CONSTRUCTING A CONSENSUS APPROACH FOR ANALYZING STUDENTS' OUT-OF-SCHOOL SPEECH

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I. INTRODUCTION

In September 2016, the Ninth Circuit became the latest federal court to weigh in on when and how a school may discipline its students for out-of-school, or off-campus, speech without violating their First and Fourteenth Amendment rights.[1] Because of the Internet, social media, and the rise of youth cell phone ownership, the line between on- and off-campus speech seems blurrier than ever before, and courts have been left the unenviable task of delineating. Most likely, the Supreme Court will be asked to hear a case on the subject in the coming years. When it chooses to hear a student's First Amendment claim regarding off-campus speech, the Court should not adopt the "nexus" or "reasonable foreseeability" tests used in some circuits.[2] Instead, the Court should adopt the analytical framework used by the Ninth Circuit in *C.R. v. Eugene School District 4J*, which combines subjective and objective factors to ensure fair results, consistency, and flexibility.[3]

This comment starts by describing the Supreme Court's existing out-of-school speech doctrine and what has been called a split between circuits on how to properly determine whether particular instances of out-of-school speech are ripe for school-imposed discipline. Section II additionally describes the Ninth

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1. C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017).

2. *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016); S.J.W. v. Lee's Summit R–7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011); Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008).

3. *C.R.*, 835 F.3d at 1150–53.

Circuit's recent decision in *C.R. v. Eugene School District 4J* and that court's choice not to choose between the two approaches used by its sister circuits. This comment concludes by analyzing the different ways courts have evaluated off-campus speech cases to show: (1) that the allegedly different approaches are actually one and the same; and (2) the Ninth Circuit's framework from *C.R.* is thus far the best approach to determine when off-campus speech reaches a campus in a manner that makes it ripe for disciplinary action.

In sum, federal courts have described a "circuit split" as to how courts will evaluate off-campus First Amendment speech cases, but both sides of the so-called split evaluate cases the same way. In declining to choose one approach over the other, the *C.R.* court created a true split and signaled a new method for evaluating cases where a school's authority to discipline students for off-campus speech is challenged.[4] If the Supreme Court chooses to grant certiorari for an off-campus speech case, it should follow the Ninth Circuit's lead and use the method of analysis from *C.R.* in determining whether a school can regulate off-campus speech under the First Amendment.

II. THE COURT'S EXISTING OFF-CAMPUS FREE SPEECH DOCTRINE

The Supreme Court first acknowledged students' First Amendment rights in 1943.[5] In a handful of cases decided in the years since, the Court has expanded—and sometimes limited—the scope of those rights.[6] Sifting through the Court's First

4. *Id.* at 1150.

5. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (finding a school in breach of the First Amendment for expelling students who would not stand and salute the American flag during the pledge of allegiance).

6. *See* Morse v. Frederick, 551 U.S. 393, 408 (2007) (deciding 5-4 that "[t]he 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse" allows schools to discipline student speech promoting illegal drug use (citation omitted)); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (holding that schools may discipline students for uttering "offensively lewd and indecent speech" that the school determines "would undermine the school's basic educational mission"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).

Amendment jurisprudence related to students can be tricky, but the Court has set forth a few distinctive frameworks through which lower courts will evaluate any alleged violations of a student's free speech: the Court's decision in *Bethel School District Number 403 v. Fraser* governs disciplinary decisions based on "vulgar, lewd, obscene, and plainly offensive speech;" *Hazelwood School District v. Kuhlmeier* controls a school's ability to maintain editorial control over school-sponsored speech; *Morse v. Frederick* is the standard for speech promoting illegal drug use; and *Tinker v. Des Moines Independent Community School District* is the catch-all authority for all other types of student speech.[7] However, while the above cases primarily concern on-campus student speech, First Amendment issues regarding off-campus speech have arisen frequently in recent years.[8]

In 1969, the Supreme Court ruled that schools cannot stifle "pure speech" unless that conduct would "materially and substantially interfer[e] with the requirements of the appropriate discipline in the operation of the school [or] collid[e] with the rights of others."[9] The student-plaintiffs in that case were suspended for wearing black armbands in protest of the Vietnam War, but the Court found that there had been no substantial disruption as a result of the students' protest.[10] Although the case involved in-school speech, Justice Fortas' opinion expanded the scope of the Court's decision to out-of-school speech by noting that "[a] student's rights . . . do not embrace merely the classroom hours."[11] He reasoned, "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect."[12]

Since *Tinker* was decided, federal courts have used it as the applicable doctrine for cases involving off-campus speech.[13] Thus, a school generally cannot discipline a student for speech uttered outside school unless that speech materially and substantially

7. *See C.R.*, 835 F.3d at 1148–49 (citing Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1067 (9th Cir. 2013)).

8. *See id.* at 1149.

9. *Tinker*, 393 U.S. at 512–13 (citation omitted).

10. *Id.* at 508.

11. *Id.* at 512.

12. *Id.* at 511.

13. *See C.R.*, 835 F.3d at 1150.

disrupts the discipline or operation of the school.[14] However, before the "substantial disruption" standard may even be applied, a court must determine whether the out-of-school speech reaches the school campus in a manner that renders the speaker subject to school discipline.[15] Courts agree that *Tinker* is the proper lens through which to evaluate out-of-school First Amendment cases, but there is no such consensus as to the standard for determining when off-campus speech interferes with school operations to the extent that a school may discipline the speaker. The complexity of making such a determination has become particularly difficult in light of today's highly interconnected technological landscape.[16] As such, the circuits have splintered and now use three perceivably different standards to decide when out-of-school speech reaches a school's campus speech in a manner that may subject the speaker to discipline.[17]

A. Kowalski *and the "Nexus" Approach*

In the Fourth Circuit's formative off-campus speech case, *Kowalski v. Berkeley County School*, the court validated a school's decision to discipline a student for creating a website designed for the purpose of "harassing and bullying" a classmate.[18] Kowalski, a high school senior, created a MySpace page called "S.A.S.H.," an acronym for "Students Against Shay's Herpes," and used it to "orchestrate a targeted attack on a classmate [named Shay]."[19] Kowalski created the web page after school on her home computer, but the school nonetheless determined that her creation of a "hate website" violated the school's policy against

14. *Tinker*, 393 U.S. at 508–09.

15. *See C.R.*, 835 F.3d at 1150.

16. *See* Jessica K. Boyd, Note, *Moving the Bully from the Schoolyard to Cyberspace: How Much Protection Is Off-Campus Student Speech Awarded Under the First Amendment?*, 64 ALA. L. REV. 1215, 1215–17 (2013) (noting that twenty percent of teens say they experience cyber bullying on a regular basis). Bullying has become a major problem for school administrators, and may amount to a material disruption in the operation of a school by distracting both the bully and bullied students from their work. When bullying amounts to a "true threat," a school may discipline students without worrying about any constitutional issues, for the First Amendment does not protect such threats. *See* Watts v. United States, 394 U.S. 705, 707 (1969) (distinguishing between threats and protected speech).

17. *See C.R.*, 835 F.3d at 1149–50.

18. Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 576–77 (4th Cir. 2011).

19. *Id.* at 567.

"harassment, bullying, and intimidation."[20] As punishment, Kowalski was given a ten day out-of-school suspension and a ninety day suspension from school social events.[21] Kowalski filed suit in response, alleging the school's punishment violated her First and Fourteenth Amendment rights.[22] At every step of the judicial chain, Kowalski's suit failed, and the Fourth Circuit Court of Appeals was equally unmoved by her argument.[23]

The court began its analysis by examining the facts of Kowalski's case to determine whether "the nexus of [her] speech to [the school's] pedagogical interests was sufficiently strong to justify the [disciplinary] action."[24] From that language, the so-called "nexus" test was born. In Kowalski's case, the metaphysical nexus between speech and school, which existed because Kowalski used the Internet as her medium of expression, was deemed sufficient to bring the speech into the school in a manner that allowed it to levy discipline.[25] The court reasoned Kowalski's speech bore a sufficient nexus to the school because the speaker "knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school."[26]

Once the court was satisfied that Kowalski's speech bore a sufficiently strong nexus to the school, it evaluated the effects of that speech under *Tinker*.[27] The court noted, "schools have a duty to protect their students from harassment and bullying in the school environment,"[28] and concluded Kowalski's speech "created 'actual or nascent' substantial disorder and disruption in the school."[29] Having found that Kowalski's speech (1) reached inside the "schoolhouse gate" and (2) caused a substantial disruption under *Tinker*, the court held that the school's disciplinary action did not violate Kowalski's First Amendment rights.[30]

20. *Id.* at 567–69.
21. *Id.* at 569.
22. *Id.* at 567.
23. *Id.* at 570, 576.
24. *Id.* at 573.
25. *Id.*
26. *Id.*
27. *Id.* at 573–74.
28. *Id.* at 572 (citing Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007)).
29. *Id.* at 574 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 513 (1969)).
30. *Id.*

B. D.J.M., S.J.W., *and the Eighth Circuit's "Reasonable Foreseeability" Test*

Unlike its sister circuit in *Kowalski*, the Eighth Circuit uses what has been called the "reasonable foreseeability" test to decide when off-campus speech reaches the schoolhouse gate.[31] For example, in *D.J.M. v. Hannibal Public School District*, a school was allowed to discipline a student who, outside of school hours, sent instant messages to another student threatening to "shoot everyone he hates [and] then shoot himself."[32] The Court first reasoned that D.J.M.'s communication amounted to a true threat and was therefore unprotected by the First Amendment.[33] However, the court went on to say that even if the speech was not a true threat, the school was free to discipline students for off-campus speech "reasonably foreseeable . . . [to] be brought to the attention of school authorities and create a risk of substantial disruption within the school environment."[34] From that language sprung the "reasonable foreseeability" test.

Only a year later, the Eighth Circuit Court of Appeals reaffirmed its use of the reasonable foreseeability standard in *S.J.W. v. Lee's Summit R-7 School District*.[35] The plaintiffs in *S.J.W.* were twin brothers who created a website for students "to discuss, satirize, and 'vent' about events" at their high school.[36] The brothers used their site to post "a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name."[37] When the school administration learned of their website,

31. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1149 (9th Cir. 2016) (noting the Eighth Circuit "applie[s] a test asking whether it was 'reasonably foreseeable' that off-campus speech [will] reach the school"); S.J.W. v. Lee's Summit R–7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012); D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 766 (8th Cir. 2011). *See also* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011) (holding that a student's free speech rights were violated when he was punished for speech the school could not have "reasonably forecasted [to disrupt or interfere] with the school"); Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 38 (2d Cir. 2007) (concluding a school may permissibly discipline its students for off-campus speech "that poses a reasonably foreseeable risk" of reaching the school).

32. *D.J.M.*, 647 F.3d at 758.

33. *Id.* at 765.

34. *Id.* at 766.

35. *S.J.W.*, 696 F.3d at 778.

36. *Id.* at 773.

37. *Id.*

the brothers were each suspended 180 days—a full school year.[38] Disagreeing with the school board's decision, the brothers took their case to court, and eventually it ascended all the way to the Eighth Circuit.[39]

Before affirming the district court's decision for the school, the Eighth Circuit discussed the methodology courts should use to determine whether a certain utterance was directed at school or reaches the schoolhouse gate.[40] First, the court discussed *D.J.M.* directly and endorsed the "reasonable foreseeability" approach as the applicable standard within the Eighth Circuit.[41] Next, the court considered precedent cases from other federal circuits: *Doninger v. Niehoff* from the Second Circuit, *Kowalski* from the Fourth Circuit, and *J.S. v. Blue Moon School District* from the Third Circuit.[42] Eventually, the court determined that the school did not violate the First Amendment by disciplining students for speech "targeted at" the school, and therefore it was reasonably foreseeable "to reach the school or impact the [school] environment."[43] Interestingly, that language was taken from *Kowalski* rather than a case from a circuit that uses the "reasonable foreseeability" approach.[44]

C. The Fifth Circuit's Decision Not to Follow Either Standard

The Fifth Circuit Court of Appeals heard an off-campus free speech case in 2013 and took a different approach than its sister circuits.[45] In *Bell v. Itawamba City School Board*, a school was sued after it disciplined a student for a rap song he had recorded off-campus—without the use of any school resources or property—and posted to social media.[46] The school suspended Bell because the song threatened teachers and coaches in violation of the

38. *Id.* at 774.

39. *Id.* at 774–75.

40. *Id.* at 776–78.

41. *See id.* at 777.

42. *Id.* at 777–78.

43. *Id.* at 778 (citing Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011)).

44. *Id.*

45. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (declining "to adopt or reject approaches advocated by other circuits").

46. *Id.* at 383.

school's policy against "harassment, intimidation, or threatening other students and/or teachers."[47] However, Bell filed suit, arguing the school had breached his First Amendment rights by disciplining him for his expression in the rap song.[48]

In resolving Bell's claim, the court first noted that *Tinker* was the appropriate standard through which to evaluate off-campus speech cases.[49] Next, it addressed the two tests— "nexus" and "reasonable foreseeability," respectively—other circuits have used to determine whether a school has the power to discipline its students under the First Amendment for off-campus speech.[50] However, the court declined "to adopt or reject approaches advocated by other circuits" and instead drew a narrowly tailored, bright-line rule, reasoning that *Tinker* permits schools to discipline a student who "intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, or intimidate a teacher . . . ."[51] Bell's speech, then, subjected him to discipline because it was harassing, intimidating, and threatening speech "intentionally direct[ed] . . . at the school community."[52] By adding a bright-line element to its analysis, the *Bell* decision opened the door for the Ninth Circuit Court of Appeals to decide its recent off-campus speech case, *C.R. v. Eugene School District 4J*, in the manner it did.

D. C.R. *and the Ninth Circuit's Approach*

In *C.R.*, a student was disciplined for off-campus speech that arose only a few hundred feet from school property.[53] After school let out, C.R. and a few of his seventh grade classmates followed a pair of sixth graders home and were alleged to have sexually harassed the younger students.[54] The harassment occurred in a field that abutted the school's property, but upon which there was (apropos of the issue at hand) no visible boundary for where the school ended and the park began.[55] Like

47. *Id.* at 384–85.
48. *Id.* at 387.
49. *Id.* at 393–94.
50. *Id.* at 395.
51. *Id.* at 396.
52. *Id.* at 397.
53. C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1145, 1150 (9th Cir. 2016).
54. *Id.* at 1146.
55. *Id.*

the circuits that have previously addressed off-campus speech and the First Amendment, the *C.R.* court relied upon *Tinker* to resolve the case.[56]

In deciding the issue, the *C.R.* court first described the various manners in which other circuits have evaluated a school's power to discipline its students under the First Amendment for off-campus speech.[57] However, rather than endorsing the nexus or reasonable foreseeability approach, the *C.R.* court relied upon another Ninth Circuit case, *Wynar v. Douglas County School District*, in "declin[ing] to choose between [the two] tests."[58] Instead, the court reasoned that both approaches are inherently satisfied in certain situations, and that no matter what test is "ultimately applied, courts consistently engage in a circumstance-specific inquiry to determine whether a school permissibly can discipline a student for off-campus speech."[59]

Looking at the circumstances of the case before it, the court determined that "under either [the nexus or reasonable foreseeability] test, the School District had the authority to discipline C.R. for his off-campus speech."[60] The court found it persuasive that all parties involved in the harassment were students; the bullying had taken place close to the school "on a path that begins at the schoolhouse door;" and the students "had been let out-of-school just minutes before the incident."[61] In concluding its opinion, the court limited its holding "to the unique facts presented by this case," and reasoned "[a] school may act to ensure students are able to leave school safely without implicating the rights of students to speak freely in the broader community."[62]

56. *Id.* at 1152–53.

57. *Id.* at 1149–50 (noting the nexus and reasonable foreseeability standards and describing the Fifth Circuit's approach in *Bell*).

58. *Id.* at 1149 (citing Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013)).

59. *Id.* at 1150.

60. *Id.*

61. *Id.* at 1150–51.

62. *Id.* at 1152.

III. ANALYZING THE TESTS TO GENERATE A COHESIVE APPROACH

A. There Is No Difference Between the "Nexus" and "Reasonable Foreseeability" Approaches

In describing the nexus and reasonable foreseeability approaches to off-campus speech, courts have consistently called the circuits "split" on how to interpret whether certain utterances reach the schoolhouse gate,[63] but the language of the decisions paints a different picture. No matter which test they claim to use, courts' analysis under either test is a wholly subjective, totality of the circumstances evaluation of the relationship between the student's speech and her school.[64] The speaker's reasonable expectation of whether the speech would reach campus is of central importance under both tests. Furthermore, courts use language from nexus and reasonable foreseeability decisions interchangeably.[65] Therefore, although the nexus and reasonable foreseeability tests are described as separate standards, they are actually one and the same; a "circumstance-specific inquiry to determine whether a school permissibly can discipline a student for off-campus speech."[66]

Both the nexus and reasonable foreseeability tests call for a court to ask whether the speaker could have expected her speech to reach the schoolhouse gate.[67] In *Kowalski*, for example, the court reasoned the speech at issue bore a reasonable nexus to the school because the speaker "knew that the electronic response would be, as it in fact was, published beyond her home and *could reasonably be expected to reach the school* or impact the school environment."[68] Later in the opinion, the court prefaced its holding for the school by noting, "it was foreseeable in this case that Kowalski's conduct would reach the school via computers, smartphones, and other electronic devices . . . ."[69] This language

63. *See id.* at 1149–50.

64. *Id.*

65. *See id.*; S.J.W. v. Lee's Summit R–7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011); Nixon v. Hardin Cty. Bd. of Educ., 988 F. Supp. 2d 826, 836–37 (W.D. Tenn. 2013).

66. *C.R.*, 835 F.3d at 1150.

67. *See S.J.W.*, 696 F.3d at 778; *Kowalski*, 652 F.3d at 573.

68. *Kowalski*, 652 F.3d at 573 (emphasis added).

69. *Id.* at 574.

shows that speaker intent and foreseeability are important elements in establishing the "nexus" between a specific utterance and the schoolhouse gate. Speech that will foreseeably reach the school bears a nexus to that school—at least according to *Kowalski*.[70]

Similarly, "reasonable foreseeability" courts' analysis of whether the speech in question reached the schoolhouse gate turns on whether the speaker could reasonably have expected her speech to do so.[71] In fact, the court's analysis in *S.J.W.* quotes *Kowalski* in coming to the conclusion that the speech in question reached campus because it "could reasonably be expected to reach the school . . . ."[72] Likewise, in *D.J.M.,* the Eighth Circuit case that established the reasonable foreseeability standard, the court found it important that the speaker "knew or at least should have known that the classmates he referenced [in his threatening instant messages] could be told about his statements."[73] Thus, the *D.J.M.* court rationalized that it was reasonably foreseeable D.J.M.'s speech would reach the schoolhouse gate. In sum, courts using the reasonable foreseeability standard, like their nexus-focused sister circuits, ask whether the speaker could have expected her speech to reach the school, and rely upon the answer to that question to determine whether the school's discipline was appropriate.

Furthermore, circuits that have heard cases of first impression regarding off-campus speech in recent years cite nexus and reasonable foreseeability language interchangeably.[74] Courts use different words, nexus and foreseeability, but their language means the same thing to a student who has been disciplined for off-campus speech: if she could have reasonably expected her speech to reach the schoolhouse gate and cause a material disruption, she can expect to be disciplined no matter which test the court uses. Pragmatically, that lack of differentiation shows

70. *Id.*

71. *S.J.W.*, 696 F.3d at 778.

72. *Id.* (citing *Kowalski*, 652 F.3d at 573).

73. D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 762 (8th Cir. 2011).

74. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1149–50 (9th Cir. 2016); Nixon v. Hardin Cty. Bd. of Educ., 988 F. Supp. 2d 826, 836–37 (W.D. Tenn. 2013) (noting that the Sixth Circuit Court of Appeals had not yet ruled on "whether schools may regulate off-campus online speech by students," and citing both *Kowalski* and *S.J.W.* in deciding the school had not met its burden of proof to be granted summary judgment).

that the two subjective standards for determining whether off-campus speech reaches a school are actually one and the same.[75] Therefore, the "split" between nexus and reasonable foreseeability circuits is purely semantic; both use the same subjective, totality of the circumstances analysis. However, the Fifth and Ninth Circuits have truly split from the subjective approach used by other circuits by adding objective elements to their analysis.

B. The Ninth Circuit's Analysis Is the Best Approach Yet for Resolving Off-Campus Speech Cases.

By deciding the *C.R.* case in the manner it did, the Ninth Circuit Court of Appeals seemingly added another step [enumerated (2) below] to off-campus speech analysis. When following *C.R.*, courts should evaluate off-campus speech cases by: (1) identifying the type of speech at issue (e.g., bullying, harassment, threats, lewd speech, etc.); (2) determining whether that category of speech is, by its nature, guaranteed to reach the campus in a way that enables a school to discipline the student-speaker in question; (3) if not, engaging in a "circumstance-specific inquiry"—the nexus or reasonable foreseeability test—to determine whether the individual facts at issue indicate that the speech in question reached the school's campus; and (4) if it is deemed to have "reached" the school's campus, asking whether the speech at issue caused a material and substantial disruption such that the school could discipline the student under *Tinker*.[76]

Following the Ninth Circuit's precedent, schools are free to discipline students for certain types of off-campus speech that are always certain to reach a school's campus.[77] For example, *Wynar* tells us that threatened school shootings will always reach the schoolhouse gate in a manner that enables a school to discipline the speaker.[78] *C.R.* says the same about sexual harassment that occurs while students are walking home from school.[79] Looking at other off-campus speech cases, other categories of speech should

75. Harold A. Lloyd, *Law's "Way of Words": Pragmatics and Textualist Error*, 49 CREIGHTON L. REV. 221, 226 (2016) (noting that the pragmatic approach to interpretation focuses on the way the user of a word relates to that word).

76. *See generally C.R.*, 835 F.3d at 1149–50.

77. *Id.* at 1148–53.

78. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013).

79. *C.R.*, 835 F.3d at 1151–52.

be treated the same way.[80] For example, cyber bullying is a major problem for schools, and it is a type of speech that will assuredly cause substantial disruption to any school wherein both the bully and bullied party are students.[81]

Bullying of any kind has a negative impact on students.[82] Generally, bullied students feel unsafe at school, are less focused, and often do not perform as well as their classmates in school.[83] As such, it could hardly be argued that bullying is not a substantial and material disruption of the school environment that may be cause for discipline under *Tinker*. Cyber bullying between students necessarily reaches a school because the bullied student will suffer those same negative effects regardless of whether the bully sends harassing messages from inside the school or out. Therefore, cyber bullying between students—like the threats of violence at issue in *Wynar* and harassment between students during their travel to or from school in *C.R.*—will always reach the schoolhouse gate in a manner that allows a school to punish the offending student under the First Amendment. Although this method of analysis has its pros and cons, its benefits to judicial efficiency and consistency with the Supreme Court's First Amendment jurisprudence makes it the best approach yet for resolving off-campus speech cases.

Adding an objective element into off-campus speech analysis is beneficial for judicial efficiency because it makes the law more predictable.[84] The *C.R.* approach promotes efficient case resolution by adding a bright line standard into an area of law that had previously been decided by a totality of the circumstances approach. Bright line rules are easy for judges to work with because their decision as to whether the rule was broken is binary:

80. Of course, courts must be careful when deeming a particular category of speech objectively certain to reach the schoolhouse gate; this objective element of the analysis should be used sparingly and deliberately to ensure that schools are not empowered to censor students or otherwise abridge their right to free expression. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.").

81. *See* Boyd, *supra* note 16, at 1216.

82. *Effects of Bullying*, STOPBULLYING, https://www.stopbullying.gov/at-risk/effects/index.html (last visited Jan. 31, 2018).

83. *Id.*

84. *See* Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

either the alleged rule breaker violated the law, or he did not.[85] As such, a judge's job is usually less difficult when the law at issue draws a bright line.[86] Also, bright line rules provide clear notice to those who might engage in the type of activity prohibited by a rule, so they can proactively avoid breaking the rule, which results in less litigation down the road.[87] Here, for example, schools in the Ninth Circuit know they can discipline students for harassing other students during their travel to or from school because of *C.R.* Therefore, schools need not worry about whether they will be liable for legal action if they discipline students accordingly. Likewise, students (and their parents) know a lawsuit would be unsuccessful, so they are more likely to accept the punishment as it is given. Adding a bright line standard will dissuade frivolous suits by students who have rightly been disciplined for speech that is certain to materially disrupt a school—like the harassment in *C.R.*, which any reasonable student should expect to reach the school campus in a disruptive manner. By keeping cases like *C.R.* off the docket, courts will have more time and resources to deal with more complex cases. In sum, adding an objective element to off-campus speech analysis is to the benefit of courts and litigants alike.

However, bright line rules do not provide judges as much discretion as circumstance-specific standards, so they are disfavored in areas of the law that involve complex and varied factual situations.[88] Off-campus speech cases can certainly present unique factual circumstances that would be more appropriately handled by a holistic, totality of the circumstances analysis. For example, what if one student claims to have been joking around with another student via Facebook Messenger during summer break, but the recipient feels harassed. The students had not communicated to one another beforehand, and do not communicate again before the recipient-student brings a transcript to the school administration in November. Does that speech reach the schoolhouse gate? The answer does not seem readily apparent, and a court evaluating the school's discipline of the student-speaker would likely need to look deeper into the

85. *Id.*
86. *Id.* at 1177.
87. *Id.*
88. *Id.*

circumstances through the nexus/reasonable foreseeability test. The *C.R.* approach still allows courts to do that in almost all situations.[89] It would only be when the category of speech in question is absolutely certain to reach the schoolhouse gate whenever it is uttered that the objective standard would be brought into play.[90] In sum, the *C.R.* approach strikes a fair balance between the bright-line and circumstance-specific analytic approaches by using both to reach a just result.

C. Using a Test that Has Both Subjective and Objective Elements Is Consistent with the Supreme Court's First Amendment Jurisprudence

The Ninth Circuit's approach to handling off-campus speech cases is consistent with both the Supreme Court's overall First Amendment jurisprudence and its school-specific case law. Both the Supreme Court's overall free speech framework and its school-related holdings involve some kind of objective analysis in which certain types (or categories) of speech will be treated differently from others. Therefore, adding an objective factor for off-campus speech through which courts may dispose of claims involving certain narrowly tailored categories of speech without delving into a fact-specific inquiry makes sense within our country's First Amendment jurisprudence.

First, the Court has held that certain types of speech are generally not protected under the First Amendment.[91] In *Chaplinksy v. New Hampshire*, the Court noted, "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—are not afforded protection under the First Amendment.[92] As such, legislatures may pass "well-defined and narrowly limited" laws abridging a citizen's right to utter those types of speech.[93] Identifying specific types of off-campus speech that will always reach the schoolhouse gate—at least when uttered from one student to another—is a practically similar exercise. For example, the *C.R.* court reasoned that

89. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1149–50 (9th Cir. 2016).

90. *Id.* at 1150–51.

91. *See* Chaplinsky v. New Hampshire, 315 U.S. 569, 571–72 (1942).

92. *Id.* at 572.

93. *Id.* at 571.

student speech always reaches the schoolhouse in a punishable manner when a student harasses another student during their transportation to or from school.[94] That is a narrowly tailored standard that future courts can rely upon much in the same way courts still cite *Chaplinsky* when a statute punishes citizens for using an unprotected category of speech.

Second, the Court's free speech jurisprudence relating to students also involves an objective element similar to that elicited by the Ninth Circuit in *C.R.* As discussed in the beginning of Section II, courts use different tests to evaluate different types of student speech.[95] For example, the holding in *Morse* allows schools to discipline their students for "expression that they reasonably regard as promoting illegal drug use."[96] As a result, schools can discipline students for in-school speech promoting illegal drug use when they deem it necessary. In *Fraser*, the Court held that the school district "acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his *offensively lewd and indecent speech*."[97] Since then, courts have allowed schools "wide discretion" to discipline students for lewd and indecent speech.[98] The objective analysis this comment calls for is similar to the logic the Court has used in previous student free-speech decisions. In sum, the Ninth Circuit's approach to handling off-campus speech is consistent with First Amendment jurisprudence both generally and in the specific context of student speech.

IV. CONCLUSION

There is not a "split" between circuits in the way recent out-of-school speech cases would indicate. Instead, the split lies between circuits that use a wholly subjective, totality of the circumstances analysis to decide whether and when a school may discipline a student for off-campus speech, and those that use objective elements in making the decision. In light of the modern technological landscape, the line between on- and off-campus seems more blurred than ever before. As a result, the Supreme

94. *C.R.*, 835 F.3d at 1149.

95. *See supra* text accompanying notes 5–17.

96. Morse v. Frederick, 551 U.S. 393, 408 (2007).

97. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (emphasis added).

98. *See* R.O. v. Ithaca City Sch. Dist., 645 F.3d 533, 535 (2d Cir. 2011).

Court will continue to receive petitions for certiorari in cases like *C.R.*, *Kowalski*, and *S.J.W.* until it provides a definite framework for evaluating out-of-school student speech cases. When the Court does hear a case involving off-campus speech and the First Amendment, it should follow the Fifth and Ninth Circuits' lead and adopt a test that combines objective and subjective factors.

Including objective, bright-line elements in the analysis provides schools and students with notice as to which types of speech will always reach the schoolhouse gate when uttered between students. As a result, the objective aspect of the Ninth Circuit's approach curbs potentially frivolous litigation and saves courts and potential litigants time and money. The subjective elements, known as the nexus or reasonable foreseeability tests, allow courts flexibility in cases where it is not so certain a student's speech reached the schoolhouse gate such that he may be disciplined. In sum, the combination of objective and subjective elements provides courts and litigants a fair mix of predictability and flexibility and is consistent with our country's greater First Amendment jurisprudence. Therefore, the Ninth Circuit's approach to off-campus speech from *C.R.* is the best we have, and it should be adopted by the Supreme Court if and when it hears a case involving a student's First Amendment right to express herself outside of school.