

**The “Nexus” Test vs. The “Reasonably Foreseeable” Test:
How Off-Campus Student Speech Can Cause On-Campus
Consequences**

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Introduction

“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹

The Supreme Court of the United States’ groundbreaking decision in *Tinker v. Des Moines Independent Community School Dist.* identified the honor and foundation that the First Amendment has, even in the seemingly restrictive environment of the school.² The term “student speech” is a loaded concept that shows the interplay between American students and their First Amendment rights. This topic represents the developing relationship of the competing interests harbored by schools and by the students, who are subject to those schools’ policies.

Several issues have arisen within the realm of student speech and public schools’ ability to reprimand certain speech including whether a student may be disciplined at school for speech that occurred off-campus. Other issues involve the implications of speech that occurred off-campus on social media but effects the school and the appropriate standard for determining whether a student may be disciplined for off-campus speech that occurred on social media that impacts the school.

Imagine a high school student, James, spoke out against a teacher while James was in class. Assume James used a colorful variety of profanity and was suspended for violating the

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

² *Id.*

school's policies against the use of profanity on school grounds. This would seem like an appropriate and, more importantly, constitutionally sound response by the school. However, imagine James was not in class; instead, he was at a grocery store when his outburst occurred. Is it still appropriate for the school to subsequently discipline James for his speech that occurred off-campus? What if James's outburst was posted on Facebook instead of delivered in person? These hypotheticals raise the question as to where the line must be drawn in order to respect students' First Amendment rights but also to enable schools to properly maintain a conducive learning environment. This article will dive into these questions and attempt to organize and define the scope of school authority and how student speech on social media implicates the First Amendment.

Currently, there is a circuit split as to what the appropriate test is for determining the reach of school authority regarding student's speech on social media that impacts the school environment.³ The crux of this circuit split is the scope of a public school district's authority to discipline student speech that occurs on social media and off school grounds. In the digital age, the internet functions as an omnipresent platform which allows student speech on social media to be heard more widely than ever before. The Fourth Circuit encountered this issue and found that where the nexus of the online, off-campus speech to the school's pedagogical concerns is "sufficiently strong," then the action taken by the school district officials is justified.⁴

Alternatively, the Second Circuit has held that a public school district is justified in disciplining

³ Compare *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011) (holding that the "nexus" of the student's speech to the school's "pedagogical interests" was strong enough to justify the school's disciplinary actions and no First Amendment violation occurred), with *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754 (8th Cir. 2011) (holding that because the student's speech at issue was "reasonably foreseeable" to reach the attention of school authorities and "create a risk of substantial disruption" at school, the school's disciplinary actions were justified and no First Amendment violation occurred.).

⁴ *Kowalski*, 652 F.3d at 573.

off-campus, online student speech if the speech was “reasonably foreseeable” to come to the attention of school authorities and “create a risk of substantial disruption within the school environment.”⁵ Other circuits have encountered this issue but have declined to join the split on either side.⁶

The proper test for determining whether a school district may discipline a student’s off-campus speech that occurred on social media without violating the First Amendment is a combination of the “nexus test” and the “reasonably foreseeable test.” The combined approach asks how closely the offensive social media speech is tied to the school and whether it is reasonably foreseeable that the speech will reach the school. The test proposed here is not a balancing test, but rather takes the form of a “totality-of-the-circumstances.”⁷

This assertion requires a walkthrough of student speech and how the law has developed thus far. A historical recap of the law regarding student speech, both on-campus and off-campus, is necessary to grasp the direction the law ought to be headed. This article will also examine not only the black letter law, but also the policy arguments that can and have been made in support of the different tests for disciplining online, off-campus student speech. This will require a discussion of the current circuit split, the law as it stands in those circuits, and the arguments being made for or against the differing approaches. At the conclusion of this article, the thesis will be developed and asserted as the appropriate direction the split ought to be headed.

Background

⁵ *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2nd Cir. 2007).

⁶ *See C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142 (9th Cir. 2016).

⁷ *Cf. United States v. Arvizu*, 534 U.S. 266, 273 (2002) (providing an example of the Supreme Court applying a “totality of the circumstances” analysis to a criminal case; this analysis draws on available facts including subjective and objective facts).

A. Historical Overview: The First Amendment

The rationale behind the First Amendment is that it protects Americans' freedom of religion, speech, press, and the right to peaceful assembly.⁸ However, despite the sovereign authority of the First Amendment, the law has developed to accommodate circumstances where the absolute exercise of these rights is not conducive to promoting legitimate pedagogical interests in the classroom setting.⁹ In tackling these instances, whether certain speech activities may be restricted often turns on where the speech occurred. In other words, the government may regulate private speech in locations that are understood as "traditional public fora."¹⁰ The traditional public forum are those places "which 'have immemorially been held in trust for the use of the public, and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"¹¹ In identifying certain locales that warrant unrestricted First Amendment rights, the Supreme Court clarified the standard to apply when determining whether certain speech can be restricted in the traditional or designated public forum.¹² In traditional public fora, the government may impose "reasonable time, place, and manner restrictions" on speech activity.¹³ Restrictions based on the content of the speech, however, must satisfy strict scrutiny in order to withstand judicial review.¹⁴ In other words, content-based restrictions must be "narrowly tailored to serve a compelling government interest"

⁸ U.S. Const. Amend. I.

⁹ *See generally*, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) ("The First Amendment does not prevent the school officials from determining that to permit vulgar and lewd speech...would undermine the school's basic educational mission.").

¹⁰ *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985).

¹¹ *Perry Ed. Assn. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

¹² *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

¹³ *Id.*

¹⁴ *Id.*

in order to preserve the First Amendment guarantees.¹⁵ Here, the Supreme Court began to isolate the guarantees of the First Amendment into zones that are worthy of public fora recognition.

While the traditional public forum provided a place for free speech, subject only to limitations that could pass the muster of strict scrutiny, other forums merited recognition. The Supreme Court recognized that nontraditional public fora could merit recognition as “designated public fora” if such “government property that has not been traditionally regarded as a public forum is intentionally opened up for that purpose.”¹⁶ In recognizing these types of fora, the Court acknowledged the growing need for these status designations as First Amendment liberties were clashing against public policy concerns.¹⁷ However, the standard of strict scrutiny is applicable to both traditional and designated public forums.¹⁸ This standard preserves the integrity of the First Amendment because it holds that content-based restrictions on speech will be permissible only if such restrictions are specifically tailored to serve substantial governmental interests.¹⁹ A third forum, the limited public forum, is a forum that is “limited to use by certain groups or dedicated solely to the discussion of certain subjects.”²⁰ The government may impose restrictions on speech in a limited public forum so long as those restrictions are “reasonable and viewpoint-neutral.”²¹

In the context of public schools, school facilities can be deemed as a public forum if the school has been opened for “indiscriminate use by the general public, or by some segment of the

¹⁵ *Id.*

¹⁶ *Summum*, 555 U.S. at 469.

¹⁷ *See generally, id.*; *Cornelius*, 473 U.S. at 802 (recognizing that government agencies can regulate private speech only in a traditional public forum).

¹⁸ *Summum*, 555 U.S. at 470.

¹⁹ *See generally id.* at 469.

²⁰ *Perry Educ. Ass’n.*, 460 U.S. at 46.

²¹ *Summum*, 555 U.S. at 470.

public, such as student organizations.”²² However, this distinction in turn means that a school whose facilities have not been made open to the public is not considered a public forum and the school officials may introduce “reasonable restrictions on the speech of students, teachers, and other members of the school community.”²³ In application, this classification grants school officials the latitude to establish school policies that the officials find best promote the educational process.²⁴ In addition, the reasonableness inquiry into school restrictions provides room for the interests of both the school and the student to commingle in order to yield a conducive learning environment.²⁵ However, there are instances where school implemented restrictions go beyond the reasonableness inquiry and cross into the realm of constitutional violations.²⁶ The next section confronts these instances and dives into the Supreme Court’s approach to student speech issues and how school policies infringe or preserve the First Amendment rights of students.

B. Student Speech and the Supreme Court of the United States

The idea that students and teachers do not shed their constitutional rights at the schoolhouse gate is founded in the policy that the suppression of student expression will result in a restricted, uninviting learning environment.²⁷ The issue of student speech and the scope of a

²² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

²³ *Id.*

²⁴ *Id.* at 271 (recognizing that educators, in the context of a student-written school newspaper, may exercise some control over certain types of student speech in order to “assure that [students] learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school”).

²⁵ *Id.* at 262.

²⁶ *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *but cf. Kuhlmeier*, 484 U.S. 260 (finding no First Amendment violation where the school removed certain student-written articles from the school’s newspaper because the speech was “inconsistent with [the school’s] basic educational mission, even though the government could not censor similar speech outside the school”).

²⁷ *Tinker*, 393 U.S. at 507.

public school districts' authority to discipline students for such speech was presented before the Supreme Court of the United States in *Tinker v. Des Moines Independent Community School District*.²⁸ Justice Fortas, writing for the Court, explained that student expression cannot be suppressed unless the school, through its officials, determines that the expression will “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”²⁹ Here, the Court focused on the *impact* the student expression had on the school’s operation; in order to justify discipline for such student expression, there must be some identifiable interference with the school’s work or there must be conflict with the rights of other students.³⁰

In identifying public school students’ First Amendment rights, the Supreme Court also recognized the importance of legitimate pedagogical concerns that warrant infringement upon those rights.³¹ The standard professed by the Supreme Court in *Tinker*—that speech must “materially and substantially”³²interfere with the school’s operation—would function as a baseline standard that other circuits would use in assessing the magnitude of student expression.³³ The Supreme Court again faced this issue in 1986 when a student gave a sexually

²⁸ *Id.* at 504 (in that case, two students were suspended for wearing black armbands in protest of the Vietnam War. The school’s administration got wind of the plan to wear the armbands and quickly moved to bar such armbands in the school’s policies. The case was brought by the parents of the suspended students seeking an injunction to keep the school from disciplining the students, however the Supreme Court took the case from a student speech/First Amendment approach. The Court, after a discussion of First Amendment rights in the school context, found that the suspensions functioned as an unconstitutional infringement upon the students’ rights).

²⁹ *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

³⁰ *Id.* at 508 (emphasis added).

³¹ See generally *Tinker*, 393 U.S. 503; *Fraser*, 478 U.S. 675; *Kuhlmeier*, 484 U.S. 260; *Morse v. Frederick*, 551 U.S. 393 (2007).

³² *Tinker*, 393 U.S. at 508-9 (explaining how the student’s conduct in wearing political armbands did not rise to the level of substantial disruption because that expression did not interfere “with the schools’ work or...colli[ded] with the rights of other students to be secure and to be let alone.”).

³³ See *Wisniewski*, 494 F.3d at 34; *Boim v. Fulton Cty. Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007); *Kowalski*, 652 F.3d at 565.

explicit speech at a school-sponsored assembly as part of an educational program in self-government.³⁴ In considering the standard established in *Tinker*, the Court was careful to explain the competing interests at play in the school setting; Chief Justice Burger explained the necessity for schools to be able to regulate student conduct in order to fulfill its role as a catalyst for developing America's youth.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.³⁵

The *Fraser* opinion acknowledged that the *Tinker* “substantial disruption” standard was not the absolute method for analyzing these lines of cases.³⁶ The Court clarified that “the constitutional rights of students in public school[s] are not automatically coextensive with the rights of adults in other settings.”³⁷ As evident from *Tinker* and *Fraser*, the Supreme Court was careful to abridge the rights of students and condones such a curtailment only when necessary to prevent student conduct that significantly interfered with a school's educational environment.³⁸ In acknowledging this growing area of student speech and the school setting, the Supreme Court statement—that public school students' First Amendment rights are not coextensive with the rights of adults—set the stage for further limiting *Tinker*'s applicability.³⁹

³⁴ *Fraser*, 478 U.S. at 677-78.

³⁵ *Id.* at 685 (the Court held that the First Amendment does not function to prohibit school officials from finding that to allow “a vulgar and lewd speech” would “undermine the school's basic educational mission”).

³⁶ *Id.* at 683-85.

³⁷ *Id.* at 682.

³⁸ *E.g.*, *Tinker*, 393 U.S. at 503; *Fraser*, 478 U.S. at 675.

³⁹ *Fraser*, 478 U.S. at 682.

As First Amendment rights for students in the school setting continued to clash with school policies, the next landmark decision for student speech came two years after the decision in *Fraser*.⁴⁰ The Court found that the school's actions were justified in light of privacy concerns of the students who were the subject of the articles.⁴¹ Furthermore, the Court identified that the *Tinker* standard applied to schools' ability to silence student expression that occurs on school grounds; whereas here, the question is whether the First Amendment calls for a school to affirmatively sponsor particular student speech.⁴² The Supreme Court held that schools do not violate the First Amendment by "exercising editorial control over the style and content" of student expression in school-sponsored activities as long as the school's actions are "reasonably related to legitimate pedagogical concerns."⁴³ In its holding, the Supreme Court affirmed the premise that is a reoccurring theme in these student speech cases: "The education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."⁴⁴ However, Justice Brennan in his dissent found that the *Tinker* standard of disciplining student conduct that "materially and substantially interferes" with school's order was not followed here.⁴⁵ Rather, Justice Brennan argues that the Hazelwood students' First Amendment rights were violated because the school engaged in censorship of student expression "that neither disrupt[ed] classwork nor invade[d] the rights of others."⁴⁶

⁴⁰ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262-65 (1988) (Students brought suit against the school district alleging First Amendment violations rising out of the deletion of two pages of articles from the student newspaper. The articles in question discussed three students' experience with pregnancy and the other discussed the impact of divorce on students); *See generally Id.*

⁴¹ *Id.* at 273-74.

⁴² *Id.* at 270-73.

⁴³ *Id.* at 270-73.

⁴⁴ *Id.* at 273.

⁴⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 277-89 (Brennan, J., dissenting).

⁴⁶ *Id.* at 278 (Brennan, J., dissenting).

The final case that encountered the class of students' First Amendment rights and legitimate school interests came before the Court in 2007.⁴⁷ *Morse* is distinguishable from the then-existing legal precedent because this case dealt with the issue of “whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when the speech is reasonably viewed as promoting illegal drug use.”⁴⁸ A key fact in this case that further distinguishes it from the other First Amendment student rights cases is the fact that the student speech/expression at issue did not occur on school grounds.⁴⁹ However, the Court dismissed this argument because, while not physically on school grounds, the student speech occurred around other students, during school hours, and at a school-sponsored event. Therefore, it was considered at school.⁵⁰

These four Supreme Court cases were significant because of the complicated nature of student speech and how that speech has the potential to clash against policy arguments for the restriction of such speech.⁵¹ The standards articulated by the Court in these cases provided a foundation for the circuit courts to apply and develop as needed in each circuit.⁵² This baseline standard, however, applied most comfortably to cases involving on-campus student speech that

⁴⁷ *Morse v. Frederick*, 551 U.S. 393 (2007) (“The ‘special characteristics of the school environment,’ and the governmental interest in stopping student drug-abuse...allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”); *Id.* at 408. (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

⁴⁸ *Id.* at 403.

⁴⁹ *Id.* at 399 (Frederick argued that this was not a school speech case because it occurred off of school grounds, however the Supreme Court rejected this argument because the expression was viewed “in the midst of his fellow students, during school hours, [and] at a school-sanctioned activity”).

⁵⁰ *Id.* at 400.

⁵¹ See *Morse*, 551 U.S. at 393; *Kuhlmeier*, 484 U.S. at 260; *Fraser*, 478 U.S. at 675; *Tinker*, 393 U.S. at 503.

⁵² See Mickey L. Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 *Cath. U.L. Rev.* 895, 906-07 (2012) (recognizing that the *Tinker* standard professed by the Supreme Court functioned as a baseline standard that left lower courts interpreting *Tinker* and applying their own rules).

“materially and substantially” interfered with school administration.⁵³ This foundation proved insufficient to cover issues involving student speech that occurred off school grounds on the internet.⁵⁴ Even judges have commented on how the Supreme Court’s precedent is inadequate to guide lower courts’ analysis on off-campus, online student speech cases.⁵⁵ While this precedent demonstrates a pattern of deferring to a school’s administration to regulate student speech, a circuit split nevertheless developed attempting to produce a workable test to determine when off-campus student speech could be disciplinable by the school authorities.⁵⁶ A special difficulty arises in student speech that occurs on the internet and social media. The next section of this article explains the lower courts’ attempts to utilize controlling precedent when encountering these issues, the circuit split as it exists today, and will culminate in an explanation of the appropriate test for resolving this inquiry.

The Circuit Split

⁵³ *Tinker*, 393 U.S. at 513; See Justin P. Markey, *Enough Tinkering with Students’ Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 Cap. U.L. Rev. 129, 139 (2007) (recognizing that despite the lack of clarity from the Supreme Court on public schools’ authority to discipline off-campus online student speech, many lower courts use the *Tinker* standard of “material and substantial disruption” when analyzing whether the school action is constitutionally permissible.).

⁵⁴ See Jett, *supra* note 52, at 914-15 (noting that the *Tinker*, *Fraser*, and other Supreme Court precedent were interpreted in different ways amongst the lower courts which produced inconsistent rules amongst the circuits); Rory A. Weeks, *The First Amendment, Public School Students, and the Need for Clear Limits on School Official’s Authority Over Off-Campus Student Speech*, 46 Ga. L. Rev. 1157, 1163-64 (2012) (indicating that “both lower courts and legal commentators are unsure about how the [Supreme Court’s] prior student-speech decisions apply to off-campus student speech”).

⁵⁵ Recent Case, *First Amendment – Student Speech – Third Circuit Applies Tinker to Off-Campus Student Speech*. – J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915 (3rd Cir. 2011) (en banc), 125 HARV. L. REV. 1064, 1067 (citing *J.S.*, 650 F.3d at 933) (“[J]udge Chagares reasoned, to apply *Fraser* to off-campus speech would give school officials the power to punish any student speech relating to school, in any place and at any time, as long as they deemed that speech offensive.”).

⁵⁶ *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, 918; See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (clarifying that circuits still differ on the appropriate test to administer in these situations even while the Supreme Court cases following *Tinker* reflect a general trend toward deference to a school’s authority to regulate student speech); See also Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1068 (9th Cir. 2013) (“A number of our sister circuits have wrestled with the question of *Tinker*’s reach beyond the schoolyard.”).

While the nature of a circuit split would suggest two completely separate tests for a given issue, here the circuit split is better characterized as a similar analytical framework with a different emphasis on the important elements.⁵⁷ For example, the “reasonably foreseeable test” also considers the “nexus” between the student speech at issue and the school, while some of the “nexus test” circuits also consider whether the speech was reasonably foreseeable to reach the school and cause a substantial disruption.⁵⁸ However, to best understand the different tests and the direction the law ought to proceed, this section will explore the “reasonably foreseeable” test and articulate the challenges in its application.

A. The “Reasonably Foreseeable” Test

While it is well established that on-campus student speech that “materially and substantially disrupt[s] the work and discipline of the school” may be restricted, the *Tinker* standard is less clear when applied to off-campus speech.⁵⁹ The Second Circuit encountered this issue with a student’s online instant messaging conducted at the student’s home.⁶⁰ In that case, a student was suspended for sending an instant message icon suggesting intent to shoot a teacher at the student’s school.⁶¹ The court developed the “reasonably foreseeable test” to determine whether off-campus, online student speech rises to meet the *Tinker* standard as it applies to on-campus speech.⁶² The court articulated this test by stating that the instant message with the icon suggesting that a teacher be shot “crosse[d] the boundary of protected speech and constitute[d] student conduct

⁵⁷ See *Kowalski*, 652 F.3d at 574.

⁵⁸ See *Markey*, *supra* note 53, at 139-42 (While addressing the factors that courts use in determining whether certain speech is reasonably foreseeable to cause a substantial disruption, the author includes a factor which considers whether there was a ‘nexus’ between the speech and the foreseeable disruption).

⁵⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

⁶⁰ *Wisniewski ex rel. Wisniewski v. Bd. Of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007).

⁶¹ *Id.*

⁶² *Id.* at 38-39.

that pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would ‘materially and substantially disrupt the work and discipline of the school.’”⁶³ In establishing this test, the Second Circuit noted that in the growing digital age, certain conduct that occurs off school grounds can inevitably create a “foreseeable risk of substantial disruption within a school.”⁶⁴

The “reasonably foreseeable test” finds additional support by Judge Newman of the Second Circuit in his concurring opinion in *Thomas v. Board of Education*.⁶⁵ In his concurrence, Judge Newman articulated a proximate cause test which would allow schools to discipline students for the “natural and reasonably foreseeable consequences of [their] action[s].”⁶⁶ In other words, Judge Newman’s proposed test “allows for regulation of speech that will foreseeably cause a material and substantial disruption [at school], regardless of where the speech originated.”⁶⁷ Conversely, writing for the majority, Chief Judge Kaufman articulated the policy rationale for having a boundary on school authority:

When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived on the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.⁶⁸

⁶³ *Id.* (quoting *Tinker*, 393 U.S. at 513).

⁶⁴ *Id.* at 39.

⁶⁵ *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (Newman, J., concurring).

⁶⁶ *Id.* at 1058 n.13 (Newman, J., concurring).

⁶⁷ Harriet A. Hader, Note, *Supervising Cyberspace: A Simple Threshold For Public School Jurisdiction Over Students’ Online Activity*, 50 B.C.L. Rev. 1563, 1577 (2009) (referencing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring)).

⁶⁸ *Thomas*, 607 F.2d at 1052.

In light of these competing rationales, the Second Circuit had the opportunity to determine whether disciplining a student for her off-campus, online blog post calling school officials “douchebags” as a part of a campaign to flood the school’s administration with commentary urging a reinstatement of recently rescheduled school concert, violated that student’s First Amendment rights.⁶⁹ Nevertheless, because the school properly asserted defense of qualified immunity,⁷⁰ the court did not reach the question of whether the disciplinary actions taken by the school for off-campus, online student speech violated that student’s First Amendment rights.⁷¹ However, it is important to note that the Second Circuit was aware that, given the facts of this case, it was “reasonably foreseeable” that the blog post “would reach school property and have disruptive consequences there.”⁷²

In the same year, the Eleventh Circuit adopted the Second Circuit’s “reasonably foreseeable” test as it applied to on-campus speech.⁷³ Here, the Eleventh Circuit affirmed its precedent that established a special deference to school authorities in situations where a student’s

⁶⁹ *Doninger v. Niehoff*, 642 F.3d 334, 339-41 (2nd Cir. 2011) (applying the doctrine of qualified immunity, thus shielding the school officials from civil liability stemming from the disciplinary actions taken against a student who called school officials “douchebags” on an online blog posted off-campus).

⁷⁰ *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (establishing the doctrine of qualified immunity which states, in part) (“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known.”).

⁷¹ *Doninger*, 642 F.3d at 346 (acknowledging the fact that qualified immunity applied) (“[A]ny First Amendment right allegedly violated here was not clearly established such that ‘it would [have been] clear to a reasonable [school official] that [her] conduct was unlawful in the situation [she] confronted[.]’”) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

⁷² *Id.* at 348 (holding that key facts include: the fact “that [the student’s] blog post directly pertained to an event at [the high school], that it invited other students to read and respond to it by contacting school officials, that students did in fact post comments on the post, and that school administrators eventually became aware of it . . .”).

⁷³ *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 983 (11th Cir. 2007) (finding that the student’s actions, in writing a passage in her notebook that described her shooting her teacher and sharing that passage with other students, “clearly caused and was reasonably likely to further cause a material and substantial disruption” to maintaining an orderly environment within the school).

First Amendment rights clash with a school's legitimate educational interests.⁷⁴ However, this case is distinguishable because the speech at issue was not considered off-campus, online speech.⁷⁵

In developing the “reasonably foreseeable” test, circuit courts have considered several factors to determine whether certain student speech is reasonably foreseeable that the speech would cause a substantial disruption.⁷⁶ These factors include whether the student speech was targeted at the school,⁷⁷ whether the student intended for the speech to reach the school,⁷⁸ whether the speech was accessible at the school,⁷⁹ whether substantial disruption actually occurred,⁸⁰ whether the speaker encouraged student participation,⁸¹ whether administrators used resources in response to the speech,⁸² and whether the speech was violent or threatening.⁸³

⁷⁴ See *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1247 (11th Cir. 2003) (“Although public school students’ First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator’s professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve.”).

⁷⁵ *Boim*, 494 F.3d at 980.

⁷⁶ Meg Hazel, Feature, *Social Media: Students Behaving Badly*, 26 S.C. LAW., 38, 43 (2014) (identifying several factors the courts use in determining whether certain speech is reasonably foreseeable to cause a substantial disruption within the school).

⁷⁷ See *Doninger*, 642 F.3d at 348 (considering the fact that the post “directly pertained to an event at [the school],” it called for other student involvement, and that students did in fact interact with the post in supporting its conclusion that “it was reasonably foreseeable that Doninger’s post would reach school property and have disruptive consequences.”).

⁷⁸ *J.S.*, 650 F.3d at 930 (holding that it was not reasonably foreseeable for the student’s speech to reach the school and cause a substantial disruption in part because it was not the student’s intent for the speech to reach the school. The court also noted the fact that the student attempted to limit those who could even access the social media profile at issue.).

⁷⁹ *Id.* at 921 (identifying the fact that the social media profile, made to ridicule a faculty member at the school, was not actually accessible from the school grounds because the school computers restricted access to social media websites).

⁸⁰ See *Doninger*, 642 F.3d at 349 (acknowledging that, based off the objective facts in the record, a substantial disruption *had* occurred and continued to occur after the student’s social media expression) (emphasis added); *J.S.*, 650 F.3d at 929; *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 774 (8th Cir. 2012) (finding that the student expression that originated off-campus and online *actually* caused a substantial disruption.) (emphasis added).

⁸¹ See *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 208 (3rd Cir. 2011); *J.S.*, 650 F.3d at 929 (noting that the J.S.’s parody profile of a faculty member was made “private” so that limited people could gain access it); *Kowalski*, 652 F.3d at 572-73 (“The [webpage at issue] functioned as a platform for Kowalski and her friends to direct verbal attacks towards her classmate”) *Id.* at 565 (Additionally, the court noted that approximately two dozen students contributed to the webpage.)

⁸² See *Doninger*, 642 F.3d at 349; *S.J.W.*, 696 F.3d at 774.

⁸³ See *D.J.M.*, 647 F.3d at 762; *Wynar*; 728 F.3d at 1065-66.

While the Second Circuit is the leading court in attempting to implement and refine the “reasonably foreseeable” test, it declined to address whether the record must show that the student expression was reasonably foreseeable to reach the school, or whether the undisputed fact that such expression *did* reach the school in order to assess the reasonable foreseeability.⁸⁴ As evident by the Second Circuit’s unwillingness to rule on that aspect of the analysis, the need for Supreme Court intervention grows as more courts attempt to reconcile the issue of off-campus, online student expression that warrants discipline by school authorities.⁸⁵

Critics of the “reasonably foreseeable” test disagree on whether “[i]nternet-based speech, created off-campus, can be regulated if there is *only* a reasonable foreseeability as to whether the speech will cause a substantial disruption on campus” or whether there must be a higher standard.⁸⁶ Some proponents of the “reasonably foreseeable” test call for a higher evidentiary standard when assessing the foreseeability of disruption from an off-campus, online student expressions:

School officials must be able to point to specific and particularized facts that support why they foresee a substantial disruption. . .not mere apprehension of a possible disruption. . .The response should be to prevent an imminent foreseeable substantial disruption or interference - not after the fact because a disruption could possibly have occurred but did not.⁸⁷

Under this suggestion, greater deference would be given to the school’s administration to identify their purported reasons behind the apprehension of disruption.⁸⁸ However, this higher

⁸⁴ *Wisniewski*, 494 F.3d at 39 (emphasis added).

⁸⁵ *See Hader*, *supra* note 82, at 1582 (“It is stretching school authority too far to say that schools may punish a student for speech that might come onto campus and cause a disruption but has not yet done so. Such holdings also present the difficult task of determining the foreseeability of speech reaching campus.”).

⁸⁶ Margaret A. Hazel, *Fourth Circuit Survey: Student Cyber-Speech After Kowalski v. Berkeley County Schools*, 63 S.C. L. REV. 1081, 1090 (2012) (emphasis added).

⁸⁷ Willard, *infra* note 127, at 108.

⁸⁸ *See id.*

evidentiary standard would also place a heavier burden on the schools to articulate “specific and particularized facts” to demonstrate foreseeability of disruption.⁸⁹

Another concern with the “reasonably foreseeable” test is the danger of its potential to be overbroad⁹⁰ in its application.⁹¹ One commentator believes that, given the widespread access and impact of social media, “[v]irtually all material posed online could foreseeably come to the attention of school authorities.”⁹² Another commentator contends that the lack of consistent application has a chilling effect on student speech, arguing that, “[b]ecause the internet blurs the line between students’ school and home lives, there is a significant risk that lower protections for on-campus speech might seep into all areas of students’ lives, with significant potential consequences for their First Amendment rights.”

However, these overbreadth concerns may be alleviated given the Supreme Court’s use of anti-chilling rationale which “favors broad constitutional rulings over narrow interpretations of certain statutes.”⁹³ This rationale was echoed in *Citizens United v. Federal Election Commission*, where the Court held that “[p]rolix laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’”⁹⁴ While this perspective by the Supreme Court was given with respect to statutes, an argument can be made that this approach should be applied to legal precedent because of the overlapping rationales.⁹⁵

⁸⁹ *Id.*

⁹⁰ M. Katherine Boychuck, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769, 771 (1994) (As applied to statutes, the “overbreadth doctrine requires that a statute not be written so broadly as to infringe on constitutionally protected activities.” Here, while the test is not in the form of a statute, it has potential to be applied in a way that infringes upon constitutionally protected speech activities by students.).

⁹¹ *See, supra* note 55, at 1090.

⁹² Willard, *infra* note 127, at 96.

⁹³ *Supra* note 55, at 1069.

⁹⁴ 558 U.S. 310, 324 (2010) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

⁹⁵ *See supra* note 55, at 1070.

In light of the “reasonably foreseeable” test’s limited application and the concerns professed by several commentators, it is evident that there are deficiencies in this test that threaten the First Amendment rights of students.⁹⁶ The next section of this article looks at the “nexus” test and the circuits that have attempted to apply the test to off-campus student speech.

B. The “Nexus” Test

While the “reasonably foreseeable” test worked for the Second, Eighth, and Eleventh Circuit Courts, other circuits developed an alternative approach for handling student speech that occurred online and off-campus.⁹⁷ These circuits, including the Fourth Circuit, developed the “nexus” test, which looks at how closely related the speech was to the school, rather than looking at the foreseeability of interference.⁹⁸ Under this approach, courts will consider “whether there is a significant relation between the speech and the school” as a preliminary finding.⁹⁹ In other words, a nexus exists where “the speech involves students or staff or is in some other manner connected to the school community.”¹⁰⁰ If no nexus is found sufficient to justify school action, then the court is to uphold the established First Amendment.

In *Kowalski v. Berkeley County Sch.*, a student was suspended from school and received an additional ninety-day social suspension after the school became aware of a webpage the student created in order to ridicule another classmate.¹⁰¹ Here, the Fourth Circuit recognized that any restriction on internet student speech would require a test that looked beyond the location in which

⁹⁶ See *infra* notes 91-100 and accompanying text.

⁹⁷ See, e.g., *Kowalski*, 652 F.3d at 565.

⁹⁸ See *id.* at 573 (“the nexus of [the student’s] speech to [the school’s] pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as trustees of the student body’s well-being”).

⁹⁹ See *supra* note 86, at 1087.

¹⁰⁰ Willard, *infra* note 127, at 108.

¹⁰¹ *Kowalski*, 652 F.3d at 567.

such speech was posted/disseminated.¹⁰² As a result, the court held that “speech originating outside of the schoolhouse gate but directed at persons in school and received by and acted on by them was in fact in-school speech.”¹⁰³ In establishing the “nexus” test, the court created a standard to determine whether off-campus, online speech could be considered in-school speech and therefore become susceptible to the *Tinker* and *Fraser* standards.¹⁰⁴

Despite the seemingly straight-forward analysis under the “nexus” test, the Fourth Circuit took pieces from the Second Circuit’s approach and addressed the foreseeability element of the analysis.¹⁰⁵ Ultimately, the Fourth Circuit supported its conclusion by articulating the rule that where a sufficient nexus exists between the student’s speech at issue and the school environment, school authorities are permitted to regulate that student speech.¹⁰⁶ However, commentators were still unsettled with the ruling of the Fourth Circuit and sought a petition for the Supreme Court to settle the issue at the highest level:

The lack of clear guidance from this Court, and the conflicting decisions in the lower courts, make it impossible for students, parents, teachers, and school administrators to understand the scope of student speech rights – in effect, leaving the public to conclude that students have a right to speak...except when they don’t.¹⁰⁷

Similarly to the Fourth Circuit’s analysis in *Kowalski*, the Third Circuit affirmed the district court’s holding in *Layshock* that the student’s punishment violated his First Amendment rights in part because the school could not establish a sufficient “nexus” between the speech at issue and a

¹⁰² *Id.* at 573.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 573-74.

¹⁰⁶ *Id.* at 577 (“...where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators’ good faith efforts to address the problem.”); Hazel, *supra* note 86, at 1087 (citing *Kowalski*, 652 F.3d at 577).

¹⁰⁷ *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011), *cert. granted*, 2011 WL 4874091, at 31 (quoting *Morse*, 551 U.S. 393, 418 (2007)) (No. 11-461).

substantial disruption of the school environment.¹⁰⁸ Additionally, the Third Circuit, in finding for the student, announced that because no substantial disruption actually occurred and was only foreseeable to cause such disruption, the school went beyond its authority to regulate online student speech.¹⁰⁹

Again, the courts are borrowing the language from each side of the circuit split and giving differing weight to either the foreseeability aspect or the nexus analysis.¹¹⁰ This lack of clarity and inconsistency is indicative of the unpredictability of this test and adds pressure on the Supreme Court to intervene.¹¹¹ One commentator criticized the “nexus” test by addressing the test’s inability to provide notice and a workable standard for students evaluating their own speech.¹¹²

The “nexus” test, and its various applications, have been criticized because of the inconsistent application by the courts which have adopted the test or implemented a similar analysis to the test.¹¹³ One commentator accused the “nexus” test as being “unpredictable and subjective,” despite having established at least some threshold test.¹¹⁴ To reiterate, one of the most significant problems with the “nexus” test and its inconsistent application is that the test does not give adequate notice to students, and even faculty for that matter, of the precise extent of school authority.¹¹⁵ In fact, the student disciplined in *Kowalski* attempted to allege, in addition to her First

¹⁰⁸ *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (citing *Layshock v. Hermitage Sch. Dist.*, 496 F.Supp.2d 587, 600 (W.D. Pa. 2007)).

¹⁰⁹ *Id.*

¹¹⁰ *See Kowalski*, 652 F.3d at 573-574; *Id.*

¹¹¹ *See Hader*, *supra* note 67, at 1584.

¹¹² *Id.* at 1585 (“The problem with such an indefinite, multi-factor test is that it does not provide sufficient notice to students and administrators of the exact boundary of school authority.”).

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*; *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 (1973) (Brennan, J., dissenting) (In his dissent, Justice Brennan cautioned against vague speech laws and their potential to result in the lack of notice and may have a chilling effect on speech).

Amendment claims, that she was denied due process¹¹⁶ because she “was afforded neither adequate notice nor a meaningful opportunity to be heard” before the school disciplined her for her expression.¹¹⁷ The crux of the Due Process Clause essentially states that “deprivation of life, liberty or property . . . be preceded by notice and [an] opportunity [to be] hear[d].”¹¹⁸ Although schools must provide *some* aspect of due process, “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures.”¹¹⁹ Ultimately, the Fourth Circuit found Kowalski was given adequate notice that her behavior could be punished by the school.¹²⁰ Additionally, the Due Process Clause is further limited in the school setting and, in the context of a ten-day suspension or less, requires only that the school give the student an “oral or written notice of the charges against [her] and, if [she] denies them, an explanation of the evidence the authorities have and an opportunity to present [her] side of the story.”¹²¹ Because such relaxed due process requirements were met, the school’s actions preserved Kowalski’s due process rights.¹²² It is important to note that the Fourth Circuit has gone so far as to identify that “[v]iolations of state laws or school procedures ‘are insufficient by themselves to implicate the interests that trigger a [federal] due process claim.’”¹²³

The balance between school interests and student rights continue to affect the shape of the law. Competing perspectives on the interplay between constitutional rights and policies

¹¹⁶ See U.S. CONST. amend. XIV.

¹¹⁷ *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011).

¹¹⁸ *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

¹¹⁹ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)).

¹²⁰ *Kowalski*, 652 F.3d at 575 (“We are satisfied that [the high school’s] [p]olicy, in conjunction with the Student Code of Conduct, adequately put Kowalski on notice of the type of behavior that could be punished by school authorities.”).

¹²¹ *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

¹²² *Kowalski*, 652 F.3d at 575-76.

¹²³ *Kowalski*, 652 F.3d at 576 (quoting *Wofford v. Evans*, 390 F.3d 318, 325 (4th Cir. 2004)).

behind school authority led to inconsistent results. In light of these issues, the next section of this article looks at other courts' approaches, as well as distinguishes between the two tests and the related case law.

C. Other Courts' Approaches to Off-Campus, Online Student Speech

While several courts joined either side of the circuit split, other courts attempted to resolve the issue of whether school officials may discipline off-campus, online student speech in their own way, often using *Tinker* as the primary foundation.¹²⁴ In avoiding application of either circuit split test, other lower courts held closely to the *Tinker* standard, thus avoiding making a definitive choice of law.¹²⁵ Some courts required proof that the student internet speech caused a material and substantial disruption at school, while other courts required a sufficient nexus between the speech and the school in order to implement disciplinary action.¹²⁶

As lower courts attempt to develop workable tests and standards to apply to off-campus, online student speech, several commentators have suggested approaches under the existing Supreme Court precedent.¹²⁷ Some suggested factors to consider when developing school

¹²⁴ See *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 421 (Pa. Commw. Ct. 2000) (The Pennsylvania Supreme Court upheld a school district's expulsion of a student based off the student's threatening and derogatory comments on an off-campus website called "Teacher Sux." *Id.* at 415. The court, while avoiding analysis on student internet speech rights, supported its holding by referencing *Tinker* when it determined the student's conduct was subject to the school's authority because "school officials [can] discipline students for conduct occurring [off-campus]...[if] the conduct materially and substantially interferes with the educational process."). *Id.* at 421.

¹²⁵ See Markey, *supra* note 53, at 144-146 (discussing lower courts' approach to off-campus speech and their application of *Tinker*).

¹²⁶ *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784-85 (E.D. Mich. 2002) (holding that a school district may not punish student Internet speech without proof of material disruption or on-campus activity by the student.); *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (The court held that the internet speech was beyond the reach of the school because the speech did not occur at a school assembly, was not in a school-sponsored newspaper, was not connected [to] a class or school project, and was not intended or interpreted as a threat.)

¹²⁷ See generally Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges*, 2011 B.Y.U. Educ. & L.J. 75, 108 (2011), <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1283&context=elj>.

policies to respond to off-campus, online student speech include notice, impact at school, altercations, causal relationship, hostile environment, implication of other students' rights, etc.¹²⁸ Some courts, however, gave greater deference to schools in their decisions to discipline students for off-campus online student speech despite being unable to punish under the Supreme Court precedent,¹²⁹ in violation of a school policy.¹³⁰ Although the conduct occurred off-campus and did not cause a material and substantial disruption to school activities, the court nevertheless upheld the expulsion.¹³¹ The Fifth Circuit supported its ruling on the grounds that the student “flout[ed] school regulations and def[ied] school authorities.”¹³²

Many other lower courts did not even reach the issue of *Tinker*'s applicability to off-campus, online student speech and applied other First Amendment principles.¹³³ Without established guidelines, plaintiffs often have to search for recognized First Amendment protections to assert their causes of action.¹³⁴ Additionally, inconsistent rulings by lower courts have received criticisms for clashing against Supreme Court precedent.¹³⁵ One critic shed light on the arguably unconstitutional reasoning in certain lower court decisions on off-campus, online student speech and warned of the dangers of such inconsistent rulings:

The reasoning used in *Houston Independent School District* and *Requa* is arguably unconstitutional because, in *Tinker*, the plaintiff students had violated a school dress code rule, and yet the Court still held that the First Amendment prevented the

¹²⁸ *Id.* at 108-09.

¹²⁹ *See, e.g.*, *Hader, supra* note 67, at 1585; *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1076 (5th Cir. 1973); *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1280-81 (W.D. Wash. 2007).

¹³⁰ *Sullivan*, 475 F.2d at 1073 (The school had a policy requiring students to submit newspapers to the principal for review before distributing it).

¹³¹ *Id.* at 1076.

¹³² *Hader, supra* note 67, at 1586.

¹³³ *See, e.g.*, *Barnett ex rel. Barnett v. Tipton Cty. Bd. of Educ.*, 601 F. Supp. 2d 980, 984 (W.D. Tenn. 2009).

¹³⁴ *See id.* (In this case, the plaintiffs argued that their First Amendment rights were violated because their off-campus, online website was a parody, thus invoking First Amendment protection. The court disagreed with their argument but did not engage in a *Tinker* analysis.)

¹³⁵ *Hader, supra* note 67, at 1586.

school from prohibiting the students' speech. *Requa* and *Houston Independent School District* highlight the danger that, if a rule is broken, the school will confuse the severity of a rule violation with the content of the speech when determining the amount of punishment.¹³⁶

This critic concluded her analysis of the lower courts' reasoning by stressing the need for clarification on the limits of school authority over off-campus online student speech.¹³⁷ Given the inconsistency in lower courts ruling on off-campus, online student speech and subsequent criticisms, continued pressure is placed on higher courts to better clarify the standard to be applied in such cases.

The next section of this article explores a blending of the two major tests to produce a practical and comprehensive approach to this issue. Considering the policies at play and their constitutional implications, the proffered approach below will resolve the circuit split and provide some clarity for lower courts as well as the students and faculty the test implicates.

The Combined Approach – Where the law ought to be headed

Given the legal background identifying the two tests that are the subject of the circuit split, this next section professes a combined approach that will likely resolve the circuit split. The test proffered by this section combines the two tests into a two-factor analysis. The first factor asks whether there is a sufficient “nexus” between the student’s speech and the school’s pedagogical concerns. The second factor asks whether it was “reasonably foreseeable” that the speech would reach the school and cause a material and substantial disruption. In order to gain an understanding of why this approach would alleviate the confusion amongst lower courts, it is

¹³⁶ *Id.*

¹³⁷ *Id.*

necessary to look at the precedent from a circuit court that declined to join the split, but nevertheless conducted an analysis under both.¹³⁸

The Ninth Circuit, in at least three significant cases, tackled the issue of schools' authority to discipline off-campus student speech.¹³⁹ Most notably, in *Wynar*, the Ninth Circuit conducted an analysis of other circuit courts' proposed tests to determine the scope of school authority to discipline off-campus student speech.¹⁴⁰ The court identified the main issue in adopting either test:

One of the difficulties with the student speech cases is an effort to divine and impose a global standard for a myriad of circumstances involving off-campus speech. A student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting, and we are reluctant to try and craft a one-size fits all approach.¹⁴¹

The court's analysis here is important for two reasons: First, it recognizes the fact that student speech cases are extremely fact-specific. Second, courts are afraid (although the court used the word "reluctant") to develop a test that is equipped to handle such fact-specific inquiries while still respecting students' First Amendment rights. The Ninth Circuit was able to avoid creating such a test or adopting another circuit's test by holding that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."¹⁴²

In 2016, the Ninth Circuit again declined to explicitly adopt either the "nexus" or the "reasonably foreseeable" test.¹⁴³ Instead, the court applied *both* tests in order to demonstrate the

¹³⁸ See *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150 (9th Cir. 2016); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013).

¹³⁹ See *C.R.*, 835 F.3d at 1150; *Wynar*, 728 F.3d at 1069.

¹⁴⁰ *Wynar*, 728 F.3d at 1068.

¹⁴¹ *Id.* at 1069.

¹⁴² *Id.*

¹⁴³ *C.R.*, 835 F.3d at 1150.

lack of necessity to join the split.¹⁴⁴ It is here that the thesis of this article finds its foundation; the Ninth Circuit conducted the same analysis professed by this combined approach. First, the court inquired into whether the off-campus student speech had a sufficient “nexus” with the school’s operation.¹⁴⁵ Next, the court determined whether it was “reasonably foreseeable” that the off-campus student speech would reach the school.¹⁴⁶ This is the precise analysis the combined approach calls for in determining whether off-campus, online student speech falls within the reach of the school authority.

Potential concerns with this combined approach include overbreadth and vagueness issues.¹⁴⁷ In order to reduce the risk of overbroad application, the combined test would exist within the confines of Supreme Court precedent as well as recognize the current limitations each test has developed thus far.¹⁴⁸ Additionally, if this combined approach was adopted, courts would be able to develop case law that demonstrates the test’s applicability given various factual circumstances. This will establish the practical scope of the combined approach and allow for students and faculty members alike to understand the reach of the two-factor, combined test.

The vagueness concerns may be quieted with a glimpse at the existing off-campus, online conduct that was actionable by the school. Under the first prong of the analysis, the existing “nexus” case law would indicate to students and school authorities the standard needed in order to

¹⁴⁴ *Id.* (“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.”).

¹⁴⁵ *Id.* at 1150-51 (finding a “nexus” because all the individuals involved were students and the incident occurred so close to school grounds that it was “unclear whether the students even recognized that they had left school property.”).

¹⁴⁶ *Id.* at 1151 (“Because the harassment happened in such close proximity to the school, administrators could reasonably expect the harassment’s effects to spill over into the school environment.”).

¹⁴⁷ See *supra* notes 105-09 and accompanying text.

¹⁴⁸ See *supra* notes 75, 80, 84, 87, 88, 91-95, 98, 99 and accompanying text.

establish a sufficient “nexus.” Factors that support a finding of a sufficient “nexus,” based on existing law, include whether all those involved were students,¹⁴⁹ whether the speech was aimed at another student or faculty member,¹⁵⁰ and whether the online student speech was accessible from school.¹⁵¹

These potential concerns, however, deal with outliers as far as potential off-campus, online student speech cases. Consider the facts from the Ninth Circuit in *Wynar*; the court declined to join a side because, under the facts of the case, either test was satisfied. Writing for the majority, Judge McKeown announced that because either test was satisfied, the Ninth Circuit did not need to definitively join the split:

Nor do we need to decide whether to incorporate or adopt the threshold tests from our sister circuits, as any of these tests could be easily satisfied in this circumstance. Given the subject and addressees of [the student’s online] messages, it is hard to imagine how their nexus to the school could have been more direct; for the same reasons, it should have been reasonably foreseeable to [the student] that his messages would reach campus.¹⁵²

Practically speaking, the combined approach has the potential to definitively resolve the circuit split as evidenced by the Ninth Circuit’s analysis in *Wynar*. The combined approach will reduce the inconsistent application of either test by giving each piece equal weight in the overall

¹⁴⁹ *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1150 (9th Cir. 2016); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013).

¹⁵⁰ *See Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011).

¹⁵¹ *See J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 421 (Pa. Commw. Ct. 2000).

¹⁵² *Wynar*, 728 F.3d at 1069.

analysis.¹⁵³ Moreover, this approach will allow for policy arguments to be made as growing technologies blur the line between on-campus and off-campus student speech.¹⁵⁴

Conclusion

Because of the lack of Supreme Court rulings on the issue of schools' authority to discipline off-campus, online student speech, the circuit courts have become split on what test to apply in these situations. As a result, two tests have emerged: the "reasonably foreseeable" test and the "nexus" test. In order to unify the courts, the two tests ought to be combined into a single, two-factor analysis that gives deference to both sides of the circuit split. By inquiring into (1) whether a sufficient "nexus" exists between the student speech and the school and (2) whether it is "reasonably foreseeable" that the student speech would reach the school and cause disruption, students and school authorities will have a workable standard to use in evaluating school policies and off-campus, online student expression.

¹⁵³ *Compare Kowalski*, 652 F.3d at 573 (identifying a reasonably foreseeable element of analysis, but ultimately relying on the finding of a "nexus" between student speech and school to support holding), *with* *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216-19 (3d Cir. 2011) (noting both the "nexus" analysis and "reasonably foreseeable" aspect to support holding).

¹⁵⁴ *See* Recent Case, *supra* note 55, at 1068 (identifying the issue with growing technologies and how the internet continues to bridge the gap between students' home and school lives).