DECIDING NOT TO DECIDE: *MAHANOY AREA SCHOOL DISTRICT v. B.L.* AND THE SUPREME COURT'S AMBIVALENCE TOWARDS STUDENT SPEECH RIGHTS

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In June 2021, the Supreme Court issued opinions in its first school speech case in over fourteen years. In *Mahanoy Area School District v. B.L.*,[1] an eight-member majority held that high school officials violated a teenager's First Amendment rights when they suspended her from the school cheerleading team as punishment for a vulgar social media post.

Legal scholars and advocacy groups of many stripes had anxiously anticipated a decision in this case. Before *B.L.*, the Supreme Court had decided just four student speech cases: In the 1969 case *Tinker v. Des Moines Independent Community School District*,[2] the Court held that public school students have constitutionally protected speech rights at school, but that schools may regulate student speech that is reasonably likely to cause a substantial disruption to school operations. In *Bethel School District No. 403 v. Fraser*,[3] decided in 1986, the Court further held that schools can punish students for profane or

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1. 141 S. Ct. 2038 (2021).
2. 393 U.S. 503 (1969).
3. 478 U.S. 675 (1986).

vulgar speech, even if it is not substantially disruptive. Two years later, in *Hazelwood School District v. Kuhlmeier*,[4] the Supreme Court established that school officials may regulate school-sponsored student speech—such as a school newspaper—for pedagogical reasons. And finally, in the 2007 case *Morse v. Frederick*,[5] the Court held that schools may discipline students for speech that promotes illegal drug use.

All of these cases involved in-school speech, however, and the Court had never before addressed the question of whether the *Tinker* rule applies to off-campus speech—in other words, whether school officials can punish students for out-of-school speech that substantially disrupts school operations. In the meantime, school officials, state legislators, and lower courts have struggled with the scope of schools' ability to regulate what students post online.[6]

More broadly, the fact that, ever since *Tinker,* the Court had consistently decided school speech cases in favor of school districts left open the question of when, if ever, the current conservative-dominated Court would uphold student speech rights. As one commentator noted, "There was every reason to dread that the court would use [this] case as a vehicle to continue, and accelerate, decades' worth of retrenchment on student rights."[7]

When the Court held 8-1 in favor of the student respondent, some free speech advocates breathed a sigh of relief. They hailed the decision as a victory,[8] and the news media published photos of former student Brandi Levy, now a college freshman, in her cheerleading uniform and holding pompoms in front of her former high school.[9]

While Brandi Levy indeed won her case, nobody should mistake this decision for a landmark victory for student free speech. The Court's opinion is a notably narrow ruling that seems primarily designed to overturn a Third Circuit holding that was far more broadly protective of student off-campus speech. The case implicates a number of genuinely difficult First Amendment issues, precisely zero of which the

4. 484 U.S. 260 (1988).

5. 551 U.S. 393 (2007).

6. *See* CATHERINE J. ROSS, LESSONS IN CENSORSHIP 207–44 (2015).

7. Frank D. Lomonte, *The Supreme Court's Cheerleader Decision has Something to Frustrate and Disappoint Everyone*, SLATE (June 25, 2021, 12:07 PM), https://slate.com/technology/2021/06/supreme-court-snapchat-cheerleader-student-speech-rights.html [https://perma.cc/GZ7P-PVVK].

8. *See, e.g.*, Rob Miraldi, *Brandi Levy, Mary Beth Tinker, and the Enduring Triumphs of Free Speech*, POUGHKEEPSIE J. (June 23, 2021, 1:58 PM), https://www.poughkeepsiejournal.com/story/opinion/2021/06/23/brandy-levy-mary-beth-tinker-talks-protection-free-speech/5323449001/ [https://perma.cc/7G9E-8SGZ].

9. *See, e.g.*, Adam Liptak, *Supreme Court Rules for Cheerleader Punished for Vulgar Snapchat Message*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/23/us/supreme-court-free-speech-cheerleader.html [https://perma.cc/M8FR-YGXG].

Court resolved. What's more, the Court's qualified immunity doctrine effectively converts legal ambiguity into government power; given the current framework, even when a court finds that a school official has violated a student's constitutional rights by disciplining her for off-campus speech, the student will almost certainly be unable to recover money damages.

I. CASE HISTORY

On Thursday, May 25, 2017, fourteen-year-old cheerleader Brandi Levy failed to earn a spot on the Mahanoy Area High School varsity cheer squad. Brandi had unsuccessfully tried out for the varsity team a year earlier, before her freshman year, and she was frustrated and upset that she would be on the junior varsity team again during her sophomore year. She was particularly aggravated that another girl who was an incoming freshman had made the varsity squad.[10]

On Saturday, while at a local convenience store, Brandi took a photo of herself and a friend both giving the camera the middle finger. She superimposed the words "fuck school fuck softball fuck cheer fuck everything" on the picture and posted it to her Snapchat account. Brandi then posted a second Snap, "Love how me and [my friend] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else?"[11]

Before the Snaps self-deleted on Sunday, a cheerleader on Brandi's Snapchat friends list took photos of the posts and sent them to yet another cheerleader, the daughter of one of the cheerleading coaches. That girl showed the posts to her mother.[12] Over the next few days, multiple members of the cheer squad also reported the Snaps to the two co-coaches.[13]

The cheerleading coaches decided that Brandi's Snaps violated the school's Cheerleading Rules, specifically, the following two provisions:

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10. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020); Joint Appendix at 34, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255).

11. *B.L.*, 964 F.3d at 175.

12. Brief of Appellee, *B.L.*, 964 F.3d 170 (No. 19-1842). It may be relevant to this saga that the coach's daughter had herself previously been suspended from the cheer squad for posting unkind comments about the cheerleaders for an opposing team. Joint Appendix, *supra* note 10, at 71.

13. Joint Appendix, *supra* note 10, at 81. Members of the Mahanoy Area High School cheerleading squad apparently policed each another enthusiastically. One of the cheerleading coaches testified that the cheerleaders "let me know no matter what, so and so has jewelry on, so and so is wearing the wrong shirt, so and so forgot their bloomers . . . I get texts from all different girls all times of the day about different situations." *Id.* at 80.

> 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 . . . . There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.[14]

On Thursday, Coach Nicole Luchetta-Rump called Brandi into her classroom and told her that her Snaps had been disrespectful and that she was off the cheerleading team for a year.[15] After unsuccessfully trying to get the principal, the school superintendent, and the district school board to overturn the coaches' decision,[16] Brandi's parents sued the Mahanoy Area School District in federal court, arguing that the school district had violated Brandi's First Amendment rights.[17]

In October 2017, District Court Judge A. Richard Caputo for the Middle District of Pennsylvania granted the Levys' motion for a preliminary injunction,[18] and Brandi returned to the junior varsity cheerleading squad.[19] Both parties then cross-moved for summary judgment. The district court again held in favor of the Levys.[20] It was unnecessary to decide whether the *Tinker* standard applied to non-school speech, Judge Caputo wrote, because Brandi's Snaps did not cause any substantial disruption, nor could they have reasonably been predicted to do so.[21]

The school district appealed, and in June 2020 a three-judge panel of the Third Circuit upheld the district court's grant of summary judgment to the Levys.[22] Unlike the lower court, however, the appellate majority eagerly dove into the larger First Amendment issue, holding that *Tinker* does not apply to off-campus speech.[23] Judge Cheryl Ann Krause left open the possibility that schools could regulate out-of-school speech that threatens violence or targets specific students or teachers for harassment, noting that such speech might fall into other exceptions to the First Amendment.[24]

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14. B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 610 (M.D. Pa. 2017).
15. Joint Appendix, *supra* note 10, at 27.
16. *Id.* at 59–60.
17. *See* Complaint, *B.L.*, 289 F. Supp. 607 (No. 3:17-CV-1734).
18. *B.L.*, 289 F. Supp. 3d 607.
19. Perhaps unsurprisingly, given the intensely personal nature of school litigation, Brandi's return to the cheer squad prompted an angry reaction from some of her teammates. *See* Joint Appendix, *supra* note 10, at 84–86.
20. B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019).
21. *Id.* at 443–44.
22. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 194 (3d Cir. 2020).
23. *Id.* at 189.
24. *Id.* at 190–91.

Judge Thomas Ambro wrote separately, concurring in the judgment but dissenting from the majority's holding that *Tinker* did not apply to off-campus speech.[25] He pointed out that under existing precedent, Brandi's Snaps were clearly beyond the scope of regulation by school officials, so there was no need for the court to decide any broader constitutional questions.[26]

In January 2021, the Supreme Court granted the Mahanoy Area School District's petition for a writ of certiorari to decide whether schools' authority under *Tinker* applies to off-campus speech.[27] In its briefs to the Court, the school district warned that the Third Circuit's sweeping decision would undermine dozens of state and federal antibullying laws that explicitly rely on *Tinker*, explaining that these statutes authorize, and in fact often require, schools to regulate off-campus harassment or bullying that substantially disrupts the school environment.[28]

The Levys asserted that allowing schools to discipline students for off-campus speech under the *Tinker* standard would significantly intrude on both students and parents' rights.[29] Young people would be subjected to censorship "24 hours a day, 365 days a year, deterring them from saying anything that school authorities might deem controversial, critical, or politically incorrect, and therefore disruptive."[30] Concerns about bullying and harassment, the respondents maintained, could be adequately addressed through other, more narrowly tailored First Amendment doctrines.[31]

The U.S. Department of Justice ("DOJ") was among the many amici—from across the political spectrum—who weighed in on this case. The DOJ urged the Court to overturn the Third Circuit's holding, noting that the lower court's "categorical rule" that schools cannot constitutionally regulate off-campus speech undermined officials' ability to respond to threats and combat harassment.[32] The Department disagreed, however, with the school district's claim that due process or the *Tinker* "substantial disruption" standard adequately protected

25. *Id.* at 194 (Ambro, J., concurring).

26. *Id.* at 195.

27. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 976 (2021) (mem.).

28. *See* Petition for a Writ of Certiorari, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 976 (No. 20-255); Brief for Petitioner at 8–9, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255); Reply Brief for Petitioner at 11–12, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255).

29. *See* Brief for Respondents at 1, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255).

30. *Id.*

31. *Id.* at 24–28.

32. Brief for the United States as Amicus Curiae Supporting Petitioner at 16, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255).

students' off-campus speech rights.[33] Instead, the federal government lawyers suggested, the Court should define a few categories of off-campus speech as "school speech" subject to *Tinker*; specifically, threatening speech, and speech that intentionally targets school programs or members of the school community.[34]

At oral argument, the Justices seemed eager to dispose of this case as narrowly as possible. Justice Breyer noted, "I can't write a treatise on the First Amendment on this case," a sentiment that Justice Kavanaugh echoed.[35] The Justices also appeared to largely agree that school officials should sometimes be able to regulate students' off-campus speech.[36] The open question was what standard should apply, and they peppered the advocates—who included not only lawyers for the Levys and the school district, but also the deputy Solicitor General—with various hypotheticals testing different lines. Justice Breyer lamented the difficulty of the task: "[S]chools have changed a lot . . . there are dozens of areas that didn't used to be thought of within the purview of the public school . . . . Now add to that the Internet . . . How do I get a standard out of that? I'm frightened to death of writing a standard."[37]

The Supreme Court issued its decision in June 2021.[38] Unsurprisingly, Justice Breyer, writing for the Court, declined to set out a clear standard for when schools may discipline students for out-of-school speech.[39] The Court explicitly rejected the Third Circuit's reasoning, noting that schools' interests in regulating speech "remain significant in some off-campus circumstances."[40] Still, Justice Breyer maintained, there were three features of off-campus speech that could diminish schools' First Amendment leeway: (1) schools rarely stand *in loco parentis* to students outside of school; (2) students need the freedom to engage in political or religious speech; and (3) for pedagogical reasons, schools have an obligation to protect students' unpopular expression. Elaborating on this last point, he noted, "Our

33. *Id*. at 21–22.

34. *Id*. at 24.

35. Transcript of Oral Argument at 43, 56, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255).

36. *See, e.g.*, *id*. at 33 (Barrett, J.); *id*. at 66 (Roberts, C.J.); *id*. at 72 (Thomas, J.); *id*. at 79 (Alito, J.); *id*. at 81 (Sotomayor, J.); *id*. at 86–87 (Kagan, J.).

37. *Id*. at 73–74.

38. *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038.

39. *Id*. at 2045 (". . .[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as "'off campus'" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need[s]. . . .").

40. *Id.*

representative democracy only works if we protect the 'marketplace of ideas.' "[41]

Turning to Brandi's Snaps, the Court quickly concluded that the school did not have a sufficient interest in teaching good manners to override Brandi's First Amendment rights. Furthermore, the Snaps had not disrupted school activities, nor had they resulted in any significant decline in morale on the cheer squad. The majority therefore affirmed the Third Circuit's judgment in favor of Brandi.[42]

Justice Alito, joined by Justice Gorsuch, concurred separately. He agreed with the majority that the First Amendment permits schools to regulate some off-campus student speech, but he argued that the central inquiry should be about parents', not students', rights. Public school students have diminished First Amendment rights at school, he maintained, only because parents effectively agree to relinquish some of their child's free speech rights when they enroll the child in school.[43] Justice Alito asserted that because there is no such general grant of authority off-campus, the key question in an out-of-school speech case is "whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question."[44] While some parents would have been unhappy with Brandi's Snaps, he concluded, it was unreasonable to assume that her parents had given Mahanoy Area High School the authority to discipline their daughter in this case.[45]

Unsurprisingly, Justice Thomas was the lone dissenter.[46] Dismissing *Tinker* and its progeny as "untethered from any textual or historical foundation,"[47] he argued that at the time the Fourteenth Amendment was ratified, school officials were allowed to regulate off-campus student speech that had a "proximate tendency to harm" the school.[48] Justice Thomas asserted that since Brandi's Snaps undermined the coaches' authority in front of other students, her suspension was not unconstitutional.[49]

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41. *Id*. at 2046.

42. *Id*. at 2047–48 (citing with approval Judge Ambro's opinion concurring in the judgment of the Third Circuit).

43. *Id*. at 2051 (Alito, J., concurring).

44. *Id*. at 2054.

45. *Id*. at 2058.

46. *See* Morse v. Frederick, 551 U.S. 393, 410 (2007) (Thomas, J., concurring) ("In my view, the . . . First Amendment . . . does not protect student speech in public schools.").

47. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2061 (Thomas, J., dissenting).

48. *Id*. at 2059.

49. *Id*. at 2061.

II. MANY QUESTIONS, FEW ANSWERS

The general takeaway from *B.L.* is that schools continue to have considerable leeway to discipline students for off-campus speech. The Court's only clear holding is that the *Tinker* standard does not *not* apply to out-of-school speech; the opinion suggests that school officials have less scope to regulate off-campus speech than they do in-school speech, but the extent of their power remains undefined. The majority listed a number of circumstances in which schools probably have the authority to discipline students for out-of-school speech: serious bullying or harassment directed at individual students or teachers, failure to follow academic rules, and breaches of school security.[50] What's more, Justice Breyer implied that the on-campus speech category might also be properly broadened to include, for example, students participating in remote learning, using school laptops,[51] or engaging in activities for school credit.[52]

This case does illustrate that the *Tinker* "significant disruption" requirement is not entirely pro forma, at least. While the various courts disagreed about the appropriate standard to apply to off-campus student speech, Brandi herself prevailed at every level because her Snaps had caused only minimal disruption at Mahanoy Area High School. Every judge, save one, who heard the case agreed that the fact that some members of the cheerleading squad repeatedly pestered the coach about the Snaps and that the coach then had to take five or ten minutes out of an algebra class to deal with the matter was not enough disruption to justify punishing Brandi for her speech.

The Court's decision, however, offers little clarity for schools and students grappling with truly thorny questions about off-campus student speech. In particular, with respect to highly inflammatory political or religious speech, speech by adult students, and speech related to extracurricular activities, the Court's opinion leaves open more questions than it answers.

A. Political or Religious Speech

At oral argument, the Justices were intensely interested in hypotheticals about schools trying to regulate off-campus student speech about hot button social issues, despite the fact that the student in the case before them had been punished for entirely nonpolitical

50. *Id*. at 2045.

51. *But see id*. at 2054 n.16 (Alito, J., concurring) (arguing that schools should not be allowed to regulate all speech on school-owned laptops).

52. *Id*. at 2045.

juvenile vulgarity. Indeed, the amicus briefs submitted to the Court illustrate how student free speech, which historically has been of interest mostly to liberals, is now also a cause célèbre for conservatives worried about "cancel culture."[53] And in their opinions, Justices Breyer and Alito both expressed considerable concern about school officials disciplining students for offensive out-of-school political or religious speech.

Nevertheless, the Court ultimately steered clear of offering any specific guidance for school officials and students struggling to resolve close cases. For example, Justice Kagan posed a hypothetical about a student who emails his classmates saying that they should refuse to do any further work for English class until the teacher changes the syllabus to include more authors of color.[54] Justice Alito asked about a student who refuses to use another student's chosen name and pronouns.[55] However, neither the majority nor the concurring opinions shed any light on the actual constitutional parameters for a school's response in such situations, offering only general exhortations to "protect[ ] unpopular ideas"[56] and "proceed cautiously."[57]

B. Adult Students

The Court's—and especially the concurrence's—reliance on the doctrine of *in loco parentis* also raises questions about school officials' authority to regulate the off-campus speech of high school students who are legal adults. This is not a theoretical issue; in 2019, nineteen percent of eighteen- and nineteen-year-olds in the United States were enrolled in high school.[58] To the extent that school speech doctrine rests on the premise that students have reduced constitutional rights because—and when—school administrators stand in the place of

53. *See, e.g.*, Brief of Alliance Defending Freedom and Christian Legal Society as Amicus Curiae in Support of Respondents at 27–28, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255) (urging the Court to clarify "in the context of our cancel culture" that students have the right to "express[ ] their beliefs on subjects including marriage and sexuality"); Brief of Amicus Curiae First Liberty Institute in Support of Respondents at 4, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255) (claiming that "government schools are hostile to student religious speech that disagrees with contemporary elite views on social issues").

54. Transcript of Oral Argument, *supra* note 35, at 51–52. In response to Justice Kagan's question, the deputy Solicitor General maintained that, under the DOJ's proposed standard, this email would be school speech and if it was substantially disruptive, subject to school regulation.

55. *Id.* at 18.

56. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046.

57. *Id.* at 2059 (Alito, J., concurring).

58. *Table 7: Percentage of the Population 3 to 34 Years Old Enrolled in School by Age Group: Selected Years, 1940 through 2019*, U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT. (2019), https://nces.ed.gov/programs/digest/d20/tables/dt20_103.20.asp [https://perma.cc/JQ23-PUCQ].

parents to "protect, guide and discipline"[59] minor students, this diminished constitutional protection would seem not to apply to adult students who are no longer under their parents' legal authority.[60] While courts have largely glossed over the apparent contradiction in applying *in loco parentis* to students past legal majority when considering public school students' constitutional rights,[61] the Court's centering of parental rights in school speech doctrine exacerbates this tension.[62]

C. Extracurricular Activities

Perhaps the most complicated issues come out of the fact that *B.L.* is a case about a student who was suspended from an extracurricular activity, rather than suspended or expelled from school itself. This implicates two strands of difficult questions: first, when assessing whether school officials have violated a student's First Amendment rights for punishing her for speech, does it matter how severely she was punished? And second, can students be required to waive their First Amendment rights in order to participate in a voluntary extracurricular activity? The Court's opinion offers no conceptual guidance on either of these matters, and the lower courts' decisions, as well as the Justices' discussion at oral argument, reflect a very confused—and confusing—jurisprudence.

In its filings to the district and circuit courts, the Mahanoy Area School District argued that public school students do not have a "protected property interest" to participate in extracurricular activities. Because Brandi had been merely suspended from the cheer squad, as opposed to suspended or expelled from school, they maintained, the court should apply a lower level of scrutiny to her First Amendment claims.[63] The Levys rejected this argument as a matter of law, of course,[64] but the American Civil Liberties Union ("ACLU") attorney representing them also sought to establish that suspension from the

59. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046.

60. For an excellent treatment of this issue, see Mark Fidanza, Note, *Aging Out of* In Loco Parentis: *Towards Reclaiming Constitutional Rights for Adult Students in Public Schools*, 67 RUTGERS U.L. REV. 805 (2015).

61. *Id.* at 806, 826–27.

62. The emphasis on *in loco parentis* also suggests that the Court's reasoning here should not apply to the college or university context. *See* Lomonte, *supra* note 7.

63. Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 5–6, B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607 (M.D. Pa. 2017) (No. 3:17-CV-1734); Memorandum of Law in Support of Defendant's Motion for Summary Judgment, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 429 (M.D. Pa. 2019) (No. 3:17-CV-1734); Brief for Appellant at 14–20, B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 194 (3d Cir. 2020) (No. 19-1842).

64. *See, e.g.*, Memorandum of Law in Support of Plaintiff B.L's Motion for Summary Judgment, *B.L.*, 376 F. Supp. 3d 429 (No. 3:17-CV-1734).

cheer squad was indeed a serious punishment, pressing witnesses about the potentially negative consequences for Brandi's college applications.[65]

The question of what constitutes "punishment" for speech such that it triggers a public school student's First Amendment rights has bedeviled school speech doctrine. Some federal courts have suggested or implied that the severity of punishment is constitutionally relevant, while others have disagreed.[66] District Judge Caputo, for his part, emphatically rejected the school district's argument, noting that the *Tinker* standard "does not ask courts to consider the punishment the school doled out . . . in determining whether student speech was protected . . . ."[67] The Third Circuit, similarly, maintained that constitutional concerns "apply with equal force where a school seeks to control student speech using even modest measures."[68]

In rejecting the Third Circuit's holding, the Supreme Court made no mention of this issue. The Justices simply assumed that for purposes of a First Amendment analysis, a yearlong suspension from the cheerleading squad constituted punishment. Indeed, in oral argument, Justice Kavanaugh noted twice that the punishment seemed "excessive."[69] However, Justice Barrett suggested that "nothing in the First Amendment prohibits soft discipline," such as reprimanding a cheerleader for her speech and warning her of future consequences.[70] And in his concurrence, Justice Alito implied that it would have been permissible for the cheerleading coaches to take Brandi's Snaps into account when assigning her a position on the team, for instance.[71] The larger question, then, of whether any negative action on the part of a school official in response to a student's speech constitutes punishment,

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65. Deposition of Lawrence J. Mussoline, *B.L.*, 376 F. Supp. 429 (No. 3:17-CV-1734); Joint Appendix, *supra* note 10, at 37 (deposition of cheerleading coach).

66. Compare, for example, a 2009 Second Circuit case involving a high school student who had been denied a place on the student council as punishment for urging her classmates to complain about the school's decision to reschedule an annual battle-of-the-bands concert, Doninger v. Niehoff, 527 F.3d 41, 53 (2d Cir. 2008) ("[A] different, more serious consequence than disqualification from student office" might "raise constitutional concerns."), with a 2013 Third Circuit case about a fifth grader who had not been allowed to distribute invitations to a Christmas party at her church, K.A. ex rel Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99 (3d Cir. 2013) (holding that the child will suffer irreparable injury without an injunction and applying the *Tinker* test).

67. *B.L.*, 376 F. Supp. 3d at 438.

68. *B.L.*, 964 F.3d at 183.

69. Transcript of Oral Argument, *supra* note 35, at 31, 98.

70. *Id.* at 36.

71. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2058 (2021) (Alito, J., concurring) (suggesting that there is a difference between a coach "selecting members of the team, [ ] assigning roles, and [ ] allocating playing time" and what happened in this case: "the school imposed punishment: suspension from a year from the cheerleading squad despite B.L.'s apologies").

or whether the official's action has to clear some threshold of severity in order to qualify, remains murky.

More pointedly, this case leaves entirely unresolved the question of whether it is constitutional to require public students to waive—either explicitly or implicitly—their free speech rights in order to participate in a voluntary extracurricular activity. The Supreme Court has held that mandating that students submit to random drug testing in order to participate in school athletics or competitive extracurricular activities does not violate the Fourth Amendment,[72] but whether this extends to the First Amendment as well remains very unclear.

In arguing its case to the lower courts, the Mahanoy Area School District repeatedly noted that sports teams and extracurricular activities frequently impose all sorts of additional requirements on participants; coaches regularly suspend athletes for violating pre-game curfews or talking back, for example.[73] In this case, the school district maintained, Brandi and her mother had freely agreed to abide by the Cheerleading Rules before tryouts, and Brandi had been suspended from the team specifically for breaking those rules.[74]

The district court disagreed. Judge Caputo rejected the claim that Brandi had actually waived her First Amendment rights. He asserted that Brandi and her mother did not have "bargaining equality" with the coaches, they were not represented by counsel, and the waiver had been coercive.[75] More broadly, while Judge Caputo agreed that student-athletes' speech could be more closely regulated than that of students generally, he argued that "[t]here is nothing unique about athletics that would justify [punishing] a student athlete's off-the-field profanity."[76]

The Third Circuit went further, explicitly distinguishing the Supreme Court's holding that, under the Fourth Amendment, student-athletes have diminished privacy expectations. Fourth Amendment reasonableness analysis, wrote Judge Krause, requires balancing social costs and benefits, which is anathema in the First Amendment context. "That line dividing First from Fourth Amendment doctrine is foundational, and we will not blur it here."[77] The Third Circuit declined

72. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding drug testing of student athletes); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottowatomie Cnty. v. Earls, 536 U.S. 822 (2002) (upholding drug testing of students in competitive extracurricular activities).

73. Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *supra* note 63; Brief for Appellant, *supra* note 63, at 14–20.

74. Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *supra* note 63.

75. B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 437–38 (M.D. Pa. 2019).

76. *Id.* at 442.

77. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 182 (3d Cir. 2020).

to affirm the district court's finding that the waiver Brandi signed was coercive, holding instead that the appellate court did not need to reach this issue because there was no waiver; a reasonable student would not have understood the Cheerleading Rules as prohibiting Brandi from posting what she did.[78]

During oral argument, many of the Justices pressed the advocates about the sorts of conditions that teams could constitutionally impose on students participating in voluntary extracurricular activities.[79] However, neither the majority nor the concurrence addressed the issue at all, leaving this complicated question wide open for future litigation.

And future litigation there will surely be. The testimony of some of the witnesses suggests that school officials most readily conceptualize voluntary extracurricular activities as similar to the workplace, where employers can and do regulate employees' social media accounts. A telling exchange between the ACLU attorney and one of the cheerleading coaches illustrates the power of this analogy:

> Q: "What are the [ ] skills other than team building that you want your cheerleaders to take with them when they graduate?
>
> A. Just basic understanding that you need to follow rules when you are part of something, whether it is at the workplace . . . . that there are different rules you have to follow in society.
>
> Q. I am trying to understand how that connects to punishing students for what they do when they're not at cheerleading.
>
> . . .
>
> A. Okay. My husband works at a distribution center, and someone hacked into his Twitter account. And they were posting negative things about Auto Zone on the internet. They were about to fire him for his job because they were saying negative things about Auto Zone on the internet until he was able to prove it was not him posting those things online. . . .[80]

Left to their own devices, teachers, coaches, and principals will continue to assume that they can suspend students from voluntary extracurricular activities as punishment for off-campus speech, just as the students' parents—or they themselves, for that matter[81]—can be fired by their employers for what they post on social media. Furthermore, the distinction that the Third Circuit drew between First and Fourth Amendment doctrine is entirely unworkable as a matter of guidance to anyone other than appellate lawyers. Coaches take it for

78. *Id.* at 192–93.

79. Transcript of Oral Argument, *supra* note 35, at 42, 57, 71, 84, 95, 98–99.

80. Joint Appendix, *supra* note 10, at 74–75.

81. *See generally* Jessica O. Laurin, Note, *"'To Hell in a Handbasket": Teachers, Free Speech, and Matters of Public Concern in a Social Media World*, 92 IND. L.J. 1615 (2017).

granted that they can sanction students for what they post online, just as they can require them to take drug tests and insist that they go to bed early on game nights.

Finally, it cannot be stressed enough that given the Court's qualified immunity doctrine, a decision to leave important constitutional questions unanswered is a decision in favor of government officials. Qualified immunity shields public officials sued in their individual capacity from money damages, unless they have violated a "clearly established" right of which a reasonable official would have known.[82] Given how little clarity the *B.L.* opinion offers with regard to students' off-campus speech rights, students who sue coaches or teachers for punishing them for things they said out-of-school are very unlikely to be able to recover monetary damages, even if courts decide that their First Amendment rights were indeed violated.

CONCLUSION

Legal scholar Fred Schauer has noted that while First Amendment litigation in the lower courts is dominated by cases involving free speech in schools and by public employees, the Supreme Court grants certiorari in such cases only rarely. And even when it does, he argues, the Court chooses unrepresentative cases and offers unhelpful opinions. He describes the *Morse* opinion, for example, as "so narrow, so case-specific, and so idiosyncratically about alleged encouragement of drug use as to provide virtually no guidance to the courts that have to deal with student speech issues."[83]

With *B.L.*, the Court continues this dubious tradition. For its first school speech case in many years, the Supreme Court selected a case with such easy facts that the actual outcome was a foregone conclusion, and it then issued an exceptionally narrow opinion that offers minimal help to schools, students, and lower courts grappling with hard questions about students' First Amendment rights. But, as the saying goes, not to decide is to decide. In *B.L.*, the Court consciously decided to keep students' free speech rights ambiguous, a decision that ultimately weighs in favor of school officials who seek to regulate students' off-campus speech. While the case was not the wipeout that First Amendment advocates feared, it is not one that they should celebrate, either.

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82. Pearson v. Callahan, 555 U.S. 223, 243–44 (2009).

83. Frederick Schauer, *Is it Important to be Important?: Evaluating the Supreme Court's Selection Process*, 119 YALE L.J. ONLINE 77 (2010), https://www.yalelawjournal.org/forum/is-it-important-to-be-important-evaluating-the-supreme-courts-case-selection-process [https://perma.cc/ZC6T-TFSC].