MAHANOY AND ITS PROGENY: WHAT DO THEY MEAN FOR THE FUTURE REGULATION OF STUDENT SPEECH OFF-CAMPUS AND IN EXTRACURRICULAR ACTIVITIES

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PART I: INTRODUCTION

The almost universal availability and pervasive presence of the internet, and its rapidly proliferating different forms of social media, have presented challenges to defining the First Amendment rights of K-12 students when they are physically or virtually present in public schools versus in non-school settings.[1] K-12 public schools publish school handbooks containing rules of conduct for students in the school context, and students are required to sign that they have read and understand the conduct rules and the consequences for violations. Schools may also require parents to attest to their knowledge of the school rules and consequences for violations.

Public schools also extend to students the privileges of representing the school in extracurricular activities, including after-school clubs onsite or at off-campus sites. Different student athletic teams compete both onsite and in competitions at off-campus locations. Students may join after-school clubs or music and orchestra practices and participate in competitions like science fairs or moot court debates. Conduct rules are also likely to be part of the privilege of belonging to and participating in these extracurricular activities. Agreeing to conform to these extracurricular conduct rules is often a necessary precedent to joining the school's extracurricular activities.

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[1] *See, e.g.*, Stephanie Klupinski, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 OHIO L. J. 611 (2010) (where the author reviewed the case law on on-campus student speech before and after the age of social media); *See also* Comment, *Mahanoy Area Sch. Dist. v. B.L.*, 135 HARV. L. REV. 353, 361 (2021) (where the Comment stated, "[f]urther, the advent of social media has made the on- and off-campus distinction more challenging and confusing, as off-campus speech can travel to and easily be replicated on campus.").

Such was the situation in the Mahanoy Area School District (MASD), located in Mahanoy City, a small borough of rural Schuylkill County in the Middle District of Pennsylvania.[2] MASD supported a junior varsity cheerleading team and a varsity cheerleading team.[3] In order to compete against classmates to be accepted as a member of either team, the student and a parent were required to sign a form indicating that they understood and would comply with the cheerleading rules.[4] The rules contained a notice that disciplinary action would result for violations.[5]

At the end of her freshman year at MASD, B.L.,[6] a junior varsity cheerleader at the school, wanted to join tryouts to advance to the varsity team.[7] Both B.L. and her mother signed the cheerleading rules.[8]

B.L. participated in tryouts but did not secure a spot on the varsity cheerleading team.[9] She expressed her frustration the following weekend, on a Saturday visit to the local hangout, the Cocoa Hut, with her friend.[10] Using her Snapchat[11] account, B.L. posted two "Snaps," including one of her and her friend with their middle fingers raised and the profane, but often used word in teenage speech, "f---," stating: "fuck school fuck softball fuck cheer fuck everything."[12] B.L.'s second Snap contained an upside-down smiley face emoji with the accompanying text complaining that she did not make the varsity team, and that no one cared about her

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[2] B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 432 (M.D. Pa. 2019).

[3] *Id.* at 432-33.

[4] *Id.* at 432.

[5] *Id.*

[6] Andrew Chung, *Cheerleader Prevails at U.S. Supreme Court in free speech case*, REUTERS (June 23, 2021), https://www.reuters.com/legal/litigation/us-supreme-court-hands-victory-cheerleader-free-speech-case-2021-06-23/.

[7] *B.L.*, 376 F. Supp. 3d at 432.

[8] *Id.*

[9] *Id.* at 432-33.

[10] *Id.* at 433.

[11] *Id.* Snapchat is a social media application that allows users to post photos and videos that disappear after a set period of time. B.L.'s posts were available to her Snapchat "friends," approximately 250 in number, for 24 hours.

[12] *Id.*

frustrations.[13] When the varsity team coach was informed about the social media posts, the coach suspended B.L. from cheerleading for the next school year.[14]

B.L. and her mother, with the help of the American Civil Liberties Union (ACLU), sued the school district in the District Court for the Middle District of Pennsylvania for violating B.L.'s First Amendment right to freedom of speech outside school.[15] The school district presented several arguments, first among them that B.L. had waived her First Amendment rights by signing the cheerleading rules.[16] The Court of Appeals for the Third Circuit ruled that the requirement to sign the conduct rules was coerced; therefore, the conditions for waiving a constitutional right were not satisfied.[17]

This, in a nutshell, is the background and several of the other arguments which later became part of the Supreme Court of the United States' decision in *Mahanoy Area School District v. B.L.*[18] The coercion argument was not discussed in this case as it advanced to the Court of Appeals for the Ninth Circuit nor, eventually, to the Supreme Court of the United States after the controversy was granted certiorari. An even more controversial argument emerged from the Court of Appeals for the Third Circuit decision regarding the *Tinker v. Des Moines Independent Community School District* decision.[19]

Part II of this commentary briefly presents the significant arguments and decisions from the *B.L. v. Mahanoy Area School District* controversy: (1) two separate court appearances in the District Court for the Middle District of Pennsylvania, first with a motion for a preliminary injunction and then with a motion for summary judgment, (2) in the Court of Appeals for the Third Circuit, and finally, (3) *Mahanoy Area School District v. B.L.* in the

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[13] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 & n.2 (3d Cir. 2020).

[14] *B.L.*, 376 F. Supp. 3d at 433.

[15] B.L. v. Mahanoy Sch. Dist., 289 F. Supp. 3d 607 (M.D. Pa. 2017).

[16] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 194 (3d Cir. 2020)

[17] *Id.*

[18] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

[19] *B.L.*, 964 F.3d at 176-77; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

Supreme Court of the United States. Part III discusses the demographics and advantages of student participation in extracurricular activities. Part IV analyzes the impact of the outcome, in what became *Mahanoy Area School District v. B.L.*, on the First Amendment rights of students off-campus and in extracurricular activities.

PART II: THE B.L. V. MAHANOY AREA SCHOOL DISTRICT LITIGATION

In any student speech controversy, *Tinker* is bound to be the initial starting point. Colloquially referred to as "the black armbands" case, this Vietnam War-era decision by the Supreme Court of the United States established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[20] However, subsequent decisions by the Court, notably *Bethel School District No. 403 v. Fraser*,[21] have limited *Tinker*'s expansive speech protection for students in school, allowing schools to prohibit, for example, in-school student speech that is "vulgar, lewd, profane,[or] plainly offensive[.]"[22]

With regard to *Fraser*, district court Judge Caputo, responding to B.L.'s move for a preliminary injunction, asserted, "[w]hile courts have allowed schools to punish a student for out-of-school speech that was reasonably expected to substantially disrupt the school, the Supreme Court has noted that schools have no power to punish 'lewd or profane' speech—as described in *Fraser*—when it occurs outside of the school context."[23]

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[20] *Tinker*, 393 U.S. at 506.

[21] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

[22] B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 612 (M.D. Pa. 2017).

[23] *Id.*

A. The MASD Cheerleading Conduct Rules Were at the Center of B.L.'s Arguments in the Litigation that Ensued After Her Snapchat Postings[24]

The 2017-2018 MASD Cheerleading Conduct Rules included more than the rules quoted by the *B.L.* courts. Considering the whole of the rules, the five sections included "ATTENDANCE, ACADEMIC POLICY, UNIFORMS, SPORTSMANSHIP AND RESPONSIBILITIES/FUNDRAISING" and "TECHNOLOGY."[25]

Only two sections pertinent to B.L.'s lawsuit were quoted in the MASD controversy, "SPORTSMANSHIP AND RESPONSIBILITIES/FUNDRAISING" and "TECHNOLOGY."[26] The sections were as follows:

> "SPORTSMANSHIP AND RESPONSIBILITIES/FUNDRAISING[:]"
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> "Please have respect for your school, coaches, teachers, other cheerleaders and teams."
>
> "Remember, you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures."[27]
>
> "TECHNOLOGY[:]"[28]
>
> "There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on

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[24] *Id.* at 611.

[25] Joint Appendix at 15-18, Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038 (2021) (No. 20-255).

[26] *Id.* at 17-18.

[27] *Id.* at 17.

[28] The final sentence, "All other school rules apply when at sporting events" was omitted by the court.

> the internet. All other school rules apply when at sporting events."[29]

B. Motion for Preliminary Injunction in the District Court for the Middle District of Pennsylvania

With the help of the ACLU, B.L. began her attempt to rescind her punishment for her alleged violation of the cheerleading rules. B.L. and her ACLU attorneys moved for a preliminary injunction.[30]

The District Court for the Middle District of Pennsylvania Judge Caputo was assigned to the case.[31] Referring to *Fraser*, Judge Caputo asserted, "[w]hile courts have allowed schools to punish a student for out-of-school speech that was reasonably expected to substantially disrupt the school, the Supreme Court has noted that schools have no power to punish 'lewd or profane' speech—as described in *Fraser*—when it occurs *outside of the school context.*"[32]

B.L.'s use of the "f---" word was considered by Cheerleading Coach Luchetta-Rump to be profane, and she had specifically testified in her deposition that she punished B.L. because B.L. had used profanity, which was forbidden under the Cheerleading Conduct Rules.[33]

Judge Caputo countered the school district's argument that so long as the district does not take away a student's "protected property interest," that is, by suspending or expelling a student, the "[d]istrict can levy any punishment it chooses[.]"[34] For example, "a student could be barred from [any] extracurricular activity[.] [I]f [the student were] at home with friends and uttered a profanity that was subsequently reported to the school" by the friends, the district alleged it could discipline that student.[35] Judge Caputo equated that

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[29] Joint Appendix at 15-18, Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038 (2021) (No. 20-255). *Id.* at 18.

[30] *B.L. v. Mahanoy Area School District*, ACLU PA (2023), https://www.aclupa.org/en/cases/bl-v-mahanoy-area-school-district.

[31] *Id.*

[32] B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 612 (M.D. Pa. 2017) (emphasis added).

[33] *Id.* at 611-12.

[34] *B.L*, 289 F. Supp. 3d. at 613.

[35] *Id.*

scenario to using school children to serve as "[t]hought Police—reporting every profanity" they heard to the school.[36]

C. Summary Judgment at the District Court

After the District Court for the Middle District of Pennsylvania granted B.L.'s motion for a preliminary injunction, B.L. and her parents returned to district court on a motion for summary judgment, with Judge Caputo presiding a second time.[37] "Indeed," the Judge began as he had left off in his earlier decision, revealing that he had granted the preliminary injunction because to do "otherwise would [have] 'allow[ed] school children to serve as Thought Police' . . . ."[38]

Perhaps the most instructive and helpful for First Amendment jurisprudence is the part of Judge Caputo's summary judgment analysis that discussed MASD's argument that B.L. and her mother had waived their First Amendment rights by signing MASD's "Application for Cheerleading Tryouts."[39] MASD required students who subsequently made the cheerleading team to abide by the conduct rules because of the alleged waiver.[40]

First, the district court looked at precedent from 1938 in *Johnson v. Zerbst*, cautioning that "[c]ourts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' "[41] In addition, "[t]he voluntary, knowing, and intelligent waiver of one's First Amendment rights must be shown by 'clear and compelling' evidence."[42] And finally, "[s]uch volition and understanding are . . . present where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contract negotiations."[43]

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[36] *Id.*

[37] B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 432 (M.D. Pa. 2019).

[38] *Id.*

[39] *Id.* at 437.

[40] *Id.* at 432.

[41] *Id.* at 437 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[42] *Id.* at 437 (quoting Curtis Publ'g. Co. v. Butts, 388 U.S. 130, 145 (1967)).

[43] B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 437 (M.D. Pa. 2019) (quoting Erie Telecomm., Inc. v. Erie, 853 F.2d 1084, 1096 (3d Cir. 1988).

Judge Caputo continued that the cheerleading rules were not up for negotiation, and even if they were, "neither B.L. nor her mother had bargaining equality with the coaches or the school[.]"[44] "B.L. and her mother were not represented by counsel when they agreed B.L. would abide by the [cheerleading] [r]ules."[45] With B.L. and her mother lacking bargaining equality and advice from competent counsel, MASD still insisted that B.L. waived her constitutional right to First Amendment protection by signing the Cheerleading Conduct Rules before she could participate in an extracurricular activity.[46] However, a waiver is involuntary if it is coerced.[47] Therefore, Judge Caputo concluded that B.L. did not waive her right to First Amendment freedom of speech, especially out-of-school speech.[48]

Judge Caputo reiterated that Coach Luchetta-Rump testified at the preliminary hearing and in her deposition that she had punished B.L. for her profane speech, not for any substantial disruption required under the *Tinker* standard.[49] However, Judge Caputo questioned whether *Tinker* even applied to off-campus speech, a thread that reappeared when MASD appealed Judge Caputo's grant of summary judgment to B.L. to the Court of Appeals for the Third Circuit.

D. The Third Circuit Court of Appeals Decision

Circuit Judge Krause began her decision by reviewing the procedural posture of the B.L. litigation.[50] Affirming that participation in extracurriculars is merely a privilege, Judge Krause agreed that B.L. had not waived her First Amendment rights by signing the MASD Cheerleading Conduct Rules.[51] B.L.'s speech did not satisfy the *Tinker* standard of substantial disruption of the

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[44] *B.L.*, 376 F. Supp. 3d at 437.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 437-38 (citing Moran v. Burbine, 475 U.S. 412, 421 (1986)); Capua v. Plainfield, 643 F. Supp 1507, 1521 (D. N.J. 1986)).

[48] *B.L.*, 376 F. Supp. 3d at 437-44.

[49] *Id.* at 444.

[50] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020).

[51] *Id.* at 176.

school environment, nor was it subject to regulation under *Fraser*, which pertained to in-school student speech.[52] Therefore, Judge Krause concluded that B.L.'s speech was protected by the First Amendment.[53]

Describing the court's task of discerning and enforcing the line separating on-campus and off-campus speech, Judge Krause characterized the task as "tricky from the beginning[,]" but "the 'omnipresence' of online communication [presents additional] challenges for school[s] . . . and courts alike."[54] Applying the precedents of *J.S. v. Blue Mountain School District*[55] and *Layshock v. Hermitage School District*,[56] Judge Krause agreed with the district court that B.L.'s Snaps were off-campus speech.[57]

However, Judge Krause took a deeper dive into the area of "legal uncertainty," addressing the "obscure lines between permissible and impermissible speech[,]" which acted to chill speech of every kind, especially "the unresolved issue of *Tinker*'s scope."[58] The circuit court then stepped onto new ground:

> The time has come for us to answer the question. We begin by canvassing the decisions of our sister circuits. We then consider the wisdom of their various approaches, tested against *Tinker*'s precepts. Finally, we adopt and explain our own, concluding that *Tinker* does not apply to off-campus speech and reserving for another day the First Amendment implications of off-campus speech that threatens violence or harasses others.[59]

The court then examined how its sister circuits handled the obscure lines of permissible and impermissible speech noted by Judge Krause: considering speech as threats of school violence, as

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[52] *Id.* at 180, 191.

[53] *Id.* at 177.

[54] *Id.* at 179.

[55] J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc).

[56] Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc) (both en banc decisions in *J.S.* and *Layshock* were decided on the same day).

[57] *B.L.*, 964 F. 3d at 180-81.

[58] *Id.* at 185.

[59] *Id.* at 185-86.

having a "nexus" with school, or considering the prospect of layering a reasonable foreseeability test on *Tinker*.[60] The Court of Appeals for the Third Circuit concluded by outlining its own approach to resolving the legal uncertainty:

> We hold today that *Tinker* does not apply to off-campus speech–that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's *imprimatur*. In so holding, we build on a solid foundation . . . explaining "that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." That rule is true to the spirit of *Tinker*, respects students' rights, and provides much-needed clarity to students and officials alike.[61]

After delivering this "bombshell" assertion confining *Tinker*'s applicability exclusively to students' on-campus speech, the circuit court reiterated that B.L. did not waive her First Amendment rights by signing the Cheerleading Conduct Rules,[62] and then proceeded to demonstrate that the rules did not even apply to B.L.'s Snaps.[63] The rules applied only when the school cheerleader was "at games, fundraisers, and other events," but B.L. posted her profane Snaps on a weekend, unconnected to any school activity or sports event, before "cheerleading season had even begun."[64] What the court called the "Negative Information Rule," was also inapplicable because B.L.'s posts contained no factual information except that she was disappointed, angry, and frustrated.[65] And finally, the Court of Appeals for the Third Circuit considered the "Personal Conduct Rule[,]" which prohibited "tarnishing" the team or school, but also applied only during the cheerleading season.[66]

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[60] *Id.* at 187-89.
[61] *Id.* at 189.
[62] *Id.* at 192.
[63] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 193 (3d Cir. 2020).
[64] *Id.* at 193.
[65] *Id.* at 175.
[66] *Id.* at 193-94.

The circuit court concluded by affirming the district court's decision, which the circuit court praised for teaching "a deeper and more enduring version of respect for civility and the 'hazardous freedom' that is our national treasure and 'the basis of our national strength.' "[67]

Circuit Court Judge Ambro penned a concurrence.[68] He agreed with the outcome but disagreed with the majority in that they relegated the *Tinker* standard of substantial disruption exclusively to in-school speech.[69] MASD appealed to the Supreme Court of the United States and the High Court granted *certiorari* on January 8, 2021.[70]

E. B.L. at the Supreme Court: Resuscitating Tinker Off-Campus

The Supreme Court of the United States held oral arguments on April 28, 2021, and speedily announced its decision on June 23, 2021.[71]

Justice Breyer began the majority ruling by stating the issue to be decided as whether the Court of Appeals for the Third Circuit correctly decided that MASD's punishment of B.L. for her out-of-school speech violated the First Amendment.[72] He stated up front that, although the majority agreed with the Court of Appeals for the Third Circuit decision, they did not agree with the appellate court's rationale.[73]

After briefly relaying the facts in the controversy, the majority described the *Tinker* standard of student speech that school authorities could regulate without violating students' First Amendment right, that is, speech that materially disrupts classwork or involves substantial disorder or invasion of the rights of others.[74]

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[67] *Id.* at 194.
[68] *Id.*
[69] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 192, 195 (3d Cir. 2020).
[70] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).
[71] *Id.*
[72] *Id.* at 2043.
[73] *Id*. at 2042-43.
[74] *Id*. at 2044.

Justice Breyer then quickly established that the majority did not want to limit the *Tinker* standard only to in-school speech.[75]

The majority noted the "three specific categories of student speech that schools may regulate": (1) "indecent," "lewd," or "vulgar" speech delivered at an in-school assembly, (2) speech that promotes illegal drug use, and (3) speech that others may reasonably perceive as bearing the school's *imprimatur*, as in a school newspaper.[76] Justice Breyer stated: "Unlike the Third Circuit, we do 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."[77]

Justice Breyer drew from the *amici* briefs filed with the Supreme Court of the United States to identify several types of out-of-school behaviors that may call for school regulation under the *Tinker* standard, including serious or severe bullying or harassment, targeting particular individuals, students, or teachers;[78] threats against teachers or other students; "the failure to follow rules concerning lessons"; or "breaches of school security devices," especially material within school computers.[79] He also noted that:

> (1) Although school authorities stand *in loco parentis* while students are in school, the school rarely stands *in loco parentis* when students are speaking off-campus and parents are responsible;
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> (2) If school regulates off-campus student speech as well as on-campus speech, that means schools regulate speech 24-hours a day; students may not be able to speak at all,

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[75] *Id.* at 2045.

[76] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021) (emphasis added).

[77] *Id.*

[78] *See* Kathleen Conn, *From Student Armbands to Cyberbullying: The First Amendment in Public Schools*, *in* 24 LEGAL FRONTIERS IN EDUCATION - COMPLEX LAW ISSUES FOR LEADERS, POLICYMAKERS AND POLICY IMPLEMENTORS 35, 35-58 (Anthony H. Normore, Patricia A.L. Ehrensal, Patricia F. First & Mario S. Torres, Jr. eds., 2015).

[79] *B.L.*, 141 S. Ct. at 2045.

> and it would be hard to justify regulation of political or religious speech;
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> (3) Perhaps most importantly, "the school itself has an interest in protecting a student's unpopular [speech off-campus]"; popular speech needs no protection, and "America's public schools are the nurseries of democracy."[80]

The majority opinion further stated that B.L. spoke under circumstances where the school did not stand *in loco parentis*—no evidence suggested that B.L.'s parents delegated that authority to the school on a Saturday night at the Cocoa Hut.[81] Additionally, the majority opinion stated that MASD presented no evidence that the school took steps to curb profanity either.[82] The school cheerleading coaches also stated they were trying to prevent disruption of classes in school by punishing B.L. for her speech, but they were unable to present evidence of a *Tinker*-standard type of disruption.[83]

Justice Alito concurred, joined by Justice Gorsuch, emphasizing the traditional common-law concept of *in loco parentis* as today's parents giving over consent to school control of their children to the extent of the tasks required by compulsory education.[84] The concurrence reasoned that the school must protect their students by prohibiting threatening and harassing speech.[85] Parents cannot protect their children while in school.[86] However, when in school, students are not stripped of their rights to free speech unless it involves "substantial disorder or invasion of the rights of others."[87]

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[80] *Id.* at 2046.

[81] *Id.* at 2043, 2047; Petition for Writ of Certiorari at 10, *B.L.*, 141 S. Ct. 2038 (No. 20-255).

[82] *B.L.*, 141 S. Ct. at 2047.

[83] *Id.* at 2047-48.

[84] *Id.* at 2052.

[85] *Id.*

[86] *Id.* at 2053.

[87] *Id.*

Justice Thomas dissented.[88] He would have upheld B.L.'s punishment.[89] He concluded his dissent by stating, "[i]t is well settled that schools can punish 'vulgar' speech–at least when it occurs on campus."[90] Justice Thomas appeared to miss the whole point of all the preceding court decisions about B.L.'s speech: that B.L.'s speech was off-campus speech.[91]

Justice Thomas instead took his characteristic "historical" stance, returning to the time when "teachers taught, and students listened."[92] Justice Thomas also took issue with the concept of *in loco parentis*, at one point saying it was abandoned, and at another point speculating that perhaps the Court will later explain the new common-law doctrine.[93]

PART III: THE VALUE OF EXTRACURRICULAR ACTIVITIES

A. Census Statistics

According to the 2020 U.S. Census, children are engaging in more extracurricular activities and sports than the previous generation.[94] The census tracks children's involvement by sex and poverty level.[95]

Yeris Mayol-Garcia, a statistician in the Census Bureau's Fertility and Family Statistics branch, provides an overview:

> Extracurricular activities are associated with a range of positive outcomes for children and adolescents including higher academic performance, more positive

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[88] *B.L.*, 141 S. Ct. at 2059.

[89] *Id.*

[90] *Id.* at 2061.

[91] *Id.* at 2043.

[92] Morse v. Frederick, 551 U.S. 393, 411-12 (2007) (Thomas, J., concurring).

[93] *B.L.*, 141 S. Ct. at 2061-63 (Thomas, J., dissenting).

[94] Yeris Mayol-Garcia, *Children Continue to be More Involved in Some Extracurricular Activities*, U.S. CENSUS BUREAU (July 26, 2022), https://www.census.gov/library/stories/2022/07/children-continue-to-be-involved-in-extracurricular-activities.html#:~:text=proportions%20than%20boys.-,In%202020%2C%2029%25%20of%20girls%20and%2024%25%20of%20boys,%25%2C%20respectively%2C%20in%201998.

[95] *Id.*

> academic perspectives and higher academic aspirations. Research has shown that participating in such activities can help develop social skills, boost self-esteem and resiliency and lower levels of risky behaviors. Additionally, researchers found that more involvement in those activities give youth a chance to develop social skills and discover their own interests.[96]

Mayol-Garcia further explains that "[i]n 2020, 29% of girls and 24% of boys were involved in clubs."[97] Boys' participation in sports fluctuated between 1998 and 2020, but in 2020, 44% of boys were involved in extracurricular sports, and 35% of girls were involved.[98] "Girls also participated more often in music, dance, language, [and] other lessons . . . [than] boys."[99]

The 2020 Census data also shows that poverty impacts children's involvement in extracurricular activities, which is expected.[100] Club participation in the last decade, however, "decreased among all children regardless of the family income-to-poverty ratio." But sports and lessons participation increased "among children in families at 200% or higher of the federal poverty threshold."[101] This is understandable because many activities, including sports and lessons, require parental participation and financial resources for fees, transportation, and equipment.

B. The History of Extracurricular Activities

The legal right to equitable access to extracurricular programs at schools came to national attention during the desegregation era.[102] In *Green v. County School Board of New Kent County*, extracurricular access was examined as one of the six factors for determining whether a school district had eliminated the vestiges of

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Mayol-Garcia, *supra* note 94.
[101] *Id.*
[102] Robert Kim, *Do Students Have a Right to "Equal Extracurricular Opportunity"?*, 102 PHI DELTA KAPPA 64, 64 (2021).

segregation.[103] Outside of the desegregation context, courts have considered extracurricular access to be a privilege, not a fundamental right.[104] This was not surprising considering that the right to a free education is not a fundamental right under the Constitution, but subject to state constitutional provisions.[105] However, because extracurricular access is not a property right, as is compulsory public education, student-athletes in extracurricular activities do not enjoy due process rights when filing grievances.[106]

At the federal level, Title IX prohibits discrimination on the basis of sex in all schools, pre-k through postsecondary education, that receive federal financial assistance.[107] The Fact Sheet from the U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations states:

> Over the last 50 years, since Title IX of the Education Amendments of 1972 was signed into law, it has paved the way for tremendous strides in access to education, scholarships, athletics, and more for millions of students across the country [,] [especially women].[108] In spite of this historic progress, women and girls still face fundamental barriers to equal education opportunity.[109]

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[103] Green v. Cnty Sch. Bd., 391 U.S. 430, 435 (1968).

[104] *See* Kirby v. Loyalsock Twp. Sch. Dist., 837 F. Supp. 2d 467, 476-77 (M.D. Pa. 2011).

[105] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

[106] *See* Amanda Segrist et al., *Interscholastic Athletics and Due Process Protection: Student-Athletes Continue to Knock on the Door of Due Process*, 6 MISS. SPORTS L. REV. 1, 3 (2016).

[107] 20 U.S.C. §1681. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*; *See* Diane Heckman, *The Golden Anniversary of Title IX of the Education Amendments of 1972: A Look at Its Application to Educational Programs Generally, Along with the Major Players Involved, Its Toolbox, and Remedies*, 403 EDUC. L. REP. 377, 379 (2022).

[108] *U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf (last visited November 8, 2023).

[109] *Id.*

Billie Jean King created the Women's Sports Foundation to protect the sports side of Title IX. "In 1971, before Title IX passed, only 1% of college athletic budgets went to women's sports programs."[110] "At the high school level, male athletes outnumbered female athletes 12.5 to 1."[111]

The Women's Sports Foundation asserts that, "[t]he impact of Title IX on women's sports is significant. . . . [W]hile female athletes and their sports programs still have fewer teams, fewer scholarships, and lower budgets than their male counterparts, since Title IX's passage, female participation at the high school level has grown by 1057 percent and by 614 percent at the college level."[112]

C. The Sport of Cheerleading

When the word "sport" is mentioned, baseball, football, soccer, and the like, may readily come to mind. However, "[t]o be considered a sport, an activity must involve physical exertion and skill in which an individual or team competes against another or others for entertainment.[113] Cheerleading involves throwing, catching, spinning, and flipping, which all involve physical exertion."[114]

Female cheerleading is also a dangerous sport. It is not all pom-poms and short skirts. More than 30,000 cheerleaders go to hospitals each year for their injuries, concussions, and catastrophic injuries that may leave a cheerleader permanently disabled.[115] Since many people do not think of cheerleading as a sport, there are not as many safety rules as there are in more traditional sports.[116]

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[110] *Title IX*, BILLIE JEAN KING, https://www.billiejeanking.com (last visited November 8, 2023).

[111] *Id.*

[112] *Id.*

[113] Courtney Higgins et al., *Why Cheerleading is a Sport*, THE DELPHI (Feb. 3, 2020), https://sno.dvrhs.org/3755/opinion/why-cheerleading-is-a-sport/#:~:text=To%20be%20considered%20a%20sport,which%20all%20involve%20physical%20exertion.

[114] *Id.*

[115] *Id.*

[116] *Id.*

D. Cheerleader Demographics

Statistics on the numbers of cheerleaders in United States high schools today vary widely according to internet sources, from 144,000 to 1,000,000.[117] However, United States cheerleader demographics are more consistent from source to source, indicating that most cheerleaders are female (84.3 percent), with only 15.7 percent male.[118] The racial breakdown includes White (58.3 percent), Hispanic or Latino (18.5 percent), Black or African American (10.6 percent), and the rest Asian or Native American.[119]

E. Other Court Decisions in Cheerleading Controversies[120]

A federal district court in Utah reached a different conclusion in a Snapchat scenario similar to B.L's situation in *Johnson ex rel. S.J. v. Cache Cnty. Sch. Dist*.[121] School officials dismissed cheerleader S.J. from the Mountain Crest High School team after she and several friends posted profanity celebrating their making the team.[122] S.J.'s father, Corey Johnson, brought a Section 1983 civil rights action against Cache County School District administrators.[123] Similarly to B.L.'s scenario, the team had conduct rules for the squad, and "[w]hile trying out for the [team], S.J. was given paperwork to review, sign, and return. S.J. and her parents signed and returned the Cheer and Stunt Squad Constitution

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[117] *Cheerleading Participation in U.S. High Schools 2010-2022, By Gender*, STATISTA (Dec. 8, 2022), https://www.statista.com/statistics/511379/participation-in-us-high-school-cheerleading/.

[118] *Cheerleader Demographics and Statistics in the U.S.*, ZIPPIA (Jul. 21, 2023), https://www.zippia.com/cheerleader-jobs/demographics/.

[119] *What Is a Cheerleader? Demographics*, ZIPPIA, https://www.zippia.com/cheerleader-jobs/demographics/ (last visited Nov. 14, 2023).

[120] *See* Kathleen Conn, *Sports*, *in* YEARBOOK OF EDUC. L., 145-56 (Charles K. Russo ed., 2019).

[121] Johnson *ex rel.* S.J. v. Cache Cnty. Sch. Dist., 323 F. Supp. 3d 1301 (D. Utah 2018).

[122] *Id.*

[123] A 42 U.S.C § 1983 action contains no independent rights on its own but acts as a vehicle to bring to court allegations that a state actor has violated an individual's constitutional right, e.g., a First Amendment right to freedom of speech.

("Cheer Constitution"), which has a provision that 'members will be dismissed for improper social media usage.' "[124]

"The cheer squad advisor . . . explained to the potential cheerleaders that there was a history of inappropriate social media usage by Mountain Crest cheerleaders and it has escalated the sometimes violent rivalry Mountain Crest had with its neighboring high school, Ridgeline, and created conflict with Mountain Crest.[125] She "instructed the prospective cheerleaders not to post any derogatory or nasty comments [on social media], to refrain from bullying or any 'catty' comments, and not to post anything that would do dishonor to themselves, their family, or their school."[126]

"On March 15, 2018, after learning that she made the squad, S.J. returned to the school for an ice cream social and new member informational meeting the school held for the girls who had made the squad."[127] "At the meeting, the students were given Mountain Crest shirts."[128] School administrators again warned the new team members "not to gloat about making the team" and "that there was a 'zero tolerance' policy for violations of the cheer constitution and that violations would result in expulsion from the cheer squad."[129] "The [new] cheerleaders agreed to be positive on social media."[130]

After the social, the new cheerleaders planned to go to dinner and, while driving, they sang the following lyrics from a song: "I don't fuck with you, you little stupid ass bitch, I ain't fucking with you[,]" and S.J. posted an eight-second video of the singing on her Snapchat account.[131] Even though S.J. quickly removed the video, copies were made and school administrators removed S.J. and four of the other singers in the video from the team, indicating that the profanity could be interpreted as "threatening" their rival cheerleading teams.[132]

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[124] *Johnson*, 323 F. Supp. 3d at 1308.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Johnson *ex rel.* S.J. v. Cache Cnty. Sch. Dist., 323 F. Supp. 3d 1301, 1308 (D. Utah 2018).
[130] *Id.*
[131] *Id.*
[132] *Id.*

The school administrators allowed the four other girls back on the team with conditions, but not S.J.[133] Her father filed suit, alleging a violation of S.J.'s First Amendment free speech rights and a violation of S.J.'s Fourteenth Amendment due process rights.[134]

Contrary to B.L.'s scenario, S.J.'s father's motion for a preliminary injunction failed because he could not meet the requirement of irreparable harm to S.J., and S.J. had no prospect of meeting the other requirements for an injunction.[135]

In another cheerleading case in Texas, not involving profane speech, cheerleaders made "run through" banners with personal religious messages on them, allegedly to inspire team members and the community.[136] The superintendent of the district banned the banners, but the court reversed the ban, ruling that the banners were personal religious speech.[137] On remand, the appellate court affirmed the cheerleaders' First Amendment right to freedom of speech.[138]

F. Summary

By far, the overwhelming majority of students, seven out of every ten who participate in extracurricular activities choose sports.[139] However, even more parents of school-age children report that their children watch television, movies, or videos (ninety percent), or play games on electronic devices (seventy-nine percent) on typical days.[140] "About half of [the] parents say their children spend too much time on these activities."[141]

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[133] *Id.*

[134] *Id.* at 1311.

[135] *Johnson*, 323 F. Supp. 3d at 1317.

[136] Kountze Indep. Sch. Dist. v. Matthews, 2017 WL 4319908 at *1 (Ct. App. Tex. 2017), *review denied and reh'g of petition for review denied*.

[137] *Id*. at *1.

[138] *Id*. at *13.

[139] *Children's Extracurricular Activities*, PEW. RES. CTR. (Dec. 17, 2015), https://www.pewresearch.org/social-trends/2015/12/17/5-childrens-extracurricular-activities/.

[140] *Id.*

[141] *Id.*

PART IV: MAHANOY'S PROGENY, 2021-2023

Numerous legal commentators, school boards, school district administrators, and parents have analyzed the Supreme Court of the United States' decision in *B.L. v. Mahanoy*. As of June 22, 2023, Westlaw reported that the *Mahanoy* decision had been cited in publicly available documents online 551 times, including 244 times in secondary sources and 161 times in appellate court documents, in approximately only two years. In addition, according to Westlaw, the decision was examined, analyzed, and identified as precedential as early as June 29, 2021, only six days after its publication.[142]

A. The Reaction to B.L.'s Lack of Punishment

Many educators and public school administrators expected the courts of the District Court for the Middle District of Pennsylvania, and even the Court of Appeals for the Third Circuit, to uphold MASD's punishment of B.L., and they were taken aback at the ease with which the Supreme Court of the United States' *Mahanoy* majority forgave B.L. for her profane speech on Snapchat.[143] Is it not the duty of the school to "inculcate [in students] the habits and manner of civility"?[144]

In. *Fraser*, which was referenced repeatedly in each stage of the *B.L*. litigation, the majority stated:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular . . . . The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a

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[142] *See* Oliver v. Arnold, 3 F.4th 152 (5th Cir. 2021).
[143] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046-47 (2021).
[144] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

> democratic society requires consideration for the personal sensibilities of the other participants and audiences.[145]

Granted, the MASD Cheerleading Rules of Conduct were not applicable the weekend B.L. posted her Snaps; the rules did not take effect until the cheerleading season started. But the Supreme Court of the United States' majority opinion seemed to overlook the "f" word as just "typical teenage speech," which unfortunately for mature adults, it may be.

Most of the *amici* briefs to the Supreme Court of the United States appeared to pay more attention to Judge Krause's "bombshell" analysis and announcement in her Court of Appeals for the Third Circuit decision that the *Tinker* standards applied only to on-campus speech. Judge Krause separated the legal standards applicable to judging students' rights to First Amendment protection for either on-campus or off-campus student speech. Therefore, Judge Kraus and the majority from the Court of Appeals for the Third Circuit ruled in their decision that the *Tinker* standard should be controlling *only* in judicial determinations regarding on-campus speech.[146] Justice Breyer's Supreme Court of the United States' majority opinion began by resuscitating the *Tinker* standard for off-campus speech when the facts made that application necessary.[147]

The next step was Justice Alito's explanation of the historical meaning and revival of the doctrine of *in loco parentis*.

B. The Doctrine of In Loco Parentis

With respect to Justice Alito's invocation of the *in loco parentis* approach as a definition of school authority and responsibility, versus parental authority and responsibility, Justices Breyer in the majority and Justice Alito in his concurrence, smoothly created an understanding of lines between the school's right and obligation to discipline a student and the parental right and obligation to do the same.[148] The school must discipline a student who disregards or breaks school conduct rules lest the example be seen and repeated

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[145] *Id.*

[146] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d. Cir. 2020).

[147] *Mahanoy*, 141 S. Ct. at 2041.

[148] *Id.* at 2045; *Id.* at 2049 (Alito, J., concurring).

by other students. Parents may discipline their child for disobedience or disregard for family rules or forego discipline and suffer the consequences. The disobedience or disregard of family rules would not be seen on the same scale as disregard of school rules would be. The line between school action and parent action can blur, and in the best-case scenario, when school discipline is merited for a student's breaking of a school rule, parent discipline would accompany school discipline.

C. The Need to Examine Sports Conduct Rules Thoroughly but to Apply Them Sparingly

As noted by several of the *B.L.* court opinions, the Cheerleading Conduct Rules were lengthy and vague in parts; for example, where *tarnishment* of the high school image was to be avoided, and the rules prohibiting only certain student activities during the cheerleading season.[149] Most of the concern that spurred the adoption of the conduct rules were founded on portraying a respectable image. The rules were lengthy and superficial.

The MASD conduct rules contrast with the explicit need for the Mountain Crest High School Cheerleading Coach's explanation of the prior misuse of social media by her squad. [A] history of [prior] inappropriate social media usage by Mountain Crest cheerleaders . . . had escalated [a] sometimes violent rivalry . . . with its neighboring high school, Ridgeline, and created conflict within Mountain Crest."[150] She "instructed the prospective cheerleaders not to post any derogatory or nasty comments, to refrain from bullying or any 'catty' comments, and not to post anything that would do dishonor to themselves, their family, or their school."[151]

This was a real need, not a *look good* conduct rule. School districts need to examine their extracurricular conduct rules. Coaches need to emphasize student safety, especially in their extracurricular sports, rather than putting a *good face* on team conduct for themselves and their districts. They also must be sure

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[149] *Id.* at 2047-48 (majority opinion); *B.L.*, 964 F.3d at 193-94; B.L. v. Mahanoy Area Sch. Dist., 376 F.Supp.3d 429, 445 (M.D. Pa. 2019).

[150] Johnson v. Cache Cnty. Sch Dist., 323 F.Supp.3d 1301, 1308 (D. Utah 2018).

[151] *Id.*

that the rules are not ambiguous or overly broad, and that they apply only when the provisions of the rules are absolutely necessary.

D. How Circuit Courts of Appeals Have Applied Mahanoy

Identifying how circuit courts of appeals have chosen to quote different parts of the *Mahanoy* Supreme Court of the United States decision helps to unravel the meaning of Justice Breyer's curious quotation in the majority opinion: "It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. *But sometimes it is necessary to protect the superfluous in order to preserve the necessary.*"[152]

Sample quotes from *Mahanoy* included:

> (1)"[T]he school's regulatory interests remain significant in some off-campus circumstances. . . . These include serious or severe bullying or harassment targeting particular individuals . . . "[153]
>
> (2)School officials "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[154]
>
> (3)"America's public schools are the nurseries of democracy."[155]

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[152] *Mahanoy*, 141 S. Ct. at 2048 (emphasis added).

[153] Doe v. Hopkinton Pub. Schs., 19 F.4th 493 (1st Cir. 2021) (quoting *Mahanoy*, 141 S. Ct. at 2045).

[154] Starbuck v. Williamsburg James City Cnty. Sch. Board, 28 F.4th 529 (4th Cir. 2022) (quoting *Mahanoy*, 141 S. Ct. at 2048).

[155] Peltier v. Charter Day Sch., 37 F.4th 104 (4th Cir. 2022) (quoting *Mahanoy*, S. Ct. at 2046).

> (4)"[P]arents[,] [not the State,] have the primary authority and duty to raise, educate, and form the character of their children."[156]
>
> (5)"Since *Tinker* the Court has identified 'three specific categories of student speech that schools may regulate' regardless of whether the circumstances satisfy Tinker 's 'substantial disruption' standard."[157]

The above is merely a cursory selection which could easily be expanded. However, the diversity of precedential "lessons" to be learned from Justice Breyer's majority opinion in *Mahanoy* belies Justice Breyer's characterization of B.L.'s Snapchat speech as "superfluous."[158] Coupled with Justice Breyer's resuscitation of the possible application of *Tinker*'s material and substantial disruption of school operations standard to off-campus speech, as well as *Tinker*'s often-neglected standard of interference with the rights of others, means that the majority opinion was totally necessary.[159]

D. Conclusion

Justice Breyer's majority decision in *Mahanoy Area School District v. B.L.* has provided clarity to assist courts in resolving student speech controversies. Justice Alito provided an even more expansive clarification of the application of *in loco parentis*. The *Tinker* decision has been restored from its limitation to on-campus speech by the Court of Appeals for the Third Circuit's decision and is now available for off-campus application when factual circumstances suggest its applicability. All is well.

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[156] Gerson v. Logan River Acad., 11 F.4th 1195 (10th Cir. 2022) (quoting *Mahanoy*, 141 S. Ct. at 2053).

[157] Quoted in N.J. v. Sonnabend, 37 F.4th 412 (7th Cir. 2022) (quoting *Mahanoy*, 141 S. Ct. at 2045).

[158] *Mahanoy*, 141 S. Ct. at 2041, 2042, 2048.

[159] *Id.* at 2045.