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## C.R. Ex Rel. Rainville v. Eugene School District 4J: Slowly Expanding a School's Ability to Reach Off- Campus Speech

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## CASE SUMMARY

### *C.R. EX REL. RAINVILLE V. EUGENE SCHOOL DISTRICT 4J: SLOWLY EXPANDING A SCHOOL'S ABILITY TO REACH OFF-CAMPUS SPEECH*

MARY R. LOUNG\*

#### INTRODUCTION

The United States Constitution guarantees equal protection under the law to all citizens regardless of race, color, religion, and gender.<sup>1</sup> However, there are special circumstances when constitutional rights can be restricted. The First Amendment rights of public school students fall under one of these special circumstances.<sup>2</sup> While parents have a responsibility to care for, protect, and discipline their child,<sup>3</sup> the responsibility transfers to the school's *in loco parentis* authority when the child becomes a student under their supervision.<sup>4</sup> The salient issue then becomes

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<sup>1</sup> U.S. CONST. amend. XIV, § 1.

<sup>2</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (“[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”).

<sup>3</sup> Parental responsibility laws vary state to state in terms of duration and level. For an overview of parental responsibility laws organized by state, see *Parental Responsibility Laws in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. (June 8, 2016), <https://www.mwl-law.com/wp-content/uploads/2013/03/parental-responsibility-in-all-50-states.pdf>.

<sup>4</sup> *Fraser*, 478 U.S. at 684.

how to determine when the school's authority begins and ends.<sup>5</sup> The Ninth Circuit's decision in *C.R. ex rel. Rainville v. Eugene School District 4J* addressed one incident where the First Amendment rights of a public school student were restricted even though the speech occurred off-campus and after school hours.<sup>6</sup>

## I. BACKGROUND

### A. PROVIDING A CONSTITUTIONAL FRAMEWORK: REGULATING STUDENT SPEECH

There are four landmark Supreme Court cases outlining when student speech may be regulated: *Bethel School District v. Fraser*,<sup>7</sup> *Hazelwood School District v. Kuhlmeier*,<sup>8</sup> *Morse v. Frederick*,<sup>9</sup> and *Tinker v. Des Moines Independent Community School District*.<sup>10</sup> In the order listed above, each case covers a type of student speech schools may regulate: (1) lewd, offensive, or vulgar speech,<sup>11</sup> (2) school-sponsored, event-based speech,<sup>12</sup> (3) speech promoting illegal drug use among schoolchildren,<sup>13</sup> and (4) speech that can foreseeably be found to be "materially and substantially" disruptive to a school's educational mission.<sup>14</sup> The Supreme Court found reasons in each case to allow schools the ability to regulate on-campus speech based on the fundamental principle of furthering a school's "basic educational mission."<sup>15</sup>

However, the Supreme Court has yet to address how its precedents apply to off-campus speech.<sup>16</sup> Thus, lower federal courts took over the responsibility and created various constitutional frameworks for how and when schools may regulate a student's off-campus speech.<sup>17</sup> The Ninth Circuit's *C.R.* court looked to its own precedent and sister circuits for guidance.<sup>18</sup>

<sup>5</sup> *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013) ("Courts have long dealt with the tension between students' First Amendment rights and 'the special characteristics of the school environment.'" (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

<sup>6</sup> *C.R. ex rel. Rainville v. Eugene Sch. Dist. 4J*, 835 F.3d 1142 (9th Cir. 2016).

<sup>7</sup> *Fraser*, 478 U.S. at 675.

<sup>8</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>9</sup> *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>10</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>11</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 685 (1986).

<sup>12</sup> *Hazelwood*, 484 U.S. at 271-73.

<sup>13</sup> *Morse*, 551 U.S. at 403, 410.

<sup>14</sup> *Tinker*, 393 U.S. at 514.

<sup>15</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>16</sup> *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013).

<sup>17</sup> *Id.* at 1067-69.

<sup>18</sup> *C.R. ex rel. Rainville v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1149-50 (9th Cir. 2016).

## B. FACTUAL BACKGROUND

Plaintiff C.R. was a seventh-grade student in the Defendant Eugene School District 4J (the “School District”).<sup>19</sup> In October 2011, over the course of several days, C.R. and several of his classmates (“older boys”) teased and harassed two disabled sixth-grade students (“younger students”): a girl (A.I.) and a boy (J.R.).<sup>20</sup> C.R., his classmates, A.I., and J.R. all went to the same school and took the same route home: a bike path that started on school grounds, crossed into a public park, adjoined the school’s athletic field, and let out onto a neighboring street.<sup>21</sup> There were no visible markers demarcating the end of school property and the beginning of the public park.<sup>22</sup>

The date of the incident leading to C.R.’s suspension was the last of the escalating encounters.<sup>23</sup> On that date, school had ended and C.R. and his classmates were heading home down a popular student-used path.<sup>24</sup> They were a couple of hundred feet from school when they spotted A.I. and J.R. and began following them.<sup>25</sup> At first, the older boys gave A.I. and J.R. vulgar nicknames and insisted the younger students repeat them.<sup>26</sup> As days progressed, the teasing behavior became more sexual in nature.<sup>27</sup> C.R. and his classmates circled J.R. and A.I. along the path and asked if they watched pornography.<sup>28</sup> One older boy asked if they were dating and suggested J.R. take A.I. to the local B.J.’s restaurant. This escalated the vulgarity of the conversation to contain puns with sexual innuendos using the abbreviation of the oral sex act, “blowjob,” in connection to the restaurant’s name.<sup>29</sup> The younger students were told to try a “B.J.’s” sandwich together because it “tasted good.”<sup>30</sup>

An instructional aide (“aide”) for the School District was biking home along the same path when she saw the group of students.<sup>31</sup> Concerned by the group’s posture, the aide approached the group and noticed A.I. looking “a little scared.”<sup>32</sup> The aide asked the younger students if

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<sup>19</sup> *Id.* at 1146.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1145.

<sup>24</sup> *Id.* at 1146.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

they felt comfortable.<sup>33</sup> A.I. replied “no,” prompting the aide to ask the older boys to leave.<sup>34</sup> The aide then walked the two younger students home.<sup>35</sup> As they walked, A.I. recounted what had happened, telling the aide that the older boys were talking about B.J.’s the restaurant but she thought it meant something else.<sup>36</sup> The aide reported what she had seen and heard to the school’s vice principal, Katherine Kiraly.<sup>37</sup> Kiraly began an informal investigation.<sup>38</sup>

Kiraly first interviewed A.I. and J.R.<sup>39</sup> A.I. confirmed what the aide reported and included the other encounters where the older boys made sexual comments.<sup>40</sup> A.I. told Kiraly the final encounter made her feel unsafe.<sup>41</sup>

Kiraly then interviewed C.R. separately.<sup>42</sup> In C.R.’s first interview, he denied any wrongdoing.<sup>43</sup> School administrators then told C.R. not to talk about the interview with the other boys involved; he ignored this request.<sup>44</sup>

At Kiraly’s interview with the other boys, they confirmed A.I.’s story and admitted to making inappropriate comments, including the B.J.’s puns, and knowing the puns referred to oral sex.<sup>45</sup> The boys also confirmed that C.R. participated with them and had talked to them about his first interview, and one referred to him as the ringleader.<sup>46</sup> At C.R.’s second interview, he admitted to making the inappropriate comments.<sup>47</sup>

Based on the interviews, school administrators determined the incident to be sexual harassment and that C.R. participated in that harassment.<sup>48</sup> The school sent an email to C.R.’s parents outlining the basis for their decision.<sup>49</sup> Accordingly, school administrators then disciplined C.R.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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

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

<sup>42</sup> *Id.* at 1147.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

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

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

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under the School District’s “door-to-door” policy<sup>50</sup> for participating in sexual harassment and issued him a two-day suspension.<sup>51</sup>

### C. PROCEDURAL HISTORY

C.R.’s parents filed a suit on his behalf against the School District alleging the School District violated C.R.’s First Amendment, procedural due process, and substantive due process rights.<sup>52</sup> In addition, C.R. alleged claims of defamation, negligence, and retaliation.<sup>53</sup> The School District filed a motion for summary judgment and C.R. filed a cross-motion for summary judgment.<sup>54</sup>

On September 12, 2013, the United States District Court for the District of Oregon heard the cross-motions for summary judgment.<sup>55</sup> The court analyzed the First Amendment claim under the “material disruption or invasion of rights” test set forth by Justice William Brennan in *Tinker*, which held that

[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.<sup>56</sup>

Thus, under *Tinker*, schools may restrict and discipline a student’s off-campus speech when the school reasonably believes it might result in “substantial disruption . . . in the learning environment,” or infringe on the rights of other students.<sup>57</sup>

The district court found that the School District acted reasonably in believing the harassing conduct of C.R. could lead to substantial disruptions at school and that their failure to address the conduct could signal to students that harassment was tolerated.<sup>58</sup> Moreover, the district court

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<sup>50</sup> The Ninth Circuit does not define the School District’s “door-to-door” policy in its opinion. However, it can be inferred that the policy allowed the school to discipline its students for inappropriate conduct on their way to and from school. (“[I]t is a reasonable exercise of the School District’s *in loco parentis* authority to be concerned with its students’ well-being as they begin their homeward journey at the end of the school day.” *Id.* at 1151.)

<sup>51</sup> *Id.* at 1147.

<sup>52</sup> *C.R. ex rel. Rainville v. Eugene Sch. Dist. 4J*, No. 6:12-cv-1042-TC, 2013 U.S. Dist. LEXIS 130463, at \*1, \*17-18 (D. Or. Sep. 12, 2013), *aff’d*, 835 F.3d 11-12 (9th Cir. 2016).

<sup>53</sup> *C.R.*, 2013 U.S. Dist. LEXIS 130463, at \*1.

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

<sup>55</sup> *C.R.*, 2013 U.S. Dist. LEXIS 130463.

<sup>56</sup> *Id.* at \*14 (quoting *Tinker*, 393 U.S. at 513).

<sup>57</sup> *Id.* at \*15 (citing *Wynar*, 728 F.3d at 1069).

<sup>58</sup> *Id.* at \*15-16.

found that the school had an affirmative duty to mitigate and prevent substantial disruptions.<sup>59</sup> Therefore, the school's imposition of discipline based on the off-campus conduct was appropriate.<sup>60</sup>

Turning to C.R.'s due process claims, the district court held that all that is required to satisfy procedural due process is an "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story"<sup>61</sup> which the court concluded the School District followed.<sup>62</sup>

Next, the district court granted summary judgment to the School District on C.R.'s substantive due process claim because it lacked a legitimate dispute.<sup>63</sup> Last, the district court adjudicated C.R.'s state-law retaliation, defamation, and negligence claims in favor of the School District for being improperly raised.<sup>64</sup> Therefore, the district court declined to exercise jurisdiction over these claims.<sup>65</sup>

In sum, the district court granted the School District's summary judgment motion, denied C.R.'s cross-motion for summary judgment, and dismissed the action.<sup>66</sup> C.R. then timely appealed the district court's ruling to the Ninth Circuit.<sup>67</sup>

## II. THE NINTH CIRCUIT'S ANALYSIS

The Ninth Circuit addressed only C.R.'s First Amendment and due process claims.<sup>68</sup> Heard before a three-judge panel, the Ninth Circuit affirmed the district court's summary judgment in favor of the School District and upheld the School District's decision to impose a two-day suspension on C.R.<sup>69</sup>

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<sup>59</sup> *Id.* at \*6.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*17 (citing *Goss v. Lopez*, 419 U.S. 565, 581 (1975)).

<sup>62</sup> *Id.* at \*18.

<sup>63</sup> *Id.* at \*19.

<sup>64</sup> *Id.* at \*7-8 (noting that a plaintiff may not raise a new allegation for the first time in response to a summary-judgment motion).

<sup>65</sup> In addition to being improperly raised, the district court declined to exercise jurisdiction over the state-law claims because the claims in which they had original jurisdiction would be dismissed. *See id.* at \*21.

<sup>66</sup> *Id.* at \*21.

<sup>67</sup> C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1147 (9th Cir. 2016).

<sup>68</sup> *Id.* (noting in footnote 2 that C.R.'s other state-law claims were not at issue in the appeal).

<sup>69</sup> *Id.* at 1145-46.

A. THE NINTH CIRCUIT’S FIRST AMENDMENT ANALYSIS OF THE  
AUTHORITY TO DISCIPLINE OFF-CAMPUS STUDENT SPEECH

First, the Ninth Circuit focused on C.R.’s First Amendment claim.<sup>70</sup> The court provided the constitutional framework for regulating student speech based on the four leading Supreme Court cases as cited above.<sup>71</sup> Because the lower courts were left with the task of creating their own tests for regulating off-campus speech, the *C.R.* court cited two Ninth Circuit cases, *LaVine* and *Wynar*.<sup>72</sup> The issue in both cases was whether schools may regulate students’ off-campus speech. Both times, the court held that schools may do so.<sup>73</sup> The *Wynar* court identified two tests used by sister circuits: the Fourth Circuit’s “nexus” test and the Eighth Circuit’s “reasonably foreseeable” test.<sup>74</sup> The “nexus” test asks if the student’s off-campus speech is closely tied enough to the school to permit regulating it.<sup>75</sup> The “reasonably foreseeable” test asks “whether it was ‘reasonably foreseeable’ that off-campus speech would reach the school.”<sup>76</sup> *Wynar* declined to choose between the two tests and instead applied both.<sup>77</sup> Further, the *C.R.* court mentioned a recent Fifth Circuit case where the court chose a different approach but also held that a school may regulate off-campus speech.<sup>78</sup> Ultimately, the *C.R.* court concluded that whatever approach a court decides, all courts routinely engage in a “circumstance-specific” inquiry to determine whether a school may discipline a student for off-campus speech.<sup>79</sup>

Following *Wynar*, the *C.R.* court applied both the “nexus” test and the “reasonably foreseeable” test and found that the School District also met both tests and therefore had authority to regulate C.R.’s off-campus speech.<sup>80</sup> The court listed the unique facts of the case leading to its decision: the off-campus speech occurred right after school, near school grounds, and was exclusively between students; it was on property closely tied to the school with no visual marker indicating it was off-

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<sup>70</sup> *Id.* at 1148.

<sup>71</sup> *Id.* at 1148-49.

<sup>72</sup> *Id.* at 1149.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (summarizing *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013) (citing *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011); and *S.J.W. v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012))).

<sup>75</sup> *Id.* (citing *Kowalski*, 652 F.3d at 573).

<sup>76</sup> *Id.* (citing *S.J.W.*, 696 F.3d at 777).

<sup>77</sup> *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013).

<sup>78</sup> *C.R.*, 835 F.3d at 1149-50 (citing *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (en banc)).

<sup>79</sup> *Id.* at 1150.

<sup>80</sup> *Id.* at 1151.

campus; and the path was frequently used by the students for the purpose of travelling to and from school.<sup>81</sup> Moreover, because of the path's setting and frequent use, the court found that the school's schedule and location was what tied the students involved in the incident together.<sup>82</sup> Subsequently, the School District could reasonably expect the harassment to reach school grounds and into the students' school experience.<sup>83</sup>

The Ninth Circuit then analyzed whether C.R.'s suspension was permissible under the "invasion of rights" prong of *Tinker's* "material disruption or invasion of rights" test.<sup>84</sup> The court noted that sexual harassment by its definition invaded the rights of the victim "because it positions the target as a sexual object . . . threatening the individual's sense of physical . . . emotional and psychological security," and left the students feeling unsafe at school.<sup>85</sup> Thus, the Ninth Circuit agreed with the district court and affirmed that because C.R.'s speech interfered with the younger students' right to be secured and left alone, the suspension was permissible.<sup>86</sup>

#### B. THE NINTH CIRCUIT'S PROCEDURAL DUE PROCESS ANALYSIS

Next, the Ninth Circuit confirmed that the Constitution only required an informal process for a school-imposed suspension of ten or fewer days.<sup>87</sup> The court dismissed C.R.'s allegation that the School District did not take proper steps in providing him with sufficient due process notice when it failed to tell him the specific rules he allegedly violated and how he violated them.<sup>88</sup> The court held both steps were not constitutionally required.<sup>89</sup> Hence, following the due process requirements outlined by the district court, the Ninth Circuit affirmed that the School District did not violate C.R.'s due process rights.<sup>90</sup>

#### C. THE NINTH CIRCUIT'S SUBSTANTIVE DUE PROCESS ANALYSIS

Finally, the Ninth Circuit addressed C.R.'s substantive due process interest claim in his right to maintain a clean school record.<sup>91</sup> The court

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<sup>81</sup> *Id.* at 1152.

<sup>82</sup> *Id.* at 1151.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1152.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1152-53.

<sup>87</sup> *Id.* at 1153.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1154.

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generalized that substantive due process exists to “protect[ ] an individual’s fundamental rights to liberty and bodily autonomy.”<sup>92</sup> Because maintaining a clean record is not considered a fundamental right, the court dismissed the claim.<sup>93</sup>

### III. IMPLICATIONS OF THIS DECISION

#### A. REAFFIRMING A SCHOOL’S AUTHORITY TO REGULATE OF OFF-CAMPUS SPEECH

The Ninth Circuit noted that in this digital age, recent cases, like *Wynar*, regarding a school’s authority to discipline a student for off-campus harassment often involved internet speech.<sup>94</sup> The Ninth Circuit made clear that the issue in this case was different and its decision was not only a first for the court but also restricted to the unique facts presented by this case.<sup>95</sup> The Ninth Circuit separated this case from others in that: the incident happened right after school, the offending comments were communicated in-person, and the students were only a few hundred feet from campus.<sup>96</sup>

Additionally, the Ninth Circuit declined to hold whether its decision of allowing schools to regulate off-campus public speech would extend to public places in general.<sup>97</sup> The *C.R.* court noted that off-campus speech at a mall or movie theater, for example, might present a different case.<sup>98</sup> Nevertheless, while the court declined to expand its decision to encompass internet speech or public places in general, the court did affirm for the third time that schools may regulate off-campus speech.

The Ninth Circuit’s decision in *C.R.* could allow more schools to implement a “door-to-door” policy without fear of violating First Amendment rights. Indeed, the Ninth Circuit held it was reasonable for a school to concern itself with their students’ safety when they begin their travel home from school.<sup>99</sup> Also, the court noted that overtly sexual speech that especially targeted young students deserved to fall under *Tinker*’s “interference with the rights of others” scope.<sup>100</sup> Therefore, schools with young students should be aware that they may reasonably

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1150, 1154-55.

<sup>95</sup> *Id.* at 1150, 1152.

<sup>96</sup> *Id.* at 1155.

<sup>97</sup> *Id.* at 1151.

<sup>98</sup> *Id.* at 1151 n.4.

<sup>99</sup> *Id.* at 1151.

<sup>100</sup> *Id.* at 1152-53.

discipline a student for off-campus sexual harassment directed in-person at another student. Conversely, students and their parents should now know that the student's First Amendment and due process rights could be restricted under similar circumstances.

#### B. PREDICTIONS OF HOW LOWER COURTS OR OTHER CIRCUITS MAY REACT TO THIS HOLDING

The Ninth Circuit laid out a clear path on what steps a school must take for its actions to survive First Amendment scrutiny. This path created a constitutional framework for district courts to follow when analyzing a school's regulation of off-campus speech. First, district courts should use both the "nexus" test and the "reasonably foreseeable" test when considering whether the school could permissibly regulate a student's off-campus speech. Although there is some uncertainty as to whether a district court could use just one test, the *Wynar* and *C.R.* courts used both tests in their analyses. Next, the district courts could use either prong of *Tinker*'s "material disruption or invasion of rights" test to decide whether the school's regulation of a student's off-campus speech complied with First Amendment's requirements.

The Ninth Circuit also mentioned several tests from sister circuits. In fact, the *Wynar* and *C.R.* courts used tests from the Fourth and Eighth Circuits in their analysis, thus supporting the validity of both. Additionally, the *C.R.* court gave credibility to the Eighth Circuit's test by using it as support in proving one of its points. Other circuits may react to the holding in *C.R.* by following or supporting it, thus creating a more commonly accepted standard.

#### IV. CONCLUSION

The expansion of a school's duty to regulate some types of on-campus speech to include some types of off-campus speech increases a school's ability to broaden a safer learning environment. The current constitutional framework regarding regulating student speech is changing to match the times and determining the scope of the school's ability to constitutionally restrict it is a delicate balancing act. Indeed, as the Ninth Circuit said, courts are consistently engaged in a "circumstance-specific inquiry" in the regulation of student speech.<sup>101</sup> Especially in this digital age, courts are often presented with special circumstances that require careful consideration in addressing off-campus student conduct. Al-

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<sup>101</sup> *Id.* at 1150.

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though the *C.R.* court called the instant issue an “analog problem”<sup>102</sup> unrelated to internet speech, the Ninth Circuit continued to recognize that “[s]chools must achieve a balance between protecting the safety and well-being of their students and respecting those same students’ constitutional rights.”<sup>103</sup> The *C.R.* court decided the case accordingly. Hence, the scope of a school’s ability to regulate off-campus speech expanded, even if by a fraction.

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<sup>102</sup> *Id.* at 1155.

<sup>103</sup> *Id.* at 1148.