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## Splitting the Difference: *Layshock* and *J.S. Chart* a Separate Path on Student Speech Rights

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# SPLITTING THE DIFFERENCE: LAYSHOCK AND J.S. CHART A SEPARATE PATH ON STUDENT SPEECH RIGHTS

**Abstract:** On June 13, 2011, the U.S. Court of Appeals for the Third Circuit, in *Layshock ex rel. Layshock v. Hermitage School District* and *J.S. ex rel. Snyder v. Blue Mountain School District*, held that school officials could not constitutionally punish the online, off-campus speech of two students when the speech would not foreseeably cause substantial disruption in school. Although the Third Circuit's results in these cases were consistent with Second Circuit precedent, the Third Circuit employed a less restrictive method for analyzing limitations on student speech. Accordingly, this Comment argues that the standards applied by the Third Circuit will lead to decisions in future online, off-campus speech cases which will generally be more favorable to public school districts than similar cases in the Second Circuit.

## INTRODUCTION

In 2005, public school officials in Pennsylvania suspended Justin Layshock for a “parody profile” of his principal that he had posted online while off school property.<sup>1</sup> In 2007, officials in a school district across the state suspended J.S. for remarkably similar conduct.<sup>2</sup> In suits challenging the constitutionality of the districts’ actions, separate panels of the U.S. Court of Appeals for the Third Circuit issued opinions in 2010 in favor of Layshock in *Layshock ex rel. Layshock v. Hermitage School District (Layshock III)* and against J.S. in *J.S. ex rel. Snyder v. Blue Mountain School District (J.S. III)*.<sup>3</sup> Vacating both opinions, the en banc Third Circuit held in 2011, in *Layshock IV* and *J.S. IV*, respectively, that school officials had violated each student’s First Amendment rights.<sup>4</sup>

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<sup>1</sup> *Layshock ex rel. Layshock v. Hermitage Sch. Dist. (Layshock I)*, 412 F. Supp. 2d 502, 505 (W.D. Pa. 2006).

<sup>2</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. I)*, No. 3:07-cv-585, 2007 WL 954245, at \*1 (M.D. Pa. Mar. 29, 2007).

<sup>3</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. III)*, 593 F.3d 286, 308 (3d Cir. 2010), *aff’d in part, rev’d in part*, 650 F.3d 915 (3d Cir. 2011) (en banc); *Layshock ex rel. Layshock v. Hermitage Sch. Dist. (Layshock III)*, 593 F.3d 249, 264–65 (3d Cir. 2010), *aff’d*, 650 F.3d 205 (3d Cir. 2011) (en banc).

<sup>4</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. IV)*, 650 F.3d 915, 933 (3d Cir. 2011) (en banc), *cert. denied*, 80 U.S.L.W. 3266 (U.S. Jan. 17, 2012) (No. 11-502); *Layshock ex rel. Layshock v. Hermitage Sch. Dist. (Layshock IV)*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc).

In recent years, students' in-school and out-of-school digital media usage has become nearly ubiquitous, contributing to a high volume of school speech litigation.<sup>5</sup> The U.S. Supreme Court has never explicitly discussed whether a school official may punish student speech that occurs outside the supervisory authority of the school.<sup>6</sup> Consequently, lower courts have often reached conflicting results in these cases.<sup>7</sup> When *Layshock IV* and *J.S. IV* were decided, only two student Internet speech cases had reached a U.S. Court of Appeals—both in the Second Circuit.<sup>8</sup> Nonetheless, *Layshock IV* and *J.S. IV* indicate a clear intra-Circuit—and potentially inter-Circuit—split regarding the appropriate standards to apply in student Internet speech cases.<sup>9</sup>

Part I of this Comment examines the factual and legal background of Layshock's and J.S.'s cases.<sup>10</sup> Part II discusses the four landmark deci-

<sup>5</sup> See *J.S. IV*, 650 F.3d at 951 (Fisher, J., dissenting); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 396 (2011) (noting that student speech cases are among the most frequently litigated under the First Amendment).

<sup>6</sup> See Goldman, *supra* note 5, at 410.

<sup>7</sup> Compare, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. II)*, No. 3:07-cv-585, 2008 WL 4279517, at \*9 (M.D. Pa. Sept. 11, 2008) (rejecting J.S.'s First Amendment claim), *aff'd on other grounds*, 593 F.3d 286 (3d Cir. 2010), and *aff'd in part, rev'd in part*, 650 F.3d 915 (3d Cir. 2011) (en banc), and *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1273–74 (W.D. Wash. 2007) (refusing to enjoin a school from suspending a student for posting a mocking video of his teacher on the Internet), with *Layshock ex rel. Layshock v. Hermitage Sch. Dist. (Layshock II)*, 496 F. Supp. 2d 587, 606–07 (W.D. Pa. 2007) (granting Layshock summary judgment on his First Amendment claim), *aff'd*, 593 F.3d 249 (3d Cir. 2010), and *aff'd in part*, 650 F.3d 205 (3d Cir. 2011) (en banc), and *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (enjoining a school from enforcing sanctions on a student for online speech that was critical of the school's administration).

<sup>8</sup> See Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 619 & n.181 (2011) (noting that these groundbreaking cases were *Doninger v. Niehoff (Doninger II)*, 527 F.3d 41 (2d Cir. 2008), and *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist. (Wisniewski II)*, 494 F.3d 34 (2d Cir. 2007)). Since *Layshock IV* and *J.S. IV*, two additional student Internet speech cases have reached U.S. Courts of Appeals. See *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011) (upholding summary judgment for the school district after officials disciplined a student for sending violent messages to another student over the Internet); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011) (upholding summary judgment for the district after officials disciplined a student for making a website ridiculing a classmate), *cert. denied*, 80 U.S.L.W. 3247 (U.S. Jan. 17, 2012) (No. 11-461).

<sup>9</sup> See *Layshock IV*, 650 F.3d at 222 n.4 (Jordan, J., concurring) (stating that the majority opinion “put[s] distance between our Court and the . . . Second Circuit”). Compare *J.S. IV*, 650 F.3d at 950–51 (Fisher, J., dissenting) (stating that the majority opinion creates a circuit split regarding the appropriate standard to govern student Internet speech), with *id.* at 931 n.8 (majority opinion) (stating that the decision creates no such circuit split).

<sup>10</sup> See *infra* notes 13–24 and accompanying text.

sions encompassing the Supreme Court's school speech jurisprudence and their impact on online, off-campus student speech cases in the Second and Third Circuits.<sup>11</sup> Finally, Part III argues that the mode of analysis employed in *J.S. IV* will generate conflicting results in the Second and Third Circuits in future online, off-campus student speech cases.<sup>12</sup>

### I. THE STUDENTS' SCHOOL DISCIPLINE AND ENSUING LITIGATION

In December 2005, Justin Layshock, a twelfth-grade public school student in Pennsylvania, used his grandmother's computer to post a "parody profile" of his principal on the social-networking website MySpace.<sup>13</sup> Two years later, in a school district across the state, *J.S.*, an eighth-grader, used her parents' computer to post a similar profile of her principal on the same website.<sup>14</sup> Layshock and *J.S.* created and posted each profile outside school hours and off school grounds.<sup>15</sup> The only school district property used by either student was the official school district photograph of each principal, which was copied from the districts' official websites and pasted to the students' profiles.<sup>16</sup> The profiles sparked discussion at the students' schools, which caught the attention of school officials.<sup>17</sup> After meeting with members of the district administration and admitting to creating the profiles, both students were charged with violating provisions of the schools' discipline codes and were suspended from school for ten days.<sup>18</sup>

The parents of both children brought separate suits, individually and on their children's behalves, in the U.S. District Court for the Western District of Pennsylvania (*Layshock I*) and the Middle District of Pennsylvania (*J.S. I*) against their children's school districts.<sup>19</sup> Each parent alleged violations of 42 U.S.C. § 1983 arising under the First and Fourteenth Amendments of the U.S. Constitution.<sup>20</sup> The plaintiffs in

<sup>11</sup> See *infra* notes 25–68 and accompanying text.

<sup>12</sup> See *infra* notes 69–82 and accompanying text.

<sup>13</sup> *Layshock IV*, 650 F.3d at 207–08. MySpace is one of many social-networking sites allowing members to use an online "profile" to communicate within an "online community." See *id.* at 208 n.2 (quoting *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008)).

<sup>14</sup> *J.S. IV*, 650 F.3d at 920.

<sup>15</sup> *Id.*; *Layshock IV*, 650 F.3d at 207.

<sup>16</sup> *J.S. IV*, 650 F.3d at 920; *Layshock IV*, 650 F.3d at 207–08.

<sup>17</sup> *J.S. IV*, 650 F.3d at 921–22; *Layshock IV*, 650 F.3d at 208.

<sup>18</sup> *J.S. IV*, 650 F.3d at 921–22; *Layshock IV*, 650 F.3d at 209–10.

<sup>19</sup> *J.S. I*, 2007 WL 954245, at \*1; *Layshock I*, 412 F. Supp. 2d at 505–06.

<sup>20</sup> *J.S. I*, 2007 WL 954245, at \*1; *Layshock I*, 412 F. Supp. 2d at 505–06. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. CONST. amend. I. This portion of the First Amendment has been incorporated against

both cases first filed unsuccessfully for a temporary restraining order and preliminary injunction.<sup>21</sup> The Western District Court granted Layshock's subsequent motion for summary judgment; the Middle District Court granted the school district's motion for summary judgment against J.S.<sup>22</sup> On appeal, separate panels of the Third Circuit affirmed each District Court's judgment on other grounds.<sup>23</sup> Rehearing both cases en banc, the Third Circuit affirmed the *Layshock III* panel and re-

the states via the Due Process Clause of the Fourteenth Amendment. *See id.* amend. XIV, § 1; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Section 1983 grants a private right of action to any individual within the jurisdiction of the United States who has been deprived of constitutional rights by a state actor under color of law. 42 U.S.C. § 1983 (2006). The parents' Fourteenth Amendment claims are beyond the scope of this Comment. *See J.S. I*, 2007 WL 954245, at \*1; *Layshock I*, 412 F. Supp. 2d at 505–06.

<sup>21</sup> *J.S. I*, 2007 WL 954245, at \*2–3 (finding no likelihood of success on the merits or irreparable harm to the student or to the public interest in the absence of preliminary relief); *Layshock I*, 412 F. Supp. 2d at 508–09 (same).

<sup>22</sup> *J.S. II*, 2008 WL 4279517, at \*6 (holding that the district was empowered to punish a student's "vulgar, lewd, and potentially illegal speech that had an effect on campus"); *Layshock II*, 496 F. Supp. 2d at 606–07 (holding that there was an insufficient nexus between Layshock's speech and any substantial disruption at school). Notably, the district court found that the personal attacks employed in J.S.'s profile were significantly more vulgar and offensive than those appearing in Layshock's. *J.S. II*, 2008 WL 4279517, at \*8. For example, the "tell me about yourself" section of Layshock's profile included the following text:

Birthday: too drunk to remember[.] Are you a health freak: big steroid freak[.] In the past month have you smoked: big blunt[.] In the past month have you been on pills: big pills[.] In the past month have you gone Skinny Dipping: big lake, not big dick[.] In the past month have you Stolen Anything: big keg[.] Ever been drunk: big number of times[.] Ever been called a Tease: big whore[.] Ever been Beaten up: big fag[.] Ever Shoplifted: big bag of kmart[.] Number of Drugs I have taken: big[.]

*Layshock IV*, 650 F.3d at 208 (alterations to formatting added). In comparison, the "about me" section of J.S.'s profile included the following text:

HELLO CHILDREN[.] yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] I have come to myspace so i can pervert the minds of other principal's [sic] to be just like me. I know, I know, you're all thrilled[.] Another reason I came to myspace is because—I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren't in my school[.] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN . . . .

*J.S. IV*, 650 F.3d at 921 (alterations in original).

<sup>23</sup> *J.S. III*, 593 F.3d at 308 (divided panel holding that J.S.'s speech posed a reasonable threat of substantial disruption at school); *Layshock III*, 593 F.3d at 264–65 (unanimous panel holding that Layshock's expression took place entirely off school property and thus his allegedly vulgar, lewd, and offensive speech could not be punished).

versed the *J.S. III* panel, holding that neither school district was empowered to punish the students' off-campus expression.<sup>24</sup>

## II. SCHOOL SPEECH STANDARDS DEVELOPED BY THE SUPREME COURT AND COURTS OF APPEALS

The U.S. Supreme Court has outlined the extent of students' school speech rights in four cases, none of which concerned student speech outside the school context.<sup>25</sup> For this reason, lower courts have struggled to develop a coherent jurisprudence to govern school discipline of student speech arising from off-campus use of digital media.<sup>26</sup> The first four online student speech cases to reach U.S. Courts of Appeals illustrate the difficulty of applying Supreme Court precedent in this developing area of the law.<sup>27</sup>

### A. *The Supreme Court's Tinker Standard and Subsequent Exceptions*

In *J.S. IV* and *Layshock IV*, the en banc Third Circuit traced the origin of student speech cases to the landmark 1969 Supreme Court decision, *Tinker v. Des Moines Independent Community School District*.<sup>28</sup> In that case, John Tinker was suspended from school for wearing a black armband to class to protest the Vietnam War.<sup>29</sup> After the District Court's dismissal of Tinker's suit against his school district, the Supreme Court reversed.<sup>30</sup> In holding that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court acknowledged both public school students' right to speech and

<sup>24</sup> *J.S. IV*, 650 F.3d at 933; *Layshock IV*, 650 F.3d at 219; see *infra* notes 59–68 and accompanying text.

<sup>25</sup> See Goldman, *supra* note 5, at 398–404 (citing *Morse v. Frederick*, 551 U.S. 393, 400 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

<sup>26</sup> See *supra* note 7 and accompanying text; see also Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1029 (2008) ("In the last several years, however, courts have struggled with [students' digital expression].").

<sup>27</sup> Compare *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. IV)*, 650 F.3d 915, 933 (3d Cir. 2011) (en banc) (holding for the student), *cert. denied*, 80 U.S.L.W. 3266 (U.S. Jan. 17, 2012) (No. 11-502), and *Layshock ex rel. Layshock v. Hermitage Sch. Dist. (Layshock IV)*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc) (same), with *Doninger v. Niehoff (Doninger II)*, 527 F.3d 41, 53 (2d Cir. 2008) (holding for the school district), and *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist. (Wisniewski II)*, 494 F.3d 34, 40 (2d Cir. 2007) (same).

<sup>28</sup> See *J.S. IV*, 650 F.3d at 925–26 (quoting *Tinker*, 393 U.S. at 506–07); *Layshock IV*, 650 F.3d at 212 (same).

<sup>29</sup> *Tinker*, 393 U.S. at 504.

<sup>30</sup> *Id.* at 514.

the special circumstances of the school environment, which may require officials to curtail student speech to ensure the effective functioning of schools.<sup>31</sup>

Accordingly, the Court granted deference to school officials to punish and prevent in-school student expression in two circumstances: when such expression “materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school,” and when it “collid[es] with the rights of others.”<sup>32</sup> In *Tinker*, school officials’ mere “undifferentiated fear or apprehension of disturbance” at the prospect of the student’s protest did not rise to the level of a substantial disruption and thus could not result in punishment.<sup>33</sup>

Subsequent Supreme Court decisions have carved out several exceptions to *Tinker*’s two-prong standard, while continuing to recognize *Tinker*’s authority over in-school student speech cases.<sup>34</sup> By analyzing each of these cases within the school context,<sup>35</sup> the Court has avoided offering lower courts guidance on the extent of students’ off-campus speech rights.<sup>36</sup>

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<sup>31</sup> See *id.* at 506–07.

<sup>32</sup> See *id.* at 513. After the *Tinker* Court’s pronouncement of this two-prong standard, subsequent courts hearing student speech cases failed to develop or rely on the “colli[sion] with the rights of others” prong. See *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (finding no court that had relied solely on the “collision of rights” prong when deciding school speech cases under *Tinker*). But see *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (holding that an anti-homosexuality message on a student’s shirt collided with the rights of others and could be constitutionally prohibited), *vacated as moot*, 549 U.S. 1262 (2007).

<sup>33</sup> *Tinker*, 393 U.S. at 508–10.

<sup>34</sup> See *Morse*, 551 U.S. at 410 (holding that school officials may prevent and punish student expression at a school-sponsored event that is reasonably viewed as promoting illegal drug use); *Kuhlmeier*, 484 U.S. at 273 (holding that school officials may curtail school-sponsored student expression “so long as their actions are reasonably related to legitimate pedagogical concerns”); *Fraser*, 478 U.S. at 685 (holding that officials may prevent and punish student speech in school that, in the officials’ view, is “lewd and indecent”).

<sup>35</sup> See *Morse*, 551 U.S. at 400–01; *Kuhlmeier*, 484 U.S. at 267; *Fraser*, 478 U.S. at 683. The most recent of these decisions involved a principal’s suspension of a student who unfurled a banner proclaiming “BONG HITS 4 JESUS” during school hours while in the midst of an off-campus, school-sponsored activity. See *Morse*, 551 U.S. at 397–98. In determining that the expression effectively occurred “at school,” the Court credited a variety of pertinent characteristics of both the activity and the student’s conduct. See *id.* at 400–01.

<sup>36</sup> See Papandrea, *supra* note 26, at 1028–29. The *Tinker* Court held that student speech that occurs “in class or out of it” may be constitutionally proscribed by school officials if it causes a substantial disruption in school or invades the rights of others. 393 U.S. at 513. Some recent opinions have used this language to reason that officials may punish a student’s off-campus speech if it satisfies one of *Tinker*’s two prongs. See, e.g., *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 765 (8th Cir. 2011); *Layshock IV*, 650 F.3d at 220 (Jordan, J., concurring). Yet, preceding the “in class or out of it” phrase, the *Tinker* Court held that “[w]hen [a student] is in the cafeteria, or on the playing field, or on the

### B. *The Second Circuit's Tinker Inquiry for Online, Off-Campus School Speech*

Although numerous cases concerning online, off-campus student speech have been heard in state courts and federal district courts,<sup>37</sup> the Second Circuit became the first U.S. Court of Appeals to consider the issue five years ago.<sup>38</sup> In 2007, in *Wisniewski v. Board of Education of Weedsport Central School District*, the Second Circuit held that school discipline for a student's off-campus, online expression is constitutional if it is reasonably foreseeable that the expression will cause a substantial disruption in school.<sup>39</sup> The case concerned an eighth grader who sent "instant messages" at home from his parents' personal computer to several of his classmates.<sup>40</sup> The instant messages contained an icon of a pistol shooting a person's head, spattered blood, and the words "Kill Mr. VanderMolen."<sup>41</sup> After a classmate brought a copy of the icon to Wisniewski's English teacher, Philip VanderMolen, Wisniewski was suspended from school.<sup>42</sup>

Wisniewski's parents brought suit against the school district and superintendent, alleging, among other claims, a violation of his First Amendment rights.<sup>43</sup> On appeal from a grant of summary judgment in favor of the school district, the Second Circuit held that the appropriate test for off-campus student expression, reasonably viewed as urging

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campus during the authorized hours, he may express his opinions" so long as they do not trigger one of *Tinker's* two prongs. See 393 U.S. at 512–13. Consequently, other recent opinions reason that the "in class or out of it" language refers only to areas outside the classroom but still on school property. See, e.g., *J.S. IV*, 650 F.3d at 937 n.1 (Smith, J., concurring); cf. *J.S. IV*, 650 F.3d at 942 (Fisher, J., dissenting) (noting that the "in class or out of it" language is unclear as to the locations it encompasses).

<sup>37</sup> See generally, e.g., *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010); *Mardis v. Hannibal Pub. Sch. Dist.*, 684 F. Supp. 2d 1114 (E.D. Mo. 2010), *aff'd sub nom. D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011); *Barnett ex rel. Barnett v. Tipton Cnty. Bd. of Educ.*, 601 F. Supp. 2d 980 (W.D. Tenn. 2009); *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272 (W.D. Wash. 2007); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698 (W.D. Pa. 2003); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

<sup>38</sup> See Waldman, *supra* note 8, at 619 & n.181.

<sup>39</sup> 494 F.3d at 38–39.

<sup>40</sup> *Id.* at 35–36. "Instant messages" are text messages that may be transmitted over the Internet between two computers. *Id.* at 35.

<sup>41</sup> *Id.* at 36.

<sup>42</sup> *Id.*

<sup>43</sup> *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist. (Wisniewski I)*, No. 5:02-CV-1403, 2006 WL 1741023, at \*4 (N.D.N.Y. June 20, 2006), *aff'd*, 494 F.3d 34 (2d Cir. 2007).

violent conduct, was *Tinker's* “substantial disruption” standard.<sup>44</sup> The court held that off-campus student expression may create a substantial disruption in school.<sup>45</sup> Furthermore, the court held that it was clear to a reasonable person that Wisniewski’s icon could foreseeably make its way to officials at the school and create a risk of a substantial disruption there.<sup>46</sup> Thus, school discipline was constitutionally permitted.<sup>47</sup>

The *Wisniewski* court developed a two-step inquiry to adapt the *Tinker* standard to students’ off-campus, online expression.<sup>48</sup> First, the court determined whether it was reasonably foreseeable that the student’s off-campus expression would reach the school setting.<sup>49</sup> Second, the court determined whether it was reasonably foreseeable that the expression would create a risk of a substantial disruption at school.<sup>50</sup> Whereas the second inquiry derives from *Tinker's* “substantial disruption” prong, the first implicitly recognizes that allowing schools to discipline any off-campus, online speech that happens to cause a substantial disruption on campus would expand deference to school authorities in a manner not envisioned by the *Tinker* Court.<sup>51</sup>

*Doninger v. Niehoff*, decided by the Second Circuit in 2008, concerned an eleventh-grade student who, in her role as junior class secretary, helped to plan a “battle-of-the-bands” concert.<sup>52</sup> After a conversa-

<sup>44</sup> *Wisniewski II*, 494 F.3d at 38.

<sup>45</sup> *Id.* at 39 (citing *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) (stating that off-campus speech may incite on-campus disruption)).

<sup>46</sup> *Id.* at 39–40.

<sup>47</sup> *Id.* at 40.

<sup>48</sup> *See id.* at 39–40; *see also* Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students’ Online Activity*, 50 B.C. L. REV. 1563, 1581–82 (2009) (labeling this two-step inquiry the “foreseeability test”).

<sup>49</sup> *See Wisniewski II*, 494 F.3d at 39–40. Nonetheless, the panel was divided on the meaning of foreseeability. *See id.* at 39 n.4. Two judges concluded that foreseeability could be shown if the expression did in fact reach campus; yet, Judge John M. Walker concluded that foreseeability should mean “foreseeable to a reasonable adult, cognizant of the perspective of a student, that the expression might reach campus[.]” *See id.*

<sup>50</sup> *See id.* at 39–40.

<sup>51</sup> *See id.* at 39 n.4.

Judge Walker believes [that not requiring an initial foreseeability inquiry] would run afoul of *Thomas*, 607 F.2d at 1045 (holding that ‘the arm of [school] authority does not [generally] reach beyond the schoolhouse gate’), and would raise substantial First Amendment concerns, as it might permit a school to punish a student for the content of speech the student could never have anticipated reaching the school . . . .

*Id.*

<sup>52</sup> 527 F.3d at 44.

tion with her principal, Doninger posted a message on her personal, publicly accessible website stating that the event was “cancelled due to douchebags in central office” and suggesting that readers “call [the superintendent] to piss her off more.”<sup>53</sup> As a result, officials prohibited Doninger from running for senior class secretary.<sup>54</sup>

Doninger’s mother sued the principal, alleging a violation of her daughter’s First Amendment rights.<sup>55</sup> On appeal from a denial of Doninger’s motion for preliminary injunction, the Second Circuit held that the *Tinker* standard, as articulated in *Wisniewski*, applied to Doninger’s off-campus speech.<sup>56</sup> The court held, under the two-step framework developed in *Wisniewski*, that it was “reasonably foreseeable that [Doninger’s] posting would reach school property” and, once there, that it “foreseeably create[d] a risk of substantial disruption within the school environment.”<sup>57</sup> Accordingly, the school’s sanction was held to be constitutionally permissible.<sup>58</sup>

### C. *The Third Circuit’s Competing Views on Online, Off-Campus School Speech*

In *Layshock IV*, the school district based its unsuccessful appeal on the “lewd and indecent” standard developed by the Supreme Court in its 1986 decision *Bethel School District No. 403 v. Fraser*,<sup>59</sup> rather than on *Tinker*’s “substantial disruption” standard.<sup>60</sup> Judge Kent Jordan noted in his concurrence that *Layshock* would have won under the *Tinker* standard as well because the district failed to demonstrate a “reasonable

<sup>53</sup> *Id.* at 45.

<sup>54</sup> *Id.* at 46.

<sup>55</sup> *Doninger v. Niehoff (Doninger I)*, 514 F. Supp. 2d 199, 211 (D. Conn. 2007), *aff’d*, 527 F.3d 41 (2d Cir. 2008).

<sup>56</sup> *Doninger II*, 527 F.3d at 50.

<sup>57</sup> *Id.* (quoting *Wisniewski II*, 494 F.3d at 40). In making the first determination, the court stated that the posting was intended to encourage members of the school community to contact school officials, and that the likelihood of readers complying with the request was high. *Id.* In making the second determination, the court stated that the language used in the post was potentially disruptive of efforts to resolve the ongoing scheduling conflict, the post contained misleading information that would tend to incite disruptive conduct on campus, and the post was disruptive of the proper role of the student council—of which Doninger was a part—in conflict resolution. *Id.* at 50–52.

<sup>58</sup> *Id.* at 53.

<sup>59</sup> 478 U.S. at 685.

<sup>60</sup> *Layshock IV*, 650 F.3d at 219 n.21 (“[T]he issue before us is limited to whether the District had the authority to punish Justin for expressive conduct outside of school that the District considered lewd and offensive.”). In holding for *Layshock*, the court noted that *Fraser* only applies to speech within the school context. *Id.* at 219; *see also J.S. IV*, 650 F.3d at 932 (rejecting the school district’s reliance on *Fraser* when the student’s speech occurred outside the school context).

apprehension of substantial disruption.”<sup>61</sup> The court also noted that the lower court had not found a “sufficient nexus” between the speech and any alleged substantial disruption at school.<sup>62</sup>

In contrast to the relatively unified Second Circuit decisions in *Wisniewski* and *Doninger* and the Third Circuit’s decision in *Layshock IV*, *J.S. IV* produced three highly divergent opinions regarding the appropriate standard to govern students’ off-campus, online expression.<sup>63</sup> Although the school district conceded that no substantial disruption had occurred, it argued that officials had acted reasonably in forecasting a substantial disruption arising from J.S.’s profile.<sup>64</sup> A majority of eight judges, comparing the facts to those of *Tinker*, held that no school official could have reasonably foreseen that J.S.’s profile would cause a substantial disruption at school.<sup>65</sup> Judge Brooks Smith, writing for four others, filed a concurring opinion in which he argued that *Tinker* was inapplicable to J.S.’s off-campus expression, which was otherwise protected under ordinary First Amendment principles.<sup>66</sup> Judge Michael Fisher, joined by five others, filed a vehement dissent in which he argued that it was reasonable for school officials in J.S.’s case to forecast a substantial disruption to the educational environment.<sup>67</sup> Further, the

<sup>61</sup> *Layshock IV*, 650 F.3d at 220 (Jordan, J., concurring).

<sup>62</sup> *Id.* at 216 (majority opinion).

<sup>63</sup> See *infra* notes 65–68 and accompanying text.

<sup>64</sup> *J.S. IV*, 650 F.3d at 928.

<sup>65</sup> *Id.* at 933. The majority gave great weight to the fact that the profile was “so outrageous that no one could have taken it seriously, and no one did.” See *id.* at 930. Because the court assumed that *Tinker* applied to J.S.’s off-campus speech and held that her First Amendment rights had been violated under this standard, it had no need to decide whether *Tinker* or the broader free speech protections applicable to the general public governed J.S.’s off-campus expression. Compare *id.* at 926 & n.3 (assuming without deciding that *Tinker* is applicable to J.S.’s off-campus expression), with *Wisniewski II*, 494 F.3d at 38 (holding that *Tinker* is the appropriate standard for a student’s off-campus expression that is “reasonably understood as urging violent conduct”), and *Doninger II*, 527 F.3d at 48 (holding that the *Tinker* standard, as articulated in *Wisniewski*, governs discipline of students for “conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ at least when it was similarly foreseeable that the off-campus expression might also reach campus”).

<sup>66</sup> *J.S. IV*, 650 F.3d at 940–41 (Smith, J., concurring); see also *supra* note 36. Judge Brooks Smith cited *Layshock IV* for the proposition that “speech originating off campus does not mutate into on-campus speech simply because it foreseeably makes its way onto campus.” *J.S. IV*, 650 F.3d at 940 (Smith, J., concurring). Yet the *Layshock IV* court made this point in its discussion of *Fraser*, rather than of *Tinker*. See *Layshock IV*, 650 F.3d at 219.

<sup>67</sup> *J.S. IV*, 650 F.3d at 941 (Fisher, J., dissenting). Judge Michael Fisher highlighted several distinctions between the facts of *Tinker* and *J.S. IV*, including the non-political nature of J.S.’s speech, its direction at a school official, and its “vulgar, obscene, malicious, or harmful” nature. *Id.* at 943. Additionally, Judge Fisher stated that J.S.’s profile was “not the type of speech that the *Tinker* Court so vehemently protected.” *Id.* at 945.

dissent posited that the majority's interpretation of the facts used to determine whether a substantial disruption was reasonably foreseeable had created a split with the Second Circuit concerning the application of off-campus, online student speech standards.<sup>68</sup>

### III. *J.S. IV* PRODUCED A SPLIT WITH THE SECOND CIRCUIT

Judge Fisher, in dissent, was correct in asserting that the majority in *J.S. IV* had created a split with the U.S. Court of Appeals for the Second Circuit, but not for the reason he claimed.<sup>69</sup> The dissent repeatedly questioned the majority's assessment of the record in *J.S. IV* in light of the facts in *Tinker*, *Wisniewski*, and *Doninger*.<sup>70</sup> According to the dissent, the obscene and harmful nature of J.S.'s baseless allegations, which were targeted at the principal and his family and distributed to members of the school community, made a substantial disruption in school reasonably foreseeable.<sup>71</sup> Based on a comparison of the facts in *J.S. IV* with those in *Wisniewski* and *Doninger*, Judge Fisher perceived a split with the Second Circuit.<sup>72</sup>

The majority responded by stating that the objective reasonableness of a foreseeable substantial disruption under *Tinker* is inherently dependent on the facts of each case.<sup>73</sup> This fact-specific inquiry had

<sup>68</sup> *Id.* at 947 n.4, 950.

<sup>69</sup> See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. IV)*, 650 F.3d 915, 950 (3d Cir. 2011) (Fisher, J., dissenting), cert. denied, 80 U.S.L.W. 3266 (U.S. Jan. 17, 2012) (No. 11-502); *Doninger v. Niehoff (Doninger II)*, 527 F.3d 41, 50 (2d Cir. 2008); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist. (Wisniewski II)*, 494 F.3d 34, 39–40 (2d Cir. 2007).

<sup>70</sup> See *J.S. IV*, 650 F.3d at 941–47 (Fisher, J., dissenting).

<sup>71</sup> *Id.* at 951.

<sup>72</sup> *Id.* The dissent also noted that the Second Circuit had held that “off-campus hostile and offensive student Internet speech that is directed at school officials results in a substantial disruption of the classroom environment.” *Id.* By compressing the two-step *Wisniewski* inquiry into a single question—whether off-campus student speech on the Internet is hostile or offensive—the dissent grossly exaggerated the Second Circuit’s jurisprudence. See *id.*; see also *id.* at 931 n.8 (majority opinion) (arguing that the dissent overstated the Second Circuit’s law). Judge Fisher’s rephrasing of Second Circuit precedent would mean that *any* hostile or offensive off-campus student speech directed at school officials on the Internet would *necessarily* result in a substantial disruption of the classroom environment. See *id.* at 950 (Fisher, J., dissenting). This would violate one of the Second Circuit’s core policy concerns—that the deference courts grant to school officials in the administration of discipline for student speech is premised on the assumption that this authority “does not reach beyond the school-house gate.” See *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044–45 (2d Cir. 1979).

<sup>73</sup> *J.S. IV*, 650 F.3d at 928 (“[O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate . . . substantial[] interfere[nce] with the work of the school . . .” (emphasis added) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969))).

been undertaken by the majorities in all three Second and Third Circuit cases applying *Tinker* to online, off-campus student speech.<sup>74</sup> In contrast to the dissent, and to distinguish *J.S. IV* from *Doninger*, the majority focused on the outrageousness of J.S.'s claims and her lack of intent to target the school.<sup>75</sup> Although the majority's and dissent's differing factual assessments demonstrate that judges may, under *Tinker*, view the record of a particular case in different lights, the dissent failed to prove that the Second Circuit would have necessarily decided J.S.'s case differently given the same record.<sup>76</sup>

The divergent paths taken by the Second and Third Circuits in their *Tinker* analyses provide a stronger basis to contend that *J.S. IV* created a circuit split.<sup>77</sup> In *J.S. IV*, the Third Circuit skipped directly to the second step of the two-part *Tinker* inquiry developed in *Wisniewski* and failed to determine if it was reasonably foreseeable that J.S.'s speech would reach the school.<sup>78</sup> Because the Second Circuit has given no indication that the two steps must be considered sequentially,<sup>79</sup> the Third Circuit's holding in *J.S. IV*, that a substantial disruption was not reasonably foreseeable, obviated any need to undertake the first inquiry.<sup>80</sup>

In future online, off-campus student speech cases, however, the results could very well differ between the two circuits if the Third Circuit continues to use a one-step inquiry and maintains that a substantial disruption is reasonably foreseeable regardless of whether it is reasonably foreseeable that the speech would reach campus.<sup>81</sup> Because the first step of the *Wisniewski* inquiry provides additional protection for students whose off-campus expression could not reasonably have been foreseen

<sup>74</sup> See *id.* at 928–31 & n.8 (comparing the record in that case with those of *Tinker*, *Doninger*, and *Wisniewski* to determine that “[t]he facts simply do not support [a] reasonable[e] forecast [of] a substantial disruption”); *Doninger II*, 527 F.3d at 50–53 (examining the record in light of the standard developed in *Tinker* and adapted in *Wisniewski II* to determine that a substantial disruption was reasonably foreseeable); *Wisniewski II*, 494 F.3d at 39–40 (determining that, based on the record, no reasonable jury could disagree as to the reasonable foreseeability of a substantial disruption).

<sup>75</sup> See *J.S. IV*, 650 F.3d at 930–31.

<sup>76</sup> See *id.*; *supra* notes 69–75 and accompanying text.

<sup>77</sup> Compare *J.S. IV*, 650 F.3d at 930–31 (failing to make a determination regarding whether it was reasonably foreseeable that J.S.'s off-campus expression would reach the school setting), with *Doninger II*, 527 F.3d at 50–51 (finding that it was foreseeable for Doninger's expression to reach the school), and *Wisniewski II*, 494 F.3d at 39–40 (finding that the instant messages could foreseeably make their way to the school context).

<sup>78</sup> See *J.S. IV*, 650 F.3d at 930–31.

<sup>79</sup> See *Doninger II*, 527 F.3d at 50–51; *Wisniewski II*, 494 F.3d at 39–40.

<sup>80</sup> See *J.S. IV*, 650 F.3d at 930–31 (holding that “it was clearly not reasonably foreseeable that J.S.'s speech would create a substantial disruption”).

<sup>81</sup> See *id.*; *Doninger II*, 527 F.3d at 50–51; *Wisniewski II*, 494 F.3d at 39–40.

to reach the school environment, it is likely that the Third Circuit approach will permit more schools to discipline students for off-campus expression in the future; in contrast, the Second Circuit approach would likely uphold a student's free speech rights given similar facts, despite the particular outcomes in *Wisniewski*, *Doninger*; and *J.S. IV*.<sup>82</sup>

## CONCLUSION

The en banc Third Circuit held in *Layshock IV* and *J.S. IV* that each school district acted outside its constitutional authority when it suspended Layshock and J.S. for their off-campus, online speech. In *Layshock IV*, the court held that the *Fraser* "lewd and offensive" standard is inapplicable to speech originating off school grounds. The *J.S. IV* court, assuming without deciding that the *Tinker* standard applied to J.S.'s off-campus speech, held that the record did not permit a reasonable school official to forecast a substantial disruption in the school environment. The dissent in *J.S. IV* posited that the majority opinion had created a split with the Second Circuit. The majority countered that the

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<sup>82</sup> See *J.S. IV*, 650 F.3d at 930–31; *Doninger II*, 527 F.3d at 50–51; *Wisniewski II*, 494 F.3d at 39–40. In addition to the federal circuit split, the Third Circuit's approach to online, off-campus student speech cases appears to create a split with the Pennsylvania state courts. Compare *J.S. IV*, 650 F.3d at 930–31 (failing to make a threshold determination whether it was reasonably foreseeable for off-campus speech to reach the school setting), with *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865, 869 (Pa. 2002) (making a threshold determination that there was a "sufficient nexus" between off-campus speech and the school setting). In 2002, the Supreme Court of Pennsylvania held in *J.S. ex rel. H.S. v. Bethlehem Area School District* that a public school could constitutionally expel a student whose personal, publicly accessible website had a "sufficient nexus" to the school and caused a substantial disruption there. 807 A.2d at 865, 869. The Supreme Court of Pennsylvania's "sufficient nexus" inquiry employed a totality test to determine, as a threshold matter, whether a student's off-campus speech should be analyzed under school speech precedents or under general First Amendment principles. See *id.* at 865 & n.12; Hoder, *supra* note 48, at 1583 (describing the "sufficient nexus" test). Although the "sufficient nexus" inquiry is not identical to *Wisniewski*'s first-step inquiry into whether it is reasonably foreseeable for a student's online, off-campus speech to reach campus, both tests limit a school's ability to punish or prevent this type of speech on a bare showing that the expression was reasonably foreseen to threaten substantial disruption at school. See *Wisniewski II*, 494 F.3d at 39–40; *Bethlehem*, 807 A.2d at 865 & n.12; Christine Metteer Lorillard, *When Children's Rights "Collide": Free Speech vs. the Right to Be Let Alone in the Context of Off-Campus "Cyber-Bullying"*, 81 Miss. L.J. 189, 263 n.279 (2011) (noting the similarity between the two inquiries). Because parents of public school students in Pennsylvania may bring suit against a child's school district alleging violations of First Amendment rights in state or federal court, the extra protection provided to students by Pennsylvania's "sufficient nexus" inquiry provides an incentive for parents to bring future suits in Pennsylvania state court rather than in federal court. See *J.S. IV*, 650 F.3d at 930–31; *Bethlehem*, 807 A.2d at 865 & n.12.

reasonableness of a school official's forecast of a substantial disruption is a fact-dependent inquiry—a proposition accepted in both circuits.

The debate over factual interpretation in *J.S. IV* obscures the split between the Second and Third Circuits arising from the courts' different methods of analyzing online, off-campus student speech cases under *Tinker*. Despite the particular outcome in *J.S. IV*, the Third Circuit's less restrictive application of the *Tinker* standard in online, off-campus student speech cases will likely produce results more favorable to public school districts than those of the Second Circuit in future decisions.

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