there was no evidence that the speech materially interfered with school activities.[58] Judge Norris, writing for the Ninth Circuit, rejected the school district's argument that a school must have the authority to prohibit "indecent" speech to protect impressionable students.[59] In response, Norris noted that "high school students are beyond the point of being sheltered from the potpourri of sights and sounds we encounter at every turn in our daily lives."[60] Rather, Judge Norris maintained that the "[f]reedom to be different in our individual manner of expression is a core constitutional value."[61]

The Court disagreed with Norris's sentiment and subsequently reversed.[62] Writing for the Court, Justice Burger notably did *not* apply *Tinker*'s substantial disruption test. Rather, he wrote an opinion further limiting students' rights by removing from First Amendment protection speech or conduct that is vulgar or lewd.[63] Justice Burger took pains to distinguish the type of expression in *Bethel* from the type of expression in *Tinker*, noting that "[u]nlike the sanctions

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[57] *Id.* at 678. The following is an excerpt from the "lewd" speech Fraser gave at his high school assembly:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you.

Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357 (9th Cir. 1985), *overruled by Bethel*, 478 U.S. 675.

[58] *See Fraser*, 755 F.2d at 1358-61 (discussing difference between "inappropriate" speech and "disruptive" speech while holding that school's evidence of former is not sufficient to prove latter).

[59] *See id.* at 1361-63.

[60] *Id.* at 1363.

[61] *Id.*

[62] *Bethel*, 478 U.S. at 687.

[63] *See id.* at 685 ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."); *see also* Morse v. Fredrick, 551 U.S. 393, 405 (2007) ("*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*."); Joe Towslee, *The "Nexus" Test vs. the "Reasonably Foreseeable" Test: How Off-Campus Student Speech Can Cause On-Campus Consequences*, 13 IDAHO CRITICAL LEGAL STUD. J., 2020, at 1, 8 ("The *Fraser* opinion acknowledged that the *Tinker* 'substantial disruption' standard was not the absolute method for analyzing these lines of cases.").

imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint."[64] The Court later clarified in *Morse v. Frederick*,[65] that if "Fraser delivered the same speech in a public forum outside the school context, it would have been protected," hinting that a school's control over a student's off-campus expression may be limited in some manner.[66]

Another noteworthy post-*Tinker* case is *Hazelwood School District v. Kuhlmeier*.[67] Like *Bethel*, *Hazelwood* also cabined *Tinker*'s application, holding that schools may control on-campus "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[68] The Court found that a school could exercise "editorial control" over the school-sponsored paper, which was run by students participating in a special course at the school, and other school-sponsored expressive conduct, "so long as [the school's] actions are reasonably related to legitimate pedagogical concerns."[69] The *Hazelwood* Court did not apply the *Tinker* test either, instead posing the issue as whether a school must "affirmatively . . . promote particular student speech."[70] The Court surmised that schools are permitted to control student speech that could be reasonably attributed to them, and thus, an application of *Tinker*'s substantial disruption test was unnecessary.[71]

Lastly, in *Morse*, the Court finally, albeit vaguely, acknowledged the issue of off-campus student speech.[72] Although ultimately determined under the on-campus *Tinker* test, *Morse* is one of the only cases where the Court considered the off-campus speech issue prior to its 2021 decision in *Mahanoy*. Popularly known as the "BONG HiTS 4 JESUS" case, high school student Joseph Frederick was suspended for waiving a banner with the aforementioned slogan at an off-campus, but school-supervised and school-sanctioned, event.[73] The principal, citing the school's antidrug policy, rationalized that the banner "promoted illegal drug use" and thus violated the school's policy.[74]

Chief Justice Roberts's opinion held that the school principal did not violate the student's First Amendment rights, noting that "schools may take steps to

[64] *Bethel*, 478 U.S. at 685.

[65] *Morse*, 551 U.S. 393.

[66] *Id.* at 405.

[67] 484 U.S. 260 (1988).

[68] *Id.* at 270-71.

[69] *Id.* at 271-73, 276.

[70] *Id.* at 270-71. The Court framed the question in *Tinker* as "whether the First Amendment requires a school to *tolerate* particular student speech." *Id.* at 270. (emphasis added).

[71] *Id.*

[72] *See* Morse v. Frederick, 551 U.S. 393, 400-01 (2007) (discussing why the Court considered Frederick's actions to be essentially school speech even if speech did not occur directly at school).

[73] *Id.* at 397-98.

[74] *Id.* at 398-99, 410.

safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[75] Although the incident clearly took place off campus, the Court found this case to be a "school speech case," as the incident occurred during school hours and at a school-sanctioned activity.[76] Thus, there was no reason to truly analyze or discuss issues involving school control of off-campus speech.

While *Tinker* ultimately resulted in the recognition of First Amendment rights for public school students across the country, it was, and continues to be, a hard-fought battle. *Tinker* provides the foundation for nearly every student speech case to date, weaving its way into on-campus and off-campus student speech debates and is essential to understanding the current student speech climate. However, *Tinker* is far from an airtight holding; as showcased by its progeny, the substantial disruption test provides judges wiggle room to choose how they wish a case to turn out by creating artificial limits on *Tinker*'s application or exploiting its often vague language. Many long-standing issues of student freedom of speech must still be answered, and with new technological advances and the rise of social media, new issues are constantly developing.[77] The battle for student freedom of expression is ongoing and, as demonstrated by these cases, is far from over.

B. *Off-Campus and Online Student Speech*

In June 2021, the Court finally addressed the issue of a school's authority to regulate students' off-campus speech in *Mahanoy*.[78] For years, the question of whether a school has any authority over a student's speech outside of the school's walls had been left unanswered by the Court. While the Court's decision in *Mahanoy* sheds light on how schools and courts should treat off-campus speech, it is a vague and ambiguous decision that fails to set any concrete limits. Prior to *Mahanoy*, circuit courts filled this gap in Court precedent through a variety of different tests, creating a circuit split. Three different solutions were conceived of and used by various courts to determine whether a school had the authority to regulate a student's speech. These solutions include (1) the reasonably foreseeable test,[79] (2) the nexus test,[80] and (3) the combination test.[81] While many expected the Court to choose one of these circuit court approaches when deciding *Mahanoy*, the Court chose not to, offering instead an answer as to whether a school *may*, under some

[75] *Id.* at 397.

[76] *Id.* at 400-01.

[77] *See* Hudson, *supra* note 30, at 1120-28 (discussing additional open issues stemming from *Tinker*).

[78] 141 S. Ct. 2038, 2045-46 (2021).

[79] Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007).

[80] Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 565 (4th Cir. 2011).

[81] C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016).

circumstances, have authority over a student's off-campus speech.[82] Although *Mahanoy* will provide some guidance to lower courts on how to approach the issue of off-campus speech, the circuit court tests may still provide insight into the complex nature of the issue.

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

After failing to make the varsity cheerleading team, high school sophomore B.L. sent a photo of herself to 250 of her friends via Snapchat.[83] In the photo she and a friend had their middle fingers raised with a caption reading, "Fuck school fuck softball fuck cheer fuck everything."[84] After one friend sent a screenshot of the photo to the head cheerleading coaches, B.L. was removed from the junior varsity cheer team for violating the team and school rules requiring students to "'have respect for [their] school, coaches, . . . [and] other cheerleaders'; avoid 'foul language and inappropriate gestures'; and refrain from sharing 'negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet.'"[85] After suing the school, the district court granted B.L. summary judgment finding that her suspension violated her First Amendment rights.[86]

On appeal, the Third Circuit affirmed the lower court's decision and rejected the previous tests established by the other circuits, instead finding that the *Tinker* analysis should not be applied to students' off-campus speech at all.[87] The court announced that it would not create a new test to determine when schools may punish or censor off-campus speech because schools have no authority to regulate off-campus speech.[88] Here, the Third Circuit clearly built off of its previous opinion in *Layshock v. Hermitage School District*.[89] In *Layshock*, the Third Circuit responded to the school district's argument that it had the authority to punish a student for publishing a photo of the principal online from an off-campus computer, stating that "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[90]

Following the Third Circuit's rejection, the Mahanoy Area School District appealed to the Supreme Court, arguing that the First Amendment does not prevent schools from regulating off-campus student speech that targets the

[82] *See Mahanoy*, 141 S. Ct. at 2045 ("[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech . . . .").

[83] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020), *aff'd on other grounds*, 141 S. Ct. 2038 (2021).

[84] *Id.*

[85] *Id.* at 176 (alterations in original).

[86] *Id.* at 175.

[87] *Id.* at 187-91.

[88] *Id.* at 189-91.

[89] 650 F.3d 205, 207 (3d Cir. 2011).

[90] *Id.* at 216.

school environment and substantially disrupts school activities or interferes with other students' rights, even when that speech occurs off campus.[91]

In a surprisingly short, twelve-page opinion, the Supreme Court affirmed the Third Circuit's holding eight-to-one.[92] While the Court ultimately did agree with the Third Circuit's determination that the school's action violated B.L.'s First Amendment rights, Justice Breyer clarified that the Court "do[es] not agree with the reasoning of the Third Circuit panel's majority"[93]: the Court "do[es] not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus."[94] In so holding, the Supreme Court departed from the Third Circuit's approach that a school never has authority over any off-campus speech.

Unlike in *Tinker*, the Court did not provide a clear test, announcing instead that they were

> not now set[ting] forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.[95]

In fact, the Court further clarified that this was only "one example" of when a school lacks authority over a student's off-campus speech and that every future case will be "circumstance-specific."[96]

In articulating its decision, the Court provided illustrations of when a school may extend its authority to off-campus speech. These instances include cases of "serious or severe bullying or harassment," threats to students or teachers, the "failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities," and "breaches of school security devices."[97]

The Court also gave some insight into instances where a school will have "diminished" authority over a student's off-campus speech. The Court identified three features of off-campus speech that will make it less likely that schools will have an interest in regulating it.[98] First, "a school, in relation to off-campus speech, will rarely stand *in loco parentis*,"[99] meaning, a student's off-campus speech will usually fall "within the zone" of their parents' authority rather than

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[91] *See* Reply Brief for Petitioner at 11-12, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255).

[92] *See Mahanoy*, 141 S. Ct. at 2041, 2059.

[93] *Id.* at 2043.

[94] *Id.* at 2045.

[95] *Id.*

[96] *Id.* at 2046.

[97] *Id.* at 2045.

[98] *Id.* at 2046.

[99] *Id.*

the school's authority.[100] Second, the mere fact that the speech is uttered off campus must weigh heavily against a school's ability to regulate it[101]: most importantly, a student's off-campus political and religious speech will fall under an even stricter First Amendment protection. And third, "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[102] Here the Court recalled its opinion in *Tinker*, noting that protecting the "marketplace of ideas" is fundamental to the workings of the country's representative democracy.[103] Justice Breyer took the opportunity to further explain that the rationale behind the protection of this third category is to ensure "that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"[104]

Justice Breyer concluded his synopsis:

> Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference.[105]

2. The Circuit Court Off-Campus Speech Tests

While *Mahanoy* gave an important and much-awaited answer to the off-campus speech question—that schools may have authority over students' off-campus speech in select situations—the case is, at best, a vague guidepost for courts to follow and will undoubtedly cause many inconsistencies and debates in the lower courts. Thus, the preexisting circuit court tests for off-campus speech will likely remain relevant.

a. *The Reasonably Foreseeable Test*

The Second Circuit confronted the issue of off-campus and online student expression in a case involving eighth-grade student Aaron Wisniewski's online, off-campus, private instant messaging activities.[106] In the case of *Wisniewski ex rel. Wisniewski v. Board of Education*,[107] Wisniewski was suspended for sending

[100] *Id.*

[101] *Id.* ("Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all.").

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] Wisniewski *ex rel*. Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007).

[107] *Wisniewski*, 494 F.3d 34.

an instant message from his home computer to fifteen school friends.[108] The message contained an icon that suggested shooting someone in the head with the words "Kill Mr. VanderMolen," a teacher at the student's school, located at the bottom of the message.[109] The nature of the message, essentially a death threat to a teacher, likely shaped the nature of the Second Circuit's resolution of the off-campus speech issue. With the seriousness of the student's speech in mind, the court created a fairly permissive standard, allowing schools a lot of authority to fit whatever off-campus student speech they didn't like under the umbrella of their authority.

To resolve the question of the school's authority to suspend Wisniewski for his off-campus speech, the Second Circuit created a threshold test named the "reasonably foreseeable test," which schools and courts must use to determine whether the *Tinker* test should be applied to off-campus speech.[110] The Second Circuit explained that under this approach, a student's off-campus speech falls within the school's authority if it "poses a reasonably foreseeable risk" that the speech may "come to the attention of school authorities."[111] If so, a court applies the *Tinker* test to determine whether the speech would "materially and substantially disrupt the work and discipline of the school,"[112] and thus the school may regulate the speech.[113] If not, the inquiry ends and the school may not interfere.[114] This two-step inquiry accounts for the ever-increasing use of social media and online platforms. With these trends, student speech conducted off campus is much more likely to disrupt the on-campus school environment.

Ultimately, the court in *Wisniewski* found that it was reasonably foreseeable that the instant message Wisniewski sent to his friends would "come to the attention" of his school and "would foreseeably create a risk of substantial disruption within the school environment."[115] Thus, the Court held that the school had the authority to punish Wisniewski for his off-campus messages. The Second Circuit's approach could easily be used to encompass and affect most of students' off-campus speech—with very few limitations.[116]

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[108] *Id.* at 35.

[109] *Id.* at 36.

[110] *Id.* at 38-39.

[111] *Id.*

[112] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

[113] *Id.*

[114] *Id.* at 39.

[115] *Id.* at 39-40.

[116] This approach was adopted by the Eighth Circuit in *D.J.M. v. Hannibal Public School District # 60*, 647 F.3d 754, 766 (8th Cir. 2011) (holding that based on the reasonably foreseeable test, student who messaged threats to classmate online was subject to school disciplinary action), and the Eleventh Circuit in *Boim v. Fulton County School District*, 494 F.3d 978, 980-81, 984-85 (11th Cir. 2007) (holding that based on the reasonably foreseeable test, student who posted story about dream of shooting teacher was subject to school disciplinary action).

b. *The Nexus Test*

Similar to the reasonably foreseeable test, the nexus test also proposes a threshold step to determine whether to apply *Tinker*'s substantial disruption test to a student's off-campus speech.[117] First adopted by the Fourth Circuit, this test dictates that schools must first ask if there is a "significant relation between the speech and the school" before applying *Tinker*.[118] While the reasonably foreseeable test asks how likely the off-campus speech is to *reach* the campus, the nexus test asks how closely *related* the student's off-campus speech is to the school.[119] This nexus can consist of speech involving other students, school faculty, or other parts of the school community.[120]

The Fourth Circuit applied this test in *Kowalski v. Berkeley County Schools*,[121] a case involving cyber bullying, and found that a student's MySpace.com webpage dedicated to making fun of another student had a "sufficient nexus with the school" to justify the student's suspension.[122] The court reasoned that the website's sole purpose was school-related because the audience was mostly other students from the school and it was intended to impact the victim in the school environment.[123] This test is somewhat less permissive than the reasonably foreseeable test, requiring an actual connection to school life before the school may regulate the speech; however, it too can include student speech that may be better off out of the school's authority.

c. *The Combination Test*

The Ninth Circuit rejected the prospect of choosing between the nexus test and the reasonably foreseeable test, stating it was "reluctant to try and craft a one-size fits all approach" to a school's authority over students' off-campus speech.[124] In the 2016 case *C.R. v. Eugene School District 4J*,[125] the Ninth Circuit decided that applying both the reasonably foreseeable test *and* the nexus test would provide the most comprehensive approach to off-campus student

[117] Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011).

[118] Margaret A. Hazel, *Student Cyber-Speech After* Kowalski v. Berkeley County Schools, 63 S.C. L. REV. 1081, 1087 (2012) (discussing factors circuits have added to the *Tinker* test, including the "sufficient nexus approach").

[119] *Kowalski*, 652 F.3d at 573.

[120] *See* Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges*, 2011 BYU EDUC. & L.J. 75, 108.

[121] *Kowalski*, 652 F.3d 565.

[122] *Id.* at 567, 577.

[123] *Id.* at 576-77. This test was initially followed by the Third Circuit in *Layshock*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 214 (3d Cir. 2011). The Third Circuit ultimately decided upon a different approach. *See* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020) (finding no school authority over student off-campus expression), *aff'd on other grounds*, 141 S. Ct. 2038 (2021).

[124] Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013) (discussing difficulty in imposing "global standard" to a variety of student off-campus speech scenarios).

[125] 835 F.3d 1142 (9th Cir. 2016).

speech.[126] The circuit rationalized that courts must "consistently engage in a circumstance-specific inquiry to determine whether a school permissibly can discipline a student for off-campus speech."[127]

The first step in the analysis is to ask whether there is a sufficient nexus between the student's off-campus speech and the school's operation.[128] The second step is to ask whether it was reasonably foreseeable that the student's off-campus speech "would reach the school."[129] Finally, upon satisfying both these tests, *Tinker* is applied "to evaluate the constitutionality of the school's imposition of discipline."[130]

C.R. involved a seventh-grade student at Monroe Middle School in Eugene, Oregon.[131] C.R., along with several other students, repeatedly bullied two younger, disabled students while they walked home from school.[132] This bullying escalated from teasing to vulgar name calling and sexual harassment.[133] After several meetings with the school to investigate and confirm details of the incidents, school administrators imposed a two-day suspension for C.R.'s behavior.[134] C.R.'s parents sued the school, alleging a violation of his First Amendment rights and, after summary judgment was granted in favor of the school, C.R. appealed.[135] On appeal, the Ninth Circuit crafted this new test for off-campus student speech and found that C.R.'s behavior satisfied the nexus test, the reasonably foreseeable test, and finally, the *Tinker* test. First the court held that, although the harassment took place off campus, it still created a sufficient nexus to the school because all parties were students and the harassment took place minutes after the students had been released from class and at a park close by the school.[136] Next, the court found the harassment was

[126] *Id.* at 1150 ("We follow *Wynar* in applying both the nexus and reasonable foreseeability tests to [the student's] speech. We conclude that under either test, the School District had the authority to discipline [the student] for his off-campus speech.").

[127] *Id.*

[128] *Id.* at 1149 ("[A] 'nexus' test, ask[s] whether a student's off-campus speech was tied closely enough to the school to permit its regulation.").

[129] *Id.* at 1150 ("[S]chools may restrict speech that 'might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities' [sic] or that collides 'with the rights of other students to be secure and to be let alone.'" (quoting *Wynar*, 728 F.3d at 1070)).

[130] *Id.* ("Thus, for its actions to survive First Amendment scrutiny, the School District must show both that it had the authority to reach [the student's] off-campus speech and that the imposition of discipline complied with *Tinker*.").

[131] *Id.* at 1145.

[132] *Id.* at 1146.

[133] *Id.*

[134] *Id.* at 1147.

[135] *Id.*

[136] *Id.* at 1150-51 ("[I]t is a reasonable exercise of the School District's *in loco parentis* authority to be concerned with its students' well being as they begin their homeward journey at the end of the school day.").

reasonably foreseeable because it "happened in such close proximity to the school, administrators could reasonably expect the harassment's effects to spill over into the school environment."[137] Finally, the Ninth Circuit concluded that C.R.'s behavior fell outside *Tinker*'s protection because it "collide[d] 'with the rights of other students to be secure and to be let alone.'"[138]

II. OTHER CONSTITUTIONAL PROTECTIONS AND CONSIDERATIONS

The balance between schools' interests in controlling its students' learning environment and students' rights to express themselves in their own homes is delicate. Because neither *Tinker* nor *Mahanoy* is directly on point for dealing with student speech that takes place both in class and within a student's private home, it is helpful to take a broader look at the constitutional protections given specifically to the home. The Court has acknowledged the special protections the First Amendment provides to individuals' homes. When read in conjunction with the special protections provided by the Fourth Amendment, these amendments showcase the heightened protection the home is given consistently throughout our constitutional jurisprudence. Understanding the rationale behind these constitutional safeguards to the home and their limits will provide jurists better insight into how to regulate virtual learning environments.

A. *The First Amendment Protections*

Nothing in the text of the First Amendment specifically gives special protections to the home. In fact, it does not even mention the home.[139] However, drawing from a textual analysis of other amendments that do specifically mention one's "house,"[140] courts have generally read a higher level of protection into First Amendment rights exercised in the "zone of privacy" that exists within the walls of a person's home.[141] Although the concept of privacy as the protection of personal information from the public may seem at odds with the central purpose of the First Amendment—to be free to speak one's mind

[137] *Id.* at 1151.

[138] *Id.* at 1150 (quoting Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1070 (9th Cir. 2013)).

[139] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[140] *See* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any *house* . . . ." (emphasis added)); *id.* amend. IV ("The right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (emphasis added)).

[141] Gerald S. Dickinson, *The Puzzle of the Constitutional Home*, 80 OHIO ST. L.J. 1099, 1102 (2019).

publicly—upon closer examination, these two principles are quite interconnected.[142]

The most notable case discussing the differences between First Amendment rights in the home and First Amendment rights in public spaces is *Stanley v. Georgia*.[143] In *Stanley*, police found "obscene" materials in the form of adult films in Stanley's home while executing a warrant on an unrelated charge.[144] Stanley was subsequently arrested and charged with violating Georgia's law prohibiting possession of "obscene matter."[145] On writ to the Supreme Court, Stanley argued that the State of Georgia had violated his First Amendment rights.[146] The Court ultimately agreed, holding that "mere private possession of obscene matter cannot constitutionally be made a crime."[147]

Specifically, the Court acknowledged the difference between the commercial sale of obscenity, which is not constitutionally protected speech and thus is within the state's control, and possession of "obscene material" within the privacy of one's home, which the Court held is constitutionally protected speech.[148] Distinguishing *Stanley* from *Roth v. United States*,[149] a case in which the defendant was convicted of "mailing obscene circulars and advertising . . . in violation of the federal obscenity statute,"[150] the Court reasoned that Georgia's justifications for banning obscenity do not "reach into the privacy of one's own home."[151] Thus, although the state has the power to control and regulate obscenity in the public and commercial sphere, "it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[152] This holding shows that people have a higher level of First Amendment protections within their homes, as opposed to in public.

The Court again addressed this heightened level of protection within the home in *United States v. Williams*,[153] in which agents discovered pornographic images

[142] Jennifer M. Kinsley, *Private Free Speech*, 58 U. LOUISVILLE L. REV. 309, 309 (2020).

[143] 394 U.S. 557, 559 (1969) (discussing whether Georgia's obscenity statute punishing private possession of obscene materials violates the First Amendment).

[144] *Id.* at 558.

[145] *Id.*

[146] *Id.* at 559.

[147] *Id.*

[148] *Id.* at 563-64 ("[Prior cases] discerned such an 'important interest' in the regulation of commercial distribution of obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.").

[149] 354 U.S. 476 (1957).

[150] *Id.* at 480.

[151] *Stanley*, 394 U.S. at 565.

[152] *Id.* at 566.

[153] 553 U.S. 285 (2008). The case discussed whether a statutory provision criminalizing the pandering or solicitation of child pornography was overbroad in light of First Amendment protections. *Id.* at 289-90 (citing Prosecutorial Remedies and Other Tools to End the

of children on hard drives in Williams's home.[154] Although strongly reaffirming the logic and reasoning expressed in *Stanley*, the Court did limit what materials were protected under the First Amendment, explicitly holding that obscenity involving underage children was not protected even within an individual's home.[155]

The Court's First Amendment jurisprudence thus shows that First Amendment rights exercised within the home are frequently given heightened protections. Indeed, the Court frequently reaffirms the principle that the home is a sacred place deserving of the utmost privacy and freedom. Although there are limitations to this protection, the Court's rationale for heightened protection of First Amendment rights within the home gives some insight into the issue at hand. Because of this increased protection, students' First Amendment rights exercised within the virtual learning environment must also be shielded from school interference more than speech that is simply exercised on school grounds.

B. *The Fourth Amendment Protections*

In analyzing the constitutional importance of privacy in the home, one must look beyond just the First Amendment to fully understand how the Court treats privacy. Constitutional protections of the home go hand in hand with the Fourth Amendment; while the Fourth Amendment may not directly apply to the realm of school authority in virtual learning platforms, the principles courts apply to the Fourth Amendment are a useful illustration of how the Court views privacy rights in a person's home. In fact, "[a]t the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"[156] The Fourth Amendment's prohibition of unwarranted government intrusions into the home explicitly creates special protections for this most private of places.[157] An analysis of basic Fourth Amendment jurisprudence provides insight into the Court's rationale behind the deference given to individuals' rights exercised within their homes and acts as a guide in analyzing how much authority public schools have to control student expression and speech expressed through their computer cameras.

Within the Fourth Amendment, "the home is first among equals."[158] In *Katz v. United States*,[159] the Court determined that the Fourth Amendment "protects

Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 503, 117 Stat. 650, 680 (codified at 18 U.S.C. § 2252A)).

[154] *Id.* at 291-92.

[155] *Id.* at 288-89.

[156] Florida v. Jardines, 569 U.S. 1, 6 (2013) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

[157] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[158] *Jardines*, 569 U.S. at 6.

[159] 389 U.S. 347 (1967).

people, not places,"[160] dispensing with the requirement that the government actually intrude upon the home for a Fourth Amendment violation to occur.[161] Although the *Katz* Court emphasized the protection of *people*, it later clarified that this emphasis on people did not detract from the well-established protections the Fourth Amendment specially placed upon the home.[162]

From requiring warrants to search a person's home, whether by physically entering the premises[163] or by thermal-imaging devices that can detect activity from outside,[164] to protecting the curtilage surrounding the physical home,[165] the Court has repeatedly stressed the sanctity of the home within the constitutional structure. There are, of course, limitations to protections within homes: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[166] The ultimate question for our purposes then is, if a student is forced to attend school through virtual platforms, thereby exposing pieces of their home to the school's view, does this reduce the constitutional protection that is afforded to that expression? Students are, in a technical sense, exposing their backgrounds "to the public."[167] However, they are not necessarily doing so willingly—K-12 students are required to attend school, virtually or in person, and reducing their constitutional rights in light of such a requirement may be bad precedent.

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[160] *Id.* at 351.

[161] *Id.* at 353 (holding government's warrantless placement of listening device placed on outside of phone booth violated Fourth Amendment).

[162] *See Jardines*, 569 U.S. at 8 ("[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave." (alteration in original) (quoting Entick v. Carrington (1765) 95 Eng. Rep. 807, 817 (KB))); Alderman v. United States, 394 U.S. 165, 180 (1969) ("[We do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home . . . .").

[163] Payton v. New York, 445 U.S. 573, 601 (1980) (emphasizing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic").

[164] Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that where "the Government uses a device . . . to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant").

[165] United States v. Dunn, 480 U.S. 294, 301 (1987) (stating that curtilage surrounding the home can be subject to Fourth Amendment protections).

[166] *Katz*, 389 U.S. at 351.

[167] *Id.* ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

III. PROBLEMS WITH APPLYING THE CURRENT TESTS TO THE VIRTUAL LEARNING ENVIRONMENT

The question that remains is how schools should approach regulating students' speech in virtual classes. Should *Tinker*'s on-campus substantial disruption test alone be applied? The new off-campus, circumstance-specific reasoning from *Mahanoy*? Or maybe one of the circuit courts' off-campus tests can be recycled? Virtual learning is not squarely either on campus or off campus and begs the question: How far can a school go in censoring a student's expression in the privacy of their own bedroom? There are numerous issues with applying any of the tests or standards currently in use, whether *Tinker*, a circuit court test, or the new *Mahanoy* analysis.

Even as currently applied to on-campus student expression, the *Tinker* test poses many issues, including inconsistent outcomes in lower courts;[168] inadequate protection for even on-campus student expression;[169] and the standard's potential for devastating racial, religious, and political discrimination. An example of a circuit court's misapplication of *Tinker* is showcased in the Ninth Circuit's decision in *Dariano ex rel. M.D. v. Morgan Hill Unified School District*.[170] In *Dariano*, the Ninth Circuit interpreted *Tinker* to allow a school to prohibit student expression where that expression may cause other students to react violently.[171] Despite the expression not fitting into one of the categories outside of *Tinker*'s protection and the fact that the students engaged in no disruptive behavior,[172] the Ninth Circuit held that the school principal could prohibit students from wearing T-shirts with the image of the American flag on

[168] *Compare* Augustus v. Sch. Bd., 507 F.2d 152, 158-59 (5th Cir. 1975) (striking down school's ban on wearing clothing with the confederate flag), *with* Melton *ex rel.* Melton v. Young, 465 F.2d 1332, 1335 (6th Cir. 1972) (upholding school's ban on clothing bearing the confederate flag).

[169] Over the years, the *Tinker* test has been twisted from its original purpose and used by courts and schools to slowly and steadily erode students' on-campus First Amendment rights. *See, e.g.*, Dariano *ex rel.* M.D. v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 778 (9th Cir. 2014).

[170] *Dariano*, 767 F.3d 764.

[171] *Id.* at 776; *see also id.* at 766 (O'Scannlain, J., dissenting) ("[I]t is a foundational tenet of First Amendment law that the government cannot silence a speaker because of how an audience might react to the speech. It is this bedrock principle—known as the heckler's veto doctrine—that the panel overlooks, condoning the suppression of free speech by some students because *other students* might have reacted violently."); Hudson, *supra* note 30, at 1118 (discussing impacts of *Dariano*).

[172] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-78 (1986) (involving lewd and vulgar speech); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262-64 (1988) (involving speech bearing imprimatur of school); Morse v. Fredrick, 551 U.S. 393, 397 (2007) (involving speech promoting illegal drug use).

their clothing on Cinco de Mayo[173] because it may invoke a hostile response from another group of students.[174] This tactic, aptly called the "heckler's veto,"[175] allows a group of students to override another student's right to free expression by threatening to react poorly. In other words, it suggests that where "the negative reaction of listeners" may cause a disturbance at the school, others' reactions may be used against the speaker to override her First Amendment rights and effectively censor her.[176] The heckler's veto has been repeatedly showcased in today's climate where the louder someone yells, the more attention and deference is given to them, in spite of the rights of others or whether they are actually justified in their outrage.[177] The heckler's veto takes a student's constitutionally protected right to express themselves and subverts it to another's desire to not listen or to prevent others from listening. Rather than protect a student's constitutional right, the veto allows any student who disagrees with the speaker to undermine the speaker's right to speak, whether by threat of violence or simply by claiming offense. When discussing the pressing need for an answer on this issue, First Amendment scholar David Hudson remarked that "[s]tudents, administrators, and others concerned need to know with certainty whether a peaceful student speaker can be punished because of the unruly actions of others."[178] This example depicts the subjectivity of the *Tinker* test and its potential for abject political discrimination by both schools and courts.

Further, *Tinker* is an inappropriate remedy for virtual learning platforms because it gives too much power to school officials and too much deference to their authority. While this authority may be necessary or appropriate in some on-campus contexts, it becomes increasingly problematic in virtual environments

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[173] Cinco de Mayo is a Mexican holiday commemorating Mexico's defeat of France in the Franco-Mexican War. For more information, see Nik Wheeler, *Cinco de Mayo*, HISTORY.COM (Apr. 16, 2021), https://www.history.com/topics/holidays/cinco-de-mayo [https://perma.cc/CZ6K-AUKA]; and Akilah Davis, *'It Makes a Mockery out of Mexican Culture:' The True Meaning Behind Cinco de Mayo*, 11ABCNEWS (May 5, 2021), https://abc11.com/cinco-de-mayo-what-means-battle-of-puebla-mexican-holiday/10585513/ [https://perma.cc/QLN9-NKE2].

[174] *Dariano*, 767 F.3d at 778-79 (holding that principal was not remiss in telling students to change out of American flag apparel on Cinco de Mayo because of likelihood it would lead to violence); *see also* Hudson, *supra* note 30, at 1118.

[175] For a more thorough analysis of this open issue, see Hudson, *supra* note 30, at 1118-28.

[176] *Id.* at 1118.

[177] *See, e.g.*, *Conservative Commentator Ben Shapiro Barred from Talking on Campus*, GONZ. BULL. (Nov. 30, 2018), https://www.gonzagabulletin.com/news/conservative-commentator-ben-shapiro-barred-from-talking-on-campus/article_e76f7174-f4d9-11e8-bf1b-af66b3c87361.html [https://perma.cc/J729-XLZE] ("[T]he proposal [for Shapiro to speak on campus] was declined because of 'concerns relating to the safety and security' of the event, and 'concerns regarding the potential for inappropriate behavior surrounding the event that might violate our institution's standards of conduct.'" (quoting statement of Gonzaga University)).

[178] Hudson, *supra* note 30, at 1120.

where a student's home and privacy are placed in a vulnerable position by computer webcams. In practice, *Tinker* heavily defers to schools for on-campus student expression, giving schools the authority to determine dress codes and prohibit certain types of clothing deemed "disruptive."[179] *Tinker* has been interpreted to give schools the right to prohibit expression that they subjectively determine as "vulgar."[180] The subjective nature of the *Tinker* analysis lends itself to case-by-case determinations of First Amendment protection, leading to inconsistent applications by schools and judges. All of this poses potential issues when applied to students' expression in their own homes. Teachers may observe items in students' physical backgrounds that they find "disruptive" to their class. For example, if a student was drinking coffee out of a mug that had the slogan "Daenerys Targaryen is the rightful queen of Westeros," and the teacher, a staunch supporter of Jon Snow, found this offensive, under a broad application of *Tinker*, he could punish the student for their choice of mug.[181] This essentially gives the school the ability to decide what a student may have in their own bedroom or home. Further, this broad regulatory power may interfere with parents' rights to determine how they wish to decorate their own home and what is appropriate for their child in their homes.[182] Thus, to apply the *Tinker* line of cases to an even more private and protected area of student expression would erode the First Amendment guarantees originally promised in *Tinker* and further blur the lines between the schools' authority and the students' constitutionally protected rights.

The circuit courts' off-campus standards are also not an ideal fit for the virtual learning environment. Although tempting, the Third Circuit's hands-off approach to off-campus speech is inappropriate for this context.[183] Preventing

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[179] *See* Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 509 (5th Cir. 2009) (holding school district may prohibit message T-shirts because prohibition was "content-neutral").

[180] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that school district "acted entirely within its permissible authority in imposing sanctions . . . in response to . . . offensively lewd and indecent speech").

[181] Daenerys Targaryen and John Snow are characters in the hit book and television series *Game of Thrones*. *See* Kelsey McKinney, *Everything You Need to Know to Start Watching Game of Thrones Today*, VOX (Apr. 16, 2015, 10:23 AM), https://www.vox.com/2018/7/11/17562192/game-of-thrones-season-4-explainer.

[182] "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925). The Court recognized that the parental "right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments." Griswold v. Connecticut, 381 U.S. 479, 482 (1965). The Court, moreover, had previously observed that this right "derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting).

[183] *See* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020) (holding schools

teachers from instituting some necessary disciplinary measures to control and protect students in the virtual learning environment would interfere with teachers' and schools' necessary integrity and authority.

The *nexus test* poses the intermediary question of whether there is a "significant relation between the speech and the school."[184] The major issue with applying the nexus test to virtual and physical backgrounds in a virtual classroom setting is that it is quite possible to argue that *everything* in a student's background has a significant relation to the school because the items in the background are directly visible to the teacher and other students in the classroom. Thus, using this test would be akin to applying no test at all and giving schools free reign to censor any and all student speech on these platforms.

While the *reasonably foreseeable test* is seemingly the most suitable of the circuit court creations for this particular issue, it does not quite fit the virtual learning environment either because it too would allow schools too much authority in censoring and silencing student expression within students' own bedrooms and homes. The scope of the reasonably foreseeable test is overbroad in its application to off-campus expression as well as any potential application to virtual platforms.[185] Nearly any type of speech can fall into the net created by the test, whether that speech causes the foreseeable disturbance or merely causes other students to create a disturbance—reasonable or not. Judge Smith expressed these concerns in his concurrence in *J.S. v. Blue Mountain School District*[186]:

> Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student's classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if *Tinker* were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption.[187]

This test provides no real limits or guidance, allowing school administrators immense discretion to control student speech.[188] Administrators can "foresee" a

have no authority over off-campus student speech), *aff'd on other grounds*, 141 S. Ct. 2038 (2021); *Mahanoy*, 141 S. Ct. at 2045-46 (declining to adopt Third Circuit's reasoning and stating instead that inquiry of whether schools can invade students' off-campus First Amendment rights is circumstance-specific).

[184] Hazel, *supra* note 118, at 1087.

[185] For a thorough compilation of criticisms of the reasonably foreseeable test, see generally Maggie Geren, Comment, *Foreseeably Uncertain: The (In)ability of School Officials to Reasonably Foresee Substantial Disruption to the School Environment*, 73 ARK. L. REV. 141 (2020).

[186] 650 F.3d 915 (3d Cir. 2011).

[187] *Id.* at 939 (Smith, J., concurring) (arguing that applying *Tinker* to off-campus speech would have "ominous implications" for student expression).

[188] Geren, *supra* note 185, at 162 ("Absent any clear definition of 'reasonably foreseeable,' whether a student's speech satisfies the foreseeability threshold is a purely subjective inquiry.").

disruption within the school "even if the only basis for doing so is disapproval of the student's message,"[189] directly contradicting what *Tinker* expressly found to be improper use of a school's authority.[190] Scholars fear that, "the foreseeability threshold may lead to a chilling effect on constitutionally protected forms of speech."[191] And finally, because neither the reasonably foreseeable test nor the nexus test is separately appropriate in this circumstance, the Ninth Circuit's *combination test* is also inapplicable.

The Supreme Court's guidance in *Mahanoy* may be instructive in this area; however, it certainly does not have an airtight application. The Court did not provide a cut-and-dry test or standard for when schools may regulate off-campus speech. Rather it simply gave one "example" of when a school may *not* regulate off-campus speech.[192] There are many overlaps in *Mahanoy*'s analysis where a student falls both under and outside of a school's authority.

In the example of Ka'Mauri Harrison, Harrison did not fall under one of the loosely described scenarios in *Mahanoy* that would give a school authority over his expression. Harrison complied with class rules, participated in scheduled activities, and did not bully or threaten his peers.[193] Further, of the three features of off-campus speech the Court identified as providing a diminished interest in school regulation, Harrison satisfies the first—he was in his own home where his parents were exercising their authority to parent him.[194] For the second feature, Harrison's expression did occur during class, giving the school a slightly higher interest in regulation.[195] Although not directly analyzed by *Mahanoy*, as that decision was geared toward pure off-campus speech, the fact that the incident occurred during class hours *would* detract from Harrison's protections under the analysis. However, Harrison's BB gun may fall within the third feature—"unpopular expression"—given there are social and political controversies regarding guns. Despite potential controversy, schools, as "nurseries of democracy," have an interest in protecting diversity of ideas.[196] Thus, although *Mahanoy*'s analysis is probably the most fitting for this issue, it

[189] *Id.*

[190] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (holding that a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is insufficient to defeat student First Amendment rights).

[191] Geren, *supra* note 185, at 160.

[192] *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 ("We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference.").

[193] *See id.* at 2044 (stating that some off-campus behavior, including bullying, failure to follow rules, and failure to participate may call for school regulation).

[194] *See id.* at 2046 (noting doctrine of *in loco parentis* treats school administrators as parents only when parents are unable to protect, guide, and discipline children).

[195] *See id.* (observing "courts must be more skeptical of a school's effort to regulate off-campus speech").

[196] *Id.* (emphasizing United States' representative democracy "only works if we protect the 'marketplace of ideas'").

is not directed toward the virtual learning environment, making its application difficult. Further, the Court purposely made *Mahanoy*'s holding quite vague to give courts the flexibility to make case-by-case decisions, allowing them to define the contours and limits to the off-campus speech issue.[197]

Creating a new one-size-fits-all test to apply to students' First Amendment rights in the virtual learning environment will be an extremely difficult, though worthwhile, task. Online learning has only just begun—the shift toward virtual learning platforms in the wake of the COVID-19 pandemic opened up a world of new possibilities for schools and showed the country the possibilities of our existing technology.

IV. THE SOLUTION? PUTTING IT ALL TOGETHER

There are a seemingly endless number of factors for schools to consider and balance when dealing with the issue of student freedom of expression in virtual learning environments. On one hand, schools must have the authority to protect students and their learning environment. On the other, students' speech must be protected from overregulation, especially speech within students' homes. Following the shift toward virtual learning, many schools have attempted to provide their students and faculty with some guidance for navigating this uncharted territory. First, this Part examines a few policies schools across the nation have implemented in the immediate wake of the pandemic. Second, it discusses the greatest First Amendment concerns presented by virtual learning platforms—physical and virtual backgrounds—and outlines the different factors and considerations that must be taken into account when creating guidelines for schools and students. While there are certainly additional issues within virtual learning platforms,[198] students' physical and virtual backgrounds comprise the most problematic areas.[199] Ultimately, this Note concludes that there is no one-size-fits-all test that can be applied to both physical and virtual backgrounds. Rather, courts must give schools parameters and guidance on how much authority they wield in virtual platforms, while still respecting students' fundamental First Amendment rights.

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[197] *See id.*

[198] *See, e.g.*, Hank Berrien, *Report: Teacher Asks Class Which Person They Most Admire. 10-Year-Old Replies Donald J. Trump. Teacher Kicks Him Out of Chatroom*, DAILY WIRE (Oct. 5, 2020), https://www.dailywire.com/news/report-teacher-asks-class-which-person-they-most-admire-10-year-old-replies-donald-j-trump-teacher-kicks-him-out-of-chatroom [https://perma.cc/5LHZ-FMH9].

[199] *See, e.g.*, Joshua Dunn, *What Teachers Spy in Homes over Zoom Winds Up in Court*, EDUC. NEXT (Mar. 9, 2021), https://www.educationnext.org/common-sense-constitution-and-covid-19-teachers-students-zoom/ [https://perma.cc/95J9-X7RE] (detailing incidents involving students' physical backgrounds); Christian Toto, *Student Faces Suspension for Background Image of Trump on Zoom Virtual Classroom Call*, JUST THE NEWS (Aug. 17, 2020, 1:52 PM), https://justthenews.com/nation/free-speech/student-faces-suspension-background-image-trump-zoom-virtual-classroom-call [https://perma.cc/3D5U-S9MA].

A. *Existing School Policies for Virtual Learning Platforms*

Schools have taken a variety of approaches in the face of the virtual learning shift. Prior to the pandemic, few, if any, public schools had existing policies on how to handle First Amendment rights in virtual classrooms. As classes became virtual during the COVID-19 pandemic, many schools simply added a tagline to their current academic policy, stating that all rules and requirements that applied prior to virtual learning applied also to virtual learning platforms.[200] Ka'Mauri Harrison's school, for example, used this method—yielding unfortunate results.

However, some schools quickly pinpointed the significant issues and realized that their current in-school policies would not fit the virtual learning environment. Many schools attempted to get ahead of this issue, whether by announcing virtual codes of conduct for students or by issuing guidelines for how teachers should react to or discipline specific acts of student expression. For example, the Paso Robles Joint Unified School District in California ("Paso Robles") dealt with these issues directly early on in the pandemic.[201] Paso Robles released a guide to students and teachers regarding how to handle students' (and teachers') First Amendment rights in virtual learning platforms, identifying the various aspects of virtual learning that pose potential issues.[202] Specifically, Paso Robles set out guidelines for what students and teachers may have in their virtual and physical backgrounds during class.[203] Paso Robles further broke down what it believed to be "permissible" and "impermissible" expressions for students to share in their backgrounds. When describing the difference between what may be disruptive and thus "impermissible" expression, the district directed teachers to "use common sense," and not allow their personal feelings or prejudices to rule their behavior.[204] Permissible student expression included political signs, banners, flags, and religious symbols.[205] However, gang symbols, hate group emblems (for example, swastikas), drugs, alcohol, sexually suggestive materials, and profanity were all deemed impermissible.[206] Interestingly, when discussing the shift to online learning, Paso Robles took a strong stance against the Ninth Circuit's decision in *Dariano*, noting that "[t]he fact that a teacher or other students disagree with the speech does NOT mean that the speech is 'disruptive.' The school district has a fundamental duty to protect the proper exercise of free speech under the First Amendment and cannot permit a 'heckler's veto.'"[207]

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[200] DeBerry, *supra* note 3 ("Embedded in all of these documents was one document with one line that says all campus policies and procedures apply to virtual-learning students.").

[201] *School District Addresses First Amendment Rights in Regards to Video Classes*, *supra* note 31.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

Another example of a school's early attempt to confront potential issues arising from the shift comes out of Shelby County in Memphis, Tennessee, and seems to fall on the other side of the spectrum from Paso Robles.[208] The county's "Virtual Student Conduct Expectations" document, distributed to faculty and students, includes a section describing different discipline categories for students.[209] From Category A ("moderate-serious" conduct comprising of threatening bodily harm to students or faculty) to Category E ("minor" conduct including cutting class or violating the dress code in the virtual environment), the county provides recommendations for teachers and schools to address these behaviors in the virtual setting.[210] However, Shelby County noted that "[t]raditional school rules and behavioral expectations still apply," even in virtual environments, leaving questions as to what differences they actually recognize between traditional on-campus learning and virtual platform learning.[211]

These schools' policies highlight different interpretations of First Amendment guidance on student speech and showcase the need for clearer directions for schools to provide consistent outcomes for students. As more stories similar to Harrison's come to light, schools are beginning to understand the complications that arise when handling students' First Amendment rights within virtual learning platforms. Some schools have attempted to create makeshift policies and guides, but without clear guidance from the courts, schools, students, and teachers will continue to be in the dark about just how much authority schools may wield on these platforms.

B. *The Solution?*

While schools arguably must have some authority to limit student expression within virtual learning platforms, that authority must be balanced with students' constitutionally protected rights under the First Amendment, as well as the heightened protections afforded to expression exercised within the privacy of one's home. As the Court stated in *Mahanoy*, student expression and speech expressed within the home generally falls under the authority of that student's parents or legal guardians.[212] Parents' authority to determine what is acceptable

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[208] SHAWN PAGE & ANGELA HARGRAVE, SHELBY CNTY. SCHS., VIRTUAL STUDENT CONDUCT EXPECTATIONS 4-6 https://schools.scsk12.org/cms/lib/TN50000520/Centricity/Domain/122/Virtual%20Code%20of%20Conduct.pdf [https://perma.cc/JZ3K-5B74] (last visited Dec. 4, 2021).

[209] *Id.*

[210] *Id.*

[211] *Id.* at 9.

[212] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) ("The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.").

in their child's homelife should not be easily overridden by schools.[213] In speaking about the Due Process Clause, the Court has noted that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[214]

Another concern in this analysis involves the lack of control K-12 students have over the setting in which they attend their virtual classes. Typically, students in K-12 live in their parents' or legal guardians' homes and thus do not have input in their home's decoration or layout. Often students share rooms with siblings or attend class in another shared space such as a family kitchen or living room. Many parents have also transitioned to work-from-home models, thereby requiring students to frequently move to different areas of the home depending upon the time of day. Extraneous noise, questionable wall art, and disruptive pets and siblings all pose issues that may be outside of the student's control. To punish a student for factors they have no power to fix is certainly problematic.

Two key areas create the most controversy in the battle of school authority versus student First Amendment rights in the virtual learning environment: virtual backgrounds and physical backgrounds. Both present similar yet distinct problems with respect to school authority and students' and parents' rights.

1. Virtual Backgrounds

Two separate problems arise from the use of virtual backgrounds: (1) the school's ability to mandate student use of virtual backgrounds and (2) the voluntary use of virtual backgrounds by students. With rapid technological developments, virtual backgrounds and filters[215] have begun to permeate online life, often as a humorous way to express oneself or sometimes as an accidental technological mishap.[216] However, with students increasingly using this technology, some teachers have decided to regulate which virtual backgrounds are appropriate for students to use in classes and which are not.

An easy answer to the background debate is for schools to mandate that students use a specific, preapproved virtual background to eliminate issues with

[213] *See id.* at 2053 ("In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children. . . . Parents do not implicitly relinquish all that authority when they send their children to a public school."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

[214] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

[215] Jen Hill, *When You Don't Want to Be a Cat: How to Use (and Remove) Meeting Filters*, ZOOM BLOG (Feb. 10, 2021), https://blog.zoom.us/how-to-use-remove-meeting-filters/ [https://perma.cc/J7MN-JMU8].

[216] *See, e.g.*, David K. Li, *'I'm Not a Cat': Video Shows Lawyer Can't Turn Off Kitten Filter During Zoom Court Appearance*, NBC NEWS (Feb. 10, 2021, 8:51 AM), https://www.nbcnews.com/news/us-news/i-m-not-cat-video-shows-lawyer-can-t-turn-n1257168 [https://perma.cc/PR9J-9Y8M].

either a student's chosen virtual background or any questionable items in their physical background. However, there are a few problems with this seemingly simple solution. One is the issue of equity. Many students are working on computers that do not have the technological capability for virtual backgrounds. Virtual backgrounds can be a blessing, allowing students to shield their private circumstances from other students.[217] But for some, mandating virtual backgrounds may cause more harm than good by revealing which students have the better, more high-tech computers and which do not. Virtual backgrounds can also cause further distractions in comparison to normal physical backgrounds.[218] Most students do not have a green screen set up to make virtual backgrounds as effective as they are intended to be, which can lead to distracting glitches and pixilation.

Imagine this scenario: During class, a high school student decides to activate a virtual background. Because it is nearing election time, he chooses an image of the political candidate who he is supporting as his virtual background.[219] The teacher disagrees with the student politically and finds the image offensive and disturbing. What can the teacher do? Can she request the student remove the virtual background? Can she discipline him if he chooses not to, whether by removing him from the virtual class or by following up with the principal?

The answer should be yes to both questions—unlike physical backgrounds,[220] school authority over virtual backgrounds must be broader. Because the virtual background does not exist outside of the virtual class, it is not a part of the student's home or private life as physical backgrounds are. Thus, schools should have the authority to dictate what virtual backgrounds are appropriate for the classroom setting. The virtual background is "directed" at the school—it is not a part of the student's normal life or home. Rather, the background exists only in the confines of the virtual classroom. As such, it is equivalent to something the student "brought" with them to the campus. So long as the school is consistently applying their guidelines for what is a permissible virtual background,[221] schools should retain the ability to dictate permissible virtual backgrounds and to discipline students for their failure to comply.

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[217] Zita Fontaine, *Zoom's Virtual Backgrounds Help Fight Inequality*, MEDIUM (Apr. 12, 2020), https://medium.com/age-of-awareness/zooms-virtual-backgrounds-help-fight-inequality-624da895634e (detailing benefits of virtual background capabilities and arguing that virtual backgrounds helps "to protect privacy, to hide economic differences, [and] to ensure equality").

[218] Paula Rizzo, *Ditch the Virtual Backgrounds*, THRIVE GLOB. (Aug. 12, 2020), https://thriveglobal.com/stories/ditch-the-virtual-backgrounds/ [https://perma.cc/WLZ9-4ZME] (discussing downsides of using virtual backgrounds).

[219] For the real-life story that inspired this scenario, see Toto, *supra* note 199.

[220] *See* discussion *infra* Section III.B.2 (discussing physical backgrounds).

[221] So long as the school is banning virtual backgrounds depicting *any* political figure, there should be no question of the school's authority to dictate what is considered a proper virtual background. However, the key in this case is the neutral, nonpartisan enforcement of

Some schools have chosen to ban the use of virtual backgrounds altogether, citing technological difficulties and other equity-related problems.[222] However, either banning or mandating virtual backgrounds should not be the ultimate solution. If students wish to use virtual backgrounds, the school should provide them the option to do so and give guidance on appropriate backgrounds or a set of preapproved backgrounds. Students may have a variety of reasons for wishing to use or not use virtual backgrounds and mandating one option may result in unnecessary harm to students.[223] For instance, banning virtual backgrounds may result in "outing" a student who lives in less than ideal circumstances or who might be embarrassed to show their home to the entire class. The same is true of mandating virtual backgrounds for students who do not have the necessary technology to comply—being the only student who cannot use a virtual background may make the student feel isolated or inferior. Ultimately, the decision to use a virtual background should be left to the student and the authority to approve the background left to the school. This accounts both for students who feel the need to use them for privacy reasons[224] and others who

the rule. The Court has long considered political speech to be one of the most important forms of speech protected by the First Amendment. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966). To bar speech in favor of one political figure or viewpoint but not another must be prohibited. In *Tinker*, the Court found highly significant the fact that the school had "singled out for prohibition" the political speech of the students wearing the black armbands in protest of the Vietnam War, while allowing other political speech such as the wearing of the Iron Cross or even swastikas. Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 511 (1969) ("Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."). Even before *Tinker*, the Court found political neutrality in education a necessity: "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). Thus, the importance of political neutrality in enforcing rules surrounding virtual background images cannot be overstated.

[222] Caitlynn Peetz, *No Virtual Backgrounds Allowed for MCPS Zoom Classes*, BETHESDA BEAT (Aug. 23, 2020, 10:01 PM), https://bethesdamagazine.com/bethesda-beat/schools/no-virtual-backgrounds-allowed-for-mcps-zoom-classes/ [https://perma.cc/GVF9-NDPY] ("'We would like to, but the technology doesn't allow it. It's not a conscious effort to not have a background for students, it's that we can't,' [Technology Officer] Cevenini said, adding that he understands why some families might be self conscious about their home environment.").

[223] *Tip 22: Address Webcam Background Equity Issues*, PARENTSQUARE https://blog.parentsquare.com/covid-19-tips/tip-22-address-equity-issues-with-webcam-backgrounds [https://perma.cc/3CC8-434G] (last visited Dec. 4, 2021) (detailing how visibility into students' bedrooms heightens socioeconomic differences by showcasing who "does and doesn't have the coolest toys and gadgets, how big their room is, [and] if their home is 'nice'").

[224] Peetz, *supra* note 222 ("[S]ome students feel uncomfortable sharing their home situation with their peers and video streams could unnecessarily expose inequities.").

may not have the technological capabilities to use them.[225] Whatever students decide, schools should retain the ability to set rules and guidelines for which virtual background are allowed—so long as they apply their guidelines in a viewpoint neutral fashion.

2. Physical Backgrounds

The second aspect of the virtual learning environment that creates the most controversy between schools and students is the students' physical background. This particular area contains the most sensitive issues—implicating more than just students' First Amendment rights; a school's attempt to monitor a student's physical background runs headlong into student privacy and parental rights.

Consider the scenario in which a high school student is living with her family while attending online classes. Because she shares a room with her younger sibling, she must attend her virtual classes from her family's kitchen table. The computer she is using has no virtual background capability. Her parents are highly devout and decorate their house accordingly. Religious symbols such as crosses, images of the Virgin Mary, and Bible quotes adorn the walls of the home and can be seen in her background. The student's teacher finds these symbols offensive or is concerned another student would. Can the school require the student to take down her parents' decorations? Or require her to move to a different part of her home without religious symbols? Can the school punish the student if she is not able to comply?

Another example to consider: A student chooses to decorate his bedroom wall with a flag supporting a particular political candidate.[226] This flag can be seen in his background. The teacher orders him to remove the flag, deeming it offensive, but the student refuses to comply. The teacher punishes the student by removing him from the virtual class. Has the teacher acted within her authority, or has she violated the student's First Amendment rights?

Although these two examples pose slightly different scenarios—one in which the student has no control over her parents allegedly offensive décor and one in which the student has voluntarily chosen to display the allegedly offensive flag on his bedroom wall—they both present the same question: How much control may a school possess over the physical items in a students' home? A student's physical background often represents their most private and protected space, one that is typically not subject to school authority and lies at the heart of the highest constitutional protections. While virtual backgrounds do not exist outside of the virtual environment and can arguably fall within school authority, the items in a

[225] *See Zoom Virtual Background System Requirements*, ZOOM https://support.zoom.us/hc/en-us/articles/360043484511-System-requirements-for-Virtual-Background [https://perma.cc/7HTE-M7R2] (last visited Dec. 4, 2021).

[226] *See* Michael Ruiz, *New Jersey High Schooler Says Teacher Ordered Him to Take Down Trump Banner at Home Before Virtual Class*, FOX NEWS (Oct. 14, 2020), https://www.foxnews.com/us/trump-banner-new-jersey-high-schooler-teacher [https://perma.cc/S24R-YWU3].

student's physical background are part of the student's off-campus, non-school-related life. Giving schools the authority to dictate to students, and consequentially to their families, what they are allowed to own or display in their private residences is a frightening prospect that runs counter to established constitutional protections.

Of course, a simple solution some schools have implemented is to require students to move to areas of their bedroom or home that are free of "offensive" or questionable décor. But that solution still poses the issue of the school having the authority to tell a student where to sit in his or her own home and what they may have showing in their background. Further, it still does not address the problem posed in the first scenario—what are students who have no control over their home décor or where they can sit supposed to do?

Certainly, there must be limitations to students' freedom to display whatever they like in their physical backgrounds. A flag supporting a particular political candidate or sports team is a far cry from a flag carrying the image of a swastika. The Paso Robles policies discussed earlier are a sensible and instructive guide for schools.[227] Paso Robles chose to parallel the Court's First Amendment jurisprudence in their guidance on student backgrounds.

Although potentially controversial, Paso Robles allows students to display flags, banners, political signs, and religious symbols regardless of whether the teacher or another student in the class finds that particular item offensive—paralleling the Court's emphasis on the importance of protecting political speech.[228] The décor that Paso Robles banned includes gang symbols, drugs and alcohol, sexually suggestive material, and profanity.[229] This list clearly mirrors the categories the Court has found to fall outside of First Amendment protections for on-campus expression.[230]

However, a distinction must be made in the language used by Paso Robles. Paso Robles refers to specific categories of physical background items as either "permitted" or "not permitted."[231] This dichotomy suggests that the schools have the authority to control all of the items—both permitted and not—but have *chosen* to allow students the freedom to display some things they find less offensive or less dangerous. Schools have no authority to control items considered permitted or to punish students for displaying them. It is not the school's label of "permitted" that allows students to retain those items in their

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[227] *School District Addresses First Amendment Rights in Regards to Video Classes*, *supra* note 31.

[228] *Id.*; *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[229] *School District Addresses First Amendment Rights in Regards to Video Classes*, *supra* note 31. The Paso Robles guidance includes the swastika within its definition of gang symbols. *Id.*

[230] *See* Morse v. Frederick, 551 U.S. 393, 397 (2007) (finding schools may restrict speech that promotes drug use); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (finding schools may restrict obscene and lewd speech).

[231] *School District Addresses First Amendment Rights in Regards to Video Classes*, *supra* note 31.

background; the permission to have those items existed before schools recognized it—stemming from the First Amendment itself—and it cannot be taken away from the students if a school decides later to change its policy.

First and foremost, all items in a student's physical background should be presumed to be protected by the First Amendment and thus fall outside of the authority of the school. From there, a small number of exceptions may be carved out, representing schools' authority over the presence of these specific items. Following along with Paso Robles's categories with some minor adjustments, these categories include pornographic images and materials, recognized gang and hate symbols, and drug and alcohol paraphernalia. Given their graphic and highly disruptive nature, pornographic images and materials are an obvious choice to include within school authority. Further, gang and hate symbols are also typically representative of illegal activity and are reasonably and traditionally held to be a representation of extreme violence or hate toward a specific group of people. Obvious examples of gang and hate symbols include the swastika[232] and well-known violent gang signs, such as those belonging to the 18th Street Gang, Aryan Brotherhood, Bloods, Crips, and MS-13. Lastly, alcohol and drug paraphernalia must be included to provide schools some authority over prohibiting in-class alcohol or drug consumption and overly suggestive drug or alcohol paraphernalia in student backgrounds. The rationale behind giving schools this authority largely lies within the illegal nature of alcohol or drug consumption for K-12 students.

Of course, none of these categories are absolute. Rather, there must be some common sense judgment on the part of teachers and school administrators in determining whether any one student violates a certain category. For example, there is certainly a difference between a student displaying beer bottles and drug paraphernalia on his desk and a student whose background shows their parents' wine rack. While this list is not necessarily exhaustive, it does represent the most disruptive items that may be visible in a student's background and those from which the school has the highest interest in protecting students. It is necessarily narrower than the categories that *Tinker*'s progeny encompass, so as to account for the differences in school authority over on-campus student expression and school authority over off-campus, in-class expression.

CONCLUSION

The issue of student First Amendment rights in virtual learning platforms presents a multitude of factors and considerations and will continue to be an area of difficulty moving forward. While the majority of lockdowns and school

[232] For the meaning and history of the swastika, see U.S. Holocaust Mem'l Museum, *The History of the Swastika*, HOLOCAUST ENCYC. (Aug. 7, 2017), https://encyclopedia.ushmm.org/content/en/article/history-of-the-swastika [https://perma.cc/3U8D-QDZ2] (noting that historically, the swastika "was in use in many different cultures for at least 5,000 years before Adolf Hitler made it the centerpiece of the Nazi flag," but in modern times, "it became associated with the idea of a racially 'pure' state").

closures may be coming to an end, many suspect that remote learning will stick around in at least some form.[233] School districts across the country have noted the benefits that come with offering a virtual learning option, including flexibility for both students and teachers and the ability to better meet students' needs.[234] There is no denying the negative impacts that total and mandatory virtual learning has had on students. However, implementing some combination of virtual learning practices moving forward may become the standard procedure for many schools. One school district superintendent noted that

> [p]ublic education will never be the same post–COVID-19. The pandemic has forced public education to adopt new practices on the fly, and many will become lasting changes to the way we do business. Flexible scheduling and virtual instruction are just two practices that will become a part of how we educate children.[235]

The prospect of virtual learning platforms in K-12 schools across the county, even after the pandemic ends, makes the need for clear guidance from the Court even more crucial. Petitioners in *Mahanoy*[236] even preemptively acknowledged this novel First Amendment issue in their brief, noting that "the question presented [of school authority over student off-campus speech] recurs constantly and has become even more urgent as COVID-19 has forced schools to operate online."[237] However, as explained throughout this Note, the issue of school authority in virtual learning platforms is separate and distinct from that of school authority over students' entirely off-campus speech. While these issues are certainly interconnected, the Court's ultimate solution in *Mahanoy* is not an ideal fit for an application to speech in virtual learning platforms.

The standard set forth by *Tinker* and its progeny is too subjective and prone to abuse and is thus similarly inappropriate for the virtual learning environment. Further, none of the three circuit court tests for off-campus speech are a perfect fit for this issue. And while the Third Circuit's hands-off approach to off-campus speech is appealing, schools do need some authority and control in the virtual environment to ensure that the environment is conducive to learning.[238] Furthermore, none of these tests account for the unique challenges that students

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[233] Denisa R. Superville, *Remote Learning Will Keep a Strong Foothold Even After the Pandemic, Survey Finds*, EDUC. WEEK (Dec. 15, 2020), https://www.edweek.org/leadership/remote-learning-will-keep-a-strong-foothold-even-after-the-pandemic-survey-finds/2020/12 [https://perma.cc/G9SE-PBYV] ("When district leaders noted the staying power of remote learning beyond the pandemic, they cited increased flexibility for students, parent or student demand, and addressing a variety of students' needs among the reasons.").

[234] *Id.*

[235] *Id.*

[236] *See supra* Section I.B.1.

[237] Reply Brief for Petitioner, *supra* note 91, at 2.

[238] For instance, the Third Circuit's novel hands-off approach to the virtual learning environment would ignore the distinction between entirely off-campus conduct unrelated to school and classroom activities or conduct in a virtual classroom.

learning in virtual platforms face, most notably the issues with physical and virtual backgrounds.

There is no one-size-fits-all test that may be applied for all situations involving students in virtual learning platforms. Speech in virtual platforms poses complex challenges to the already murky waters of student freedom of speech. Because this issue is an ever-growing challenge for many schools in this new era of virtual learning, Supreme Court guidance is becoming increasingly necessary.

Ultimately, whichever test or standard is created to deal with this issue must be narrower than the circuit court tests. Nor can it be as susceptible to subjective discrimination as *Tinker* has become. Schools must account for the nature of virtual learning environments and how school authority must be balanced with not only students' First Amendment rights but also students' privacy, students' autonomy, and the authority of students' parents to raise them.