RUPP, ANDERSON, SQUIRES & WALDSPURGER, P.A.

333 South Seventh Street, Suite 2800
Minneapolis, MN 55402
Office (612) 436-4300
Fax (612) 436-4340

www.raswlaw.com

FIRST AMENDMENT RIGHTS OF STUDENTS AND STAFF

2021 MASA Fall Conference
September 28, 2021

Trevor S. Helmers
trevor.helmers@raswlaw.com

I. INTRODUCTION

School districts have faced unprecedented challenges over the past year, including dealing with the intrusion of the national political environment into schools. Walkouts, critical race theory, black lives matter, and anti-masking groups have created hot button issues that do not appear to be going away anytime soon. This session will focus on the First Amendment rights of students and staff members in school, political speech in school, and when and how a school district may discipline for and respond to student and staff member speech without violating the First Amendment.

II. OVERVIEW OF FIRST AMENDMENT RIGHTS TO FREEDOM OF SPEECH AND EXPRESSION

A. First Amendment of the U.S. Constitution

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The First Amendment applies to the states, which includes local governments like public school districts, through the Fourteenth Amendment.

B. No adverse employment action. A school district may not restrain or restrict the free speech rights of employees or applicants for employment by not hiring, disciplining, or taking other adverse employment action against an employee or an applicant for employment because of his or her constitutionally protected speech.

C. Free Speech Rights Are Not Absolute. The U.S. Supreme Court has identified several forms of speech that are not protected, including the following:

1. Speech that is intended to incite or incites imminent violence or lawless action (e.g. yelling "fire" in a crowded theatre or "bomb" on an airplane);

2. Speech that is defamatory;

3. Speech that constitutes a true threat;

4. Speech that constitutes "fighting words";

5. Speech that violates a copyright;

6. Speech that constitutes fraud;

7. Speech that is obscene (i.e. speech that appeals to the prurient interest, depicts or describes sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value);

8. Speech that is integral to criminal conduct;

9. Speech that invades the privacy rights of another; and

10. Speech that causes intentional inflection of emotional distress.

D. What Forms of Expression Constitute Speech? Freedom of speech is not limited to verbal or written communications. It can apply to various forms of expression, including clothing, jewelry, buttons, and tattoos. The following two-part test is used by the courts to determine whether expression constitutes speech: (1) whether the expression was "intended to convey a particularized message"; and (2) whether "the likelihood was great that the message would be understood by those who viewed it." *See Spence v. Washington*, 418 U.S. 405 (1974).

1. **Hypothetical 1:** Dusty Carr is the starting quarterback for the district's varsity football team. Dusty is white, but he has many teammates who are persons of color. During the first home game of the season, Dusty takes a knee during the playing of the national anthem. Is Dusty engaging in First Amendment speech or expression by kneeling during the playing of the national anthem? Would your answer change if Dusty is kneeling to tie his cleats?

E. Silence as Speech. Depending on the circumstances, a person's silence can convey a particularized message that is likely to be understood by those who observed it. In those circumstances, the individual's silence constitutes speech for purposes of the First Amendment.

1. **Hypothetical 2:** Faith Christian is a junior attending the district's high school. Faith moved to Minnesota from Texas two years ago, and since enrolling in the district, she has been requesting that she and other students be allowed to recite a prayer over the high school's intercom following morning announcements. Faith claims her high school in Texas allowed this practice and it is the "American" thing to do. The district has been hesitant to grant Faith's request and thus has not allowed any students to recite a morning prayer. Faith has taken to protesting the district's denial of her request by refusing to recite the Pledge of Allegiance with the rest of her class at the beginning of morning announcements. Is Faith's refusal to recite the Pledge of Allegiance speech?

F. Compelled Speech. In line with the principle that an individual's silence may constitute speech, the government generally cannot compel an individual to speak or to express a particular viewpoint.

1. **Students and compelled speech.** The U.S. Supreme Court has held that a school may not require a student to recite the Pledge of Allegiance or to salute the American flag. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). On the other hand, a school may be able to compel student speech or the expression of a particular viewpoint if the speech is school-sponsored. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1231 (10th Cir. 2009). Speech is "school-sponsored" when the school affirmatively promotes, rather than simply tolerates it. Examples of school-sponsored speech may include student graduation speeches and student newspapers.

2. **Compelled speech claims.** Schools are more and more likely to face claims of compelled speech in the current political environment, particularly when they engage in government speech (see Section V below) or open a forum for others to engage in political speech. In a recent case involving an Oregon school district, several students alleged that the district compelled them to participate in the nationwide walkout against gun violence on March 14, 2018, largely because the district had expressed views in favor of gun control and against gun violence in schools. *Burwell v. Portland Sch. Dist. No. 1J*, Case No. 3:19-CV-00385-JR, 2019 WL 9441663 (D. Ore. March 23, 2019). Schools in Minnesota have faced similar claims.

G. Political Speech. The First Amendment affords a high level of protection to political speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Any attempt to regulate political speech is subject to "exacting scrutiny" by the courts. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). As a result, a school district that seeks to regulate political speech must be able to prove that the regulation furthers a compelling interest and is narrowly tailored to achieve that result. *Id.*; *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

1. **Examples of political speech.** Discussions about candidates for office, issues in upcoming elections, and school referenda are examples of political speech.

2. **Political association.** The First Amendment protects "political association" under the umbrella of political speech. *See Minnesota Fifth Congressional Dist.*, 295 N.W.2d 650, 652 (Minn. 1980). Political association, the association with others "for the common advancement of political beliefs and ideas,"

includes things like affiliating with a political party or joining a political group. *Kusper v. Pontikes*, 414 US 51 (1973).

III. EMPLOYEES AND THE FIRST AMENDMENT

A. Public Employees Have the Right to Freedom of Speech.

1. School employees retain their rights to freedom of speech, expression, and association. The U.S. Supreme Court has repeatedly affirmed "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

B. Public Employers Have the Right to Regulate Employee Speech in Order to Promote Efficiency and Maintain Discipline.

1. Schools, as employers, have a competing right to restrain employee speech in certain circumstances. The U.S. Supreme Court has recognized that school districts have an interest in regulating the speech of their employees that differs significantly from the general free speech rights of citizens. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968).

2. The basis for allowing public employers, like schools, to restrain employee speech is the recognized "wide discretion and control over the management of its personnel and internal affairs" granted to public employers. *Connick v. Meyers*, 461 U.S. 138 (1983). This wide discretion "includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency." *Id.*

C. Courts Balance the Competing Rights of Employees and Employers.

1. When the rights of public employees to speak collide with the rights of public employers to restrain that speech, courts try to "arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency

of the public services it performs through its employees." *Pickering*, 391 U.S. 563.

2. When balancing the parties' rights, courts generally focus on three questions:

   a. Is the employee speaking as a private citizen or in his or her capacity as a school-district employee?

   The U.S. Supreme Court has held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from discipline." *Garcetti*, 547 U.S. 410. Accordingly, an employer may exercise greater control if the employee is speaking in his or her capacity as an employee and less control if he or she is speaking in a personal capacity.

   b. Is the employee speaking about a matter of public concern or about a matter of personal interest?

   An employer may exercise greater control if the employee is speaking about a matter of personal interest and less control if he or she is speaking about a matter of public concern. In determining whether speech touches on a matter of public concern, courts consider the following:

      i. Whether the speech was made primarily in the employee's role as a citizen, or primarily in the role as an employee. *Williams v. Alabama State Univ.*, 979 F. Supp. 1406, 1410 (M.D. Ala. 1997). "Issues do not rise to a level of 'public concern' by virtue of the speaker's interest in the subject matter; rather, they achieve that protected status if the words or conduct are conveyed by the teacher in his role as a citizen and not in his role as an employee of the school district." *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798-9 (5th Cir. 1989).

      ii. Whether the speech relates to a matter of political, social or other concern to the community. Here, the employee's intent is critical. If the employee's intent was to further a purely private interest, then the mere fact that the topic of the employee's speech was one in

which the public might or would have had a great interest is of little import. *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986).

iii. Whether the speech addresses only internal practices that are relevant only to the people involved. If so, the employee speaks as an employee and such speech is not protected. *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). Accordingly, the airing of personal grievances by an upset employee does not raise a free speech issue. *Colburn v. Trustees of Indiana Univ.*, 973 F.2d 581, 585 (7th Cir. 1992); *Williams*, 979 F. Supp. at 1410.

c. Is the employee's speech disruptive to the employer's efficient and orderly operations?

An employer may exercise greater control if the employee's conduct causes disruption and less control if the conduct does not cause disruption. A school district may prohibit an employee from speaking about issues of public concern if the school district can show that the speech would (1) create disharmony in the workplace, (2) impede the speaker's ability to perform his or her job duties, or (3) significantly impair the working relationship with other employees who work closely with the speaker. *Kinkade v. City of Blue Springs*, 64 F.3d 389 (8th Cir. 1995); *see also Lewis v. Harrison School District No. 1*, 805 F.2d 310 (8th Cir. 1986).

D. Personal Political Activities. During personal time, outside the duty day, employees (and school board members) may do any of the following, provided they do not use District resources:

1. Serve on political committees, including "Vote Yes" or "Vote No" committees;

2. Put "Vote Yes" or "Vote No" stickers, or other political signs, on the vehicles they drive to school;

3. Display political and referendum-related lawn signs in their yard at home;

4. Donate their own money to support or oppose a political party, school district ballot question, or school board candidate;

5. Participate in promotional phone-calling campaigns or "Get out the Vote" drives;

6. Write letters to the editor and blogs advocating passage or defeat of a referendum, candidate, or ballot issue. A school district may adopt a policy requiring that board members and employees who write letters to the editor state that they are expressing a personal view, not a view of the district, and that their personal view is not necessarily the same as the district's.

7. **Hypothetical 3:** Aretha Holly is an art teacher in the district's middle school. Ms. Holly would like to use the middle school's copier to print a campaign flyer for her husband, who is running for a seat on the local city council. Ms. Holly would also like to distribute the flyers to her colleagues by placing a flyer in each staff member's mailbox. Staff mailboxes are kept in the middle school copy room. May Ms. Holly use the middle school copier to copy her husband's campaign flyer? May Ms. Holly distribute the flyers through the middle school's internal mailboxes?

E. School equipment. School districts are not required to permit employees to use school equipment (e.g. fax machines, copy machines, computers, or email accounts) for political activities. Governmental entities are "not required to assist others in funding the expression of particular ideas, including political ones." *Ysursa v. Pocatello Educ. Ass'n.*, 555 U.S. 353, 358 (2009).

F. Use of School Mailboxes to Distribute Political Speech. Unless a school district opens its internal mail system to members of the public, the internal mail system is generally considered to be a non-public forum that is designed to facilitate internal communications. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983).

1. **General rule:** A school district may adopt a policy prohibiting the distribution of any and all political material in its internal mailboxes, including political material created by the teachers' union. Such a policy must be consistently enforced. *See Education Minnesota Lakeville v. Independent School District No. 194*, 341 F. Supp.2d 1070 (D. Minn. 2004).

G. School Districts May Not Consider Speech When Hiring. A school district may not deny a candidate a position based on the candidate's constitutionally protected speech. *See Perry v. Sindermann*, 408 U.S.

593 (1972). In order for job candidates to succeed on a free speech claim, they must show that they engaged in protected speech and that they were not hired as a result of that speech. *Ruscoe v. Housing Authority of the City of New Britain*, 259 F. Supp.2d 160 (D. Conn. 2003).

1. **Is there an exception for speech that is disruptive?** Although the law is not settled, a court is likely to hold that a school district may refuse to hire a candidate for speech that was disruptive to the work environment. *See, e.g., Childers v. Dallas Police Department*, 513 F.Supp. 134 (N.D.Tex. 1981).

H. Apply the Framework.

1. **Hypothetical 4:** Cam Payne is an eighth grade history teacher in the district. Mr. Payne is very politically active. Following the election of President Trump, he participated in the Minnesota Women's March, and he frequently attends gun-control rallies at the Capitol. Mr. Payne was also arrested for disobeying the Minneapolis curfew during the protests related to the death of George Floyd and his private Facebook profile picture is the Black Lives Matter sign. Students are aware of Mr. Payne's activities and opinions because they've seen him on the news in the past. However, Mr. Payne has never talked about his advocacy or expressed his opinions in class. Could your district subject Mr. Payne to discipline for his political activities?

2. **Hypothetical 5:** Laura Norder is a hall monitor in the district's high school. Ms. Norder feels very strongly about systematic racism and supports efforts to defund police. She also thinks the district hasn't done enough to address racism in its schools. She recently heard that a big group of her school's students is planning to protest racism in policing and the district's ongoing contract with the local police department for School Resource Officers (SROs) by walking out of their third hour classes on October 13. Ms. Norder intends to join the students in solidarity by walking out with the students, joining in the students' chants, and listening to several planned student speeches that will take place just outside of the school building. Is Ms. Norder protected by the First Amendment if she follows through with her plan?

3. **Hypothetical 6:** Marshall Law teaches shop class in the district's high school. Mr. Law has a brother who is a Minneapolis police officer, and he supports the "Blue Lives

Matter" initiative. Mr. Law has heard that students in the school intend to walk out in support of efforts to defund the police and to remove SROs from the district's schools. Mr. Law, like all other employees, was directed by the school's administration not to participate in the walkout, but was also told to monitor students in the halls as they engage in the walkout. Mr. Law has decided that he will wear his "Blue Lives Matter" t-shirt and hat on the day of the walkout so that students can see where he stands on the issue while they walk out of the building. May your district subject Mr. Law to discipline if he follows through with his plan? Would your answer change if Mr. Law wore a "Trump 2024" t-shirt instead?

4. **Hypothetical 7:** Misty Waters is a beloved cafeteria worker in your district's high school. She is popular amongst the students because she's taken the time to learn each one of their names. Ms. Waters learns that many students in the high school intend to walk out on October 13 to protest racism and the District's contract for SROs with the local police department. She knows that the district's leadership opposes the walkout and intends to take disciplinary action against students who participate. Despite her knowledge, Ms. Waters takes to Facebook and posts, "So proud of the many students who are going to walk out of our school on October 13! It takes courage to stand up for what they believe in despite the school's opposition. Keep up the good fight!" You learn about the post because you're friends with Ms. Waters on Facebook. You can also see that Ms. Waters is Facebook friends with many district students, including some who are allegedly planning the walkout. May the district discipline Ms. Waters for the post?

5. **Hypothetical 8:** Joe Kerr, a quirky seventh grade science teacher, hangs several posters in his classroom. These posters are visible to all of his students. May the district direct Mr. Kerr to remove each poster?

    a. A poster that says, "COVID-19 is real, don't be a COVID-iot."

    b. A sign that says, "Masks are child abuse."

    c. A poster with an image of a DNA strand and the caption, "All races created equally."

IV. STUDENTS AND THE FIRST AMENDMENT

A. ***Tinker v. Des Moines Indep. Comm. Sch. Dist.*** The seminal case involving student First Amendment rights is *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, a group of students planned to object to the Vietnam War by wearing black armbands to school. Administrators became aware of the plan and adopted a policy that any student wearing an armband would be suspended until he or she returned without the armband. Three students, were suspended pursuant to the policy. The Court established several principles regarding student speech:

1. **"Material and substantial disruption" standard.** The Court held that student speech and expression may not be restricted without evidence that engaging in the forbidden conduct would "materially and substantially interfere" with the educational environment or the rights of other students.

2. **Vague fear of disturbance is not enough.** In *Tinker*, there was no evidence that wearing the black armbands would cause a significant disruption at school. The Court ruled that a school district may not restrict a student's speech or expression merely to avoid the discomfort or unpleasantness that accompanies an unpopular viewpoint.

3. **Viewpoint discrimination is prohibited.** Another problem with the armband policy was that it singled out only one form of political expression. The Court noted that the record showed the school district had previously allowed students to wear other political items, including political buttons and an Iron Cross, which had been affiliated with Nazi Germany.

B. ***Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).** A student made a sexually suggestive speech nominating a fellow student for a student government position. The student referred to his preferred candidate with an "an elaborate, graphic, and explicit sexual metaphor." Many young students heard the speech. The student was suspended. The Court ruled the discipline did not violate the student's free speech rights.

1. **Students do not enjoy the same rights as adults.** The Court recognized that students in school do not enjoy the same speech rights enjoyed by adults in other settings and stated it is a "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." School districts

may thus impose sanctions on students in response to offensive and/or indecent speech.

2. ***Tinker* distinguished.** A key difference between *Tinker* and *Fraser* is that *Tinker* involved political speech, which is among the most protected type of speech. In addition, unlike *Tinker*, the speech in *Fraser* caused a material and substantial disruption in the educational environment due in part to the fact that it exposed minors to vulgar and offensive language.

C. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). School officials edited a student newspaper to remove articles concerning students' experiences with pregnancy and the impact of divorce on students. The newspaper was written and edited by a journalism class, as part of the school's curriculum. Consistent with established practice, a principal reviewed proofs of the pages in question and objected because he believed pregnant students and divorced parents could be identified and because the content was inappropriate for younger students.

1. **No First Amendment violation.** The Court ruled that the principal did not engage in a First Amendment violation because the school had the right to exercise editorial control over the newspaper based on "legitimate pedagogical concerns."

2. ***Tinker* distinguished.** Again, the Court distinguished its decision from *Tinker*. This time, the Court noted that *Tinker* was not directly applicable because *Tinker* did not involve student speech that was affirmatively promoted by the school in the forum of a school-sponsored publication. The Court expressly stated that schools have the right to exercise editorial control over school-sponsored newspapers, theatrical productions, and other publications or productions that bear the "imprimatur of the school" based on a number of factors, including:

   a. The maturity level of the intended audience.

   b. Standards for grammar and writing quality (schools do not have to publish material that is ungrammatical, poorly written, poorly researched, or inappropriately biased).

   c. Prohibitions on lewd, vulgar, or offensive language.

   d. Concerns over student views being inappropriately attributed to the school.

D. ***Morse v. Frederick*, 551 U.S. 393 (2007).** In this case, students were out of school at a school-sponsored and sanctioned event, and a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. The banner read: "BONG HiTS 4 JESUS." The principal confiscated the banner and later suspended the student that refused to take the banner down. The student then sued the school district alleging a violation of his First Amendment right of expression.

1. **No First Amendment violation.** The Court held that the student did not have a First Amendment right to wield his banner. The Court explained that deterring drug use by schoolchildren is an important interest and the "special characteristics of the school environment, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse." Thus, "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."

2. **Off-Campus conduct.** The student attempted to argue he could not be subject to the authority of school officials because the banner was displayed across the street from the school and was not on school grounds. The Court rejected this argument, noting that the banner was unfurled at an event that took place during school hours and was sponsored by the school. School events and field trips off school grounds were subject to the school's rules for student conduct.

E. ***B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734 (8th Cir. 2009).** In *B.W.A.*, the Eighth Circuit considered whether a public school district violated its students' First Amendment right to freedom of speech by banning the wearing of clothing that depicted the Confederate flag. Following several racially-motivated incidents, including one where a white student urinated on a black student and another where several white students showed up at the house of a black student and threatened him, the district prohibited students from wearing clothing bearing the Confederate flag. After the ban was put in place, three students violated the ban by wearing Confederate flag apparel to school. The district disciplined all of the students, and the students sued.

1. **Application of *Tinker*.** The Eighth Circuit applied the standard set forth in the *Tinker* decision—whether school officials could

point to facts that reasonably led them to forecast a substantial disruption or a material interference with school activities.

2. The Eighth Circuit concluded that the incidents discussed above, along with other race-related incidents, including one that involved a Confederate flag, provided facts that would reasonably have led the district's staff to belief that allowing students to wear the Confederate flag would cause a substantial disruption.

F. ***Mahanoy Area School District v. B.L.*****, 594 U.S. (2021).** In this case, a student on a school district's cheerleading team, posted two snaps to her Snapchat story. The first showed her and a friend giving the middle finger and included a caption stating, "Fuck school fuck softball fuck cheer fuck everything." The photo was taken off of school grounds. The second was a completely black screen and included a caption stating, "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" Another student saw the snaps, took photos of them, and sent the photos to other students. One student who received the photos showed them to her mother, who was one of the cheer coaches and reported it to the school district. After receiving the photos of the snaps, some students approached the cheer coaches and were visibly upset by them. Some students also discussed the snaps during a class taught by one of the coaches. The coaches ultimately decided to suspend B.L. for the season.

1. **Application of *Tinker*.** The Supreme Court concluded that schools may regulate off-campus student speech in some scenarios, clarifying that schools do not always have the right to punish students for off-campus speech. The opinion listed several examples of off-campus speech that schools might be able to regulate, including "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." The majority declined to set forth any bright-line rule for regulating off-campus student speech, indicating that a school's ability to regulate such speech will vary depending upon many factors.

2. The Supreme Court explained that three key features of off-campus speech "diminish the strength of the unique characteristics that might call for special First Amendment leeway" for schools.

a. First, schools rarely stand in loco parentis with respect to off-campus speech. In other words, schools typically are not acting in the place of parents when students engage in speech off-campus, unlike when students engage in speech on campus.

b. Second, if both on-campus and off-campus speech are regulated, then all speech by a student is regulated. This 24-hour regulation of student speech could mean that a student is unable to engage in certain speech at all.

c. Third, public schools, as "nurseries of democracy," have an interest in protecting unpopular student speech.

3. With respect to the specific incident involving B.L., the Supreme Court first analyzed B.L.'s speech. It noted that B.L.'s speech was "pure speech" for which an adult would have strong protection under the First Amendment. In other words, her speech did not rise to the level of certain types of speech that are not protected under the First Amendment like fighting words and obscenity. The Court then considered when, where, and how B.L. spoke. The facts that the speech occurred off campus, did not identify or target the school or anyone from school, and was expressed through personal platforms (i.e. through a personal cell phone and sent to private Snapchat friends) led the majority to conclude that the school district's interest in regulating that speech was diminished.

4. The Supreme Court also considered the school district's asserted interest in regulating the speech, which was described as "teaching good manners and . . . punishing the use of vulgar language aimed at part of the school community." The Court noted that this "anti-vulgarity" interest was weakened because the speech occurred outside of school, because the school district did not stand in loco parentis, and because the school did not make a general effort to prevent vulgarity outside of the classroom. In the end, the Court concluded the school district's anti-vulgarity interest was not sufficient to restrict B.L.'s speech here.

5. The school district's interest in preventing a disruption in the school environment also was not sufficient because the school district did not present any evidence of a substantial disruption like that contemplated by the *Tinker* Court. Instead, the school district showed only that some cheerleaders were upset by the snaps and

that some discussed the snaps in a couple of Algebra classes. Finally, the school district's interest in preventing a substantial interference in or disruption of team morale was not supported by any evidence in the record. For those reasons, the majority determined that B.L.'s speech was protected.

6. **Implications.** Overall, the Mahanoy decision may prove to have little impact on future litigation involving off-campus student speech for a two reasons. First, while the Court endorsed the application of *Tinker* to off-campus speech in some scenarios, it declined to draw any bright-line rules. Second, the Supreme Court tailored its analysis to the specific facts of the case. Thus, future litigation is likely to continue to revolve around the issue of when *Tinker* applies to off-campus student speech. The main takeaway from the Supreme Court's decision is the necessity that schools can point to evidence of a substantial disruption when restricting student speech—or disciplining a student for engaging in "prohibited" speech.

G. Apply the Framework.

1. **Hypothetical 9:** April Schauers, an Asian-American student, is the president of the student council. While April has never been the victim of racist policing, she is friends with a couple of black students who have shared their experiences with her. Following the death of George Floyd, April was moved to activism. At the September student council meeting, she opens the meeting by handing out solid black ribbons and asking her fellow student council members to wear them as a show of solidarity with students of color and the "Black Lives Matter" movement. After the meeting, April and most of the student council members adorn the black ribbons. May the district prohibit April and the other student council members from wearing the ribbons during the school day?

   The following week, Brock Lee and his friends start wearing solid blue ribbons in support of the "Blue Lives Matter" initiative. During lunch, a fight breaks out between the black ribbon-wearers and the blue ribbon-wearers, and April ends up punching Brock in the eye. May the district prohibit both groups from wearing their ribbons to school?

2. **Hypothetical 10:** Hugh Mann, a senior in the district's high school, is one of the organizers of the October 13 student walkout

related to racist policing and the district's SRO contract. Hugh is black and has had bad experiences with one of the SROs in the past. In promotion of the walkout, Hugh has started handing out flyers to students during passing time. The flyers state, "Walk out with us to demand an end to policing in school! Now is the time to remove the racist pigs, voluntarily or by force!" May the district tell Hugh to stop handing out the flyers and discipline him if he refuses? Would your answer change if Hugh was handing out the flyers at an away football game?

3. **Hypothetical 11:** Jack Glass is a junior who attends the high school. He and his friends think April and Hugh are making too big a deal out of the George Floyd incident. Jack, who is white, has one of his friends take a picture of him kneeling on the neck of another friend, who is also white. Jack sends the photo to April and Hugh over Snapchat with the caption "Doing the Derek Chauvin!" Jack also posts the photo with the same caption to his Instagram account. April and Hugh confront Jack in class, leading to the teacher not being able to teach, and April and Hugh complain to the high school principal about the photo. When the principal confronts Jack, Jack says the photo was meant to be a joke. May the district discipline Jack for sending the photo to April and Hugh?

4. **Hypothetical 12:** Anita Friend also attends the district's high school. She is a strict libertarian and thinks the two-party political system is a joke. Anita arrives to her first class wearing a t-shirt that says "F*ck Elephant. F*ck Donkey. Vote Third Party." Anita's teacher tells her that she needs to change her shirt, but Anita refuses, claiming she has a First Amendment right to express her political views. The district's student dress code prohibits clothing that bears a lewd, obscene, or vulgar message. Can the district discipline Anita if she refuses to change her shirt?

V. GOVERNMENT SPEECH

A. What Is "Government Speech?" "Government speech" is speech or expression by or on behalf of a government entity, like a public school district.

B. The Government Speech Doctrine. The government speech doctrine is a relatively new concept created by the Supreme Court, and the doctrine is still evolving. Under the doctrine, a government is free to engage in expressive conduct that favors or disfavors any particular view. In other

words, a government can say what it wants. Government speech is not restricted by the Free Speech Clause. *Pleasant Grove City, Utah v. Summum*, 555 US 460 (2009). This doctrine has been specifically extended to public school districts by at least one federal court. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000).

1. **School districts may advocate certain views.** Recent decisions by federal courts in other states have held that a public school district may advocate for tolerance toward LGBTQ students, and may advocate for gun control. *Downs*, 228 F.3d 1003; *Burwell*, 2019 WL 9441663.

2. **And may exclude other views.** When a school district expresses a view, it does not open a public forum for private speakers to express their opposing views. In other words, a school district may exclude viewpoints that are contrary to its own. Similarly, a school district gets to decide who may speak on its behalf.

C. Is It Government Speech? Three considerations are analyzed when determining whether speech constitutes "government speech." *Shurtleff v. City of Bos.*, 928 F.3d 166, 172 (1st Cir. 2019).

1. Whether the government has traditionally used the message or conduct at issue to speak to the public;

2. Whether persons would interpret the speech as conveying some message on the government's behalf; and

3. Whether the government maintains control over the selection of the message.

D. Examples from case law.

1. ***Women for Am. First v. de Blasio*, No. 20 CIV. 5746 (LGS), 2021 WL 634695 (S.D.N.Y. Feb. 18, 2021).** In this case, artists painted a mural on a street in New York City without City approval that included the phrase "Black Lives Matter." The next day, the Mayor learned about the mural, and his office Tweeted a message in support. Artists painted a second mural several days later, and the Mayor directly expressed support, stating that "these are our values in New York City." The City then preserved the murals and played a role in the creation of six more murals over the next couple of months. Private citizens then made requests to put

murals on other streets, including a "Blue Lives Matter" mural, as well as others. These requests were denied and litigation followed.

a. That court applied the test for government speech to the murals, first determining that the surfaces of public streets are "reserved primarily for government communication." Second, the court determined that an outside observer would interpret the message as being from the government because the Mayor himself said the government is "sending a message that these are our values in New York City." Finally, the government was involved in the creation of and controlled the content of the six subsequent murals, exhibiting that the government maintains enough control over the message.

b. The Court concluded: "Because the [m]urals are government and not private speech, and therefore did not open up the surfaces of New York City streets as designated public fora, strict scrutiny does not apply to the denial of the Plaintiff's request to paint its own street mural."

2. ***Shurtleff v. City of Boston***, **986 F.3d 78 (1st Cir. 2021).** In this case, the City of Boston owned and managed three flagpoles at its buildings and accepted requests to fly flags as an alternative to the City's flag for limited periods of time. The City decided which flags to raise based on whether the flag was "consistent with the City's message, policies, and practices." When an organization applied to have the Christian flag raised, the City denied the request, and the organization sued the City for violating its First Amendment rights partly on the basis of viewpoint discrimination. The court dismissed the claims on the grounds that the flag display constituted government speech.

a. The court reviewed the three government speech factors, first determining that governments have used flags "throughout history to communicate messages and ideas." Further, the Court stated: "That a government flies a flag as a 'symbolic act' and signal of a greater message to the public is indisputable."

b. Second, the Court determined that an outside observer would likely interpret the speech as the governments because an observer would "see a city employee replace the city flag

with a third-party flag and turn the crank until the third-party flag joins the United States flag and the Massachusetts flag."

c. Third, the City clearly maintained control over the messages conveyed on the flags. There was a process for seeking approval, and the City ensured the flag was consistent with the City's messages, policies, and practices before approving it.

3. ***Downs v. Los Angeles Unified School Distrist*, 228 F.3d 1003 (9th Cir. 2000).** The school in this case created a bulletin board inside the school building on which faculty and staff could post materials related to LGBTQ awareness and support. A teacher in the high school objected and created his own competing bulletin board across the hall from his classroom titled "Testing Tolerance" and later "Redefining the Family." Included among the materials he posted were a portion of the Declaration of Independence, newspaper articles, various school district memoranda, and several excerpts, including statements that "60% of Americans hold the belief that homosexuality is immoral: that "most mainline religions in America . . . condemn homosexual behavior." The principal ordered the teacher to remove his materials, and the teacher then filed a lawsuit alleging violation of the First Amendment.

a. The court ruled that the District did not violate the First Amendment because the posters that it allowed on its walls were considered government speech. The court held that a public school board may decide not only to talk about LGBTQ issues and tolerance in general, but also to advocate such tolerance and to restrict contrary speech from its employees at school. The court further held that because the government itself was speaking, the school district's regulation of speech does not need to be viewpoint neutral.

E. Restrictions on Government Speech.

1. **Religious speech.** Government speech cannot violate the Establishment Clause. Thus, school districts may not engage in or sponsor religious speech.

2. **Political speech.** School districts may not sponsor political speech regarding school district ballot questions. Through their

employees, school districts may provide factual information about referenda to the public but may not use public funds to advocate for passage of referenda. This can be a difficult line to draw.

a. **Examples of permissible conduct.** The school district may distribute factual data to the public, including statements about the intended uses of the revenue generated by a levy referendum and the ramifications of not passing the levy. Toward that end, school districts may give informational presentations to parent and community groups. School districts may also challenge and correct inaccurate information reported by the media.

b. **Reasonable expenditure of funds to inform voters of facts**. The Minnesota Attorney General has opined that school boards may expend a *reasonable* amount of time and money to inform voters of facts surrounding a contested issue. *See* Minn. Op. Atty. Gen. 159a-3, May 25, 1962 (holding that school districts may purchase space in newspaper to inform voters of facts). In a separate opinion, the attorney general stated that the school board determines what constitutes a reasonable amount. *See* Minn. Op. Atty. Gen. 159b-11, September 17, 1957. However, a school district may not use public funds to advocate for a referendum. *See* Minn. Opp. Atty. Gen. 159a-13, May 24, 1966.

3. **Use of Authority to Compel Political Activity.** Minnesota Statutes Section 211B.09 states that "an employee or official . . . of a political subdivision may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. A political subdivision may not impose or enforce additional limitations on the political activities of its employees." (Emphasis added.) A violation of this statute is a misdemeanor.

a. **Application to school districts.** This law applies to school districts, school board members, and school employees.

b. **Conduct that does not violate the statute.** An administrative law judge ("ALJ") has ruled that handing out political literature and asking employees if they have voted

does not rise to the level of "compelling" an employee to take part in political activity. See OAH File No. 7-6310-16288-CV (Nov. 2004). In a separate case, an ALJ has ruled that wearing a political button in class does not rise to the level of using official authority to compel students to participate in political activity. See OAH File No. 21-6379-16251-CV (Oct. 29, 2004).

F. Applying the Framework.

1. **Hypothetical 13:** During the October student council meeting, April Schauers proposes that the student council display a Black Lives Matter (BLM) flag in the high school gym. Several other flags are displayed in the gym, including a United States flag, a Minnesota, and a Swedish flag (because the district has an exchange program with a high school in Sweden). Several student council members support April's proposal, but Emma Wise, the student council advisor, has some hesitations. She approaches you wondering if the student council can put up a BLM flag. Final approval for hanging banners, posters, etc. in the gym must go through you, the principal. What do you tell Ms. Wise?

2. **Hypothetical 14:** Dick Tator is the district's long-time superintendent. He is approaching retirement and, frankly, sick of being politically correct all the time. Mr. Tator has a tradition of sending out a "Welcome Back" letter to district families before the start of a new school year. The school board is aware of this tradition and has never censored Mr. Tator's letter. In his "Welcome Back" letter for the 2021-22 school year, Mr. Tator wrote that while COVID-19 is a "hoax that has not killed a single person in the county," the School Board voted to require masks in school and he has to follow that vote. The letter was sent to families on district letterhead. Is Mr. Tator's speech "government speech?"

3. **Hypothetical 15:** Bea O'Problem, a concerned citizen in the district, is a scholar of the Christian faith. She recently discovered that the district is exclusively teaching evolution as part of its science curriculum. Ms. O'Problem demands that the district revise its curriculum to include the competing theory of creationism, arguing that the district's failure to present that theory constitutes viewpoint discrimination. Does the district

need to meet Ms. O'Problem's demand and revise its science curriculum?

VI. QUESTIONS?

RASW: 170394