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TABLE 3 PRESENTATION
HATE SPEECH
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I. Introduction

Hate speech is generally understood to be any form of expression through which a speaker intends to vilify, humiliate, or incite hatred against a group or a class of persons on the basis of race, religion, skin color, sexual identity, gender identity, ethnicity, disability, or national origin. *See, e.g.,* "Hate Speech," The First Amendment Encyclopedia, updated June 2017 at https://www.mtsu.edu/first-amendment/article/967/hate-speech.

In the United States, the intersection of hate speech and free speech is heavily influenced by philosophers like John Stuart Mill. Mill espoused the theory that public discourse ought to serve as a marketplace of ideas and that hate speech is an unavoidable part of the wider current of free speech. Because there is no such thing as partial-truth, Mill believed, everything must be debated to determine what is true and what is false. In his view, the community's progression toward determining truth through the free exchange of opinion and debate was of greater importance than individual desires. By denying others the ability to evaluate statements because one believes those words to be offensive was to make a unilateral decision that was ultimately harmful to the collective good. Mill, John Stuart, *On Liberty* (2d ed. 1860).

U.S. Supreme Court jurisprudence on government limitation of speech hews to the ideals Mill espoused. The U.S. Supreme Court has construed the Free Speech Clause of the First Amendment to prevent the government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. For this reason, regulations that attempt to control or limit the content of speech are presumptively invalid in the United States. *R.A. V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382 (1992).

To be sure, there are boundaries to speech in the United States. The modern-day contours of those limitations are reflected in U.S. Supreme Court decisions dating back nearly a century. In fact, an early case arose from the streets of Rochester, New Hampshire, where a Jehovah's Witness shouted to a local sheriff that he was a "damn racketeer" and "a damned Fascist." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568,

569 (1942). The Jehovah's Witness was convicted of violating a state law that banned addressing "offensive, derisive or annoying" words to another person in public with the intent to "deride, offend, or annoy" the other person. *Id*.

The U.S. Supreme Court affirmed the conviction because the phrases used by the Jehovah's Witness were "epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id*. at 574. The Court acknowledged that there existed well-defined and narrowly limited classes of speech, the prevention and punishment of which had never been thought to raise any Constitutional problem. *Id*. at 571-72. "These include 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." *Id*. at 572. The Court reasoned that such limitations were permissible because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id*.

The dividing line between the narrowly limited classes of proscribable speech and the Free Speech Clause of the First Amendment was examined in *Terminello v. City of Chicago*, 337 U.S. 1 (1949) and *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Both cases involved public speeches in which the speakers expressed unpopular opinions (e.g., hatred toward minorities or the overthrow of the government) and were then arrested under state laws that restricted "riotous speech" or "criminal syndicalism." The U.S. Supreme Court struck down the laws as unconstitutional infringements of the Free Speech Clause of the First Amendment because the speech did not create an immediate risk action or breach of the peace. In *Terminello*, the Court held that the freedom of speech was protected against censorship or punishment, "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest" 337 U.S. at 4. In *Brandenburg*, the Court declared that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447.

The Court again addressed the contours of proscribable speech in a pair of cross burning cases decided after 1990. *R.A. V. v. City of St Paul, Minnesota*, 505 U.S. 377, 379 (1992); *Virginia v. Black*, 538 U.S. 343 (2003). In *R.A. V.*, the Court struck down a St. Paul,

Minnesota ordinance that made it a misdemeanor to place on public or private property "a symbol, object, appellation, characterization or graffiti…which arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 379. The Petitioner was charged with violating the ordinance for burning a cross on the lawn of a neighbor's property. *Id*. Although viewed by the Minnesota Supreme Court as a permissible regulation of "fighting words," the U.S. Supreme Court deemed the ordinance unconstitutional because it was not content neutral. *Id*. at 391. The ordinance only proscribed "fighting words" that insult or provoke violence on the "disfavored topics" of race, color, creed, religion or gender. "Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered." *Id*. "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id*.

In *Black*, the U.S. Supreme Court again confronted a state law that prohibited cross burning, this time in Virginia, and again struck the law down. *Virginia v. Black*, 538 U.S. 343 (2003). In this instance, the law banned cross burning "with an intent to intimidate a person or group of persons." *Id*. at 348. The Court observed that this portion of the law was not in conflict with the First Amendment. *Id*. at 362. The problem was that the law treated any cross burning "as prima facie evidence of an intent to a person or group of persons." *Id*. at 364. This provision, in the eyes of the Court, created "an unacceptable risk of the suppression of ideas." *Id*. at 365. The Court explained that the act of burning a cross may mean that the person is engaging in intimidation, which may be proscribed consistent with the Constitution, or the person may be engaged in core political speech. *Id*. The prima facie assumption of intimidation, therefore, risked allowing the state to prosecute and convict someone who was engaging only in lawful political speech. *Id*. For context, the Court noted that while cross burning had a long history as an act of intimidation, it was also a ritual used at KKK gatherings as a form of political speech. *Id*. Moreover, the law made no exception for cross burning in circumstances that plainly lacked an intention to intimidate, such as for the purposes of filming a scene in a movie where a cross is burning. *Id*.

Two more U.S. Supreme Court decisions are worth noting on the intersection between free speech and hate speech. *Snyder v. Phelps*, 562 U.S. 443 (2011) and *Matal v. Tam*, 137 S. Ct. 1744 (2017). In *Snyder*, a jury held members of the Westborough Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket

signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The Court set aside the jury verdict, holding that the First Amendment shielded the church members from tort liability for their speech. The Court reasoned:

> Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder's funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.
>
> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

Id. at 460-61.

Finally, *Tam* concerned a dance-rock band's application for federal trademark application of the band's name, "The Slants." The Patent and Trademark Office (PTO) denied the application based on a provision of the Lanham Act, called the disparagement clause, that prohibits the registration of trademarks that may "disparage … or bring … into contemp[t] or disrepute" any "persons, living or dead." 15 U.S.C. § 1052(a). The PTO saw the trademark application as a derogatory term for people of Asian descent. The Court held that the disparagement clause of the Lanham Act as applied to the trademark application violated the Free Speech Clause of the First Amendment. The Court reasoned that the government had no legitimate interest in preventing speech expressing ideas that offend and that the PTO could not invoke the disparagement clause to deny the application. The Court observed that the "idea strikes at the heart of the First

Amendment." *Id*. at 1764. "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Id*.

With this backdrop on the general contours of hate speech and the Free Speech Clause of the First Amendment, the next sections address specific areas of the law where hate speech and free speech intersect: public employees, students, and attorneys.

II. Public Employee Speech

A. Public Employee Speech – First Amendment Protections

Public employers may not penalize employees for exercising their right to free speech under the First Amendment to the United States Constitution. *Pickering v. Board of Ed.*, 391 U.S. 563, 568 (1968). However, in order to strike a balance between free speech rights and the employer's legitimate interest in managing its employees, the United States Supreme Court has recognized several distinctions. First, in order to be protected, an employee's speech must relate to a matter of public concern, not the employee's own personal employment interests. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (*citing Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968)). Second, the employee must be speaking as an individual, not in accordance with their official duties. *Id.* Finally, to the extent the individual was engaged in private speech on matters of public concern, the government can nonetheless take action if it has "adequate justification for treating the employee differently from any other member of the general public . . . [i.e., a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.*

1. Matters of Public Concern v. Personal Grievances

The First Circuit Court of Appeals has held that, when approaching these inquiries, its "first step is to determine, based on the content, form, and context of a given statement, as revealed by the whole record, whether the employee was speaking as a citizen upon matters of public concern, or, alternatively, as an employee upon matters only of personal interest." *Jordan v. Carter*, 428 F.3d 67, 72 (1st Cir. 2005) (internal quotation marks omitted). " If the speech relates to matters that affect only the speaker and their co-

workers, such as internal working conditions, a complete analysis must be performed to determine whether the speech sufficiently addresses a matter of *public* concern. *See, e.g.*, *Connick v. Meyers*, 461 U.S. 138, 148 (1983) (determining that speech related to trust and confidence of co-workers in various supervisors, level of office morale, and the need for a grievance committee were matters of private concern related to personal issue specific to the speaker (an undesired transfer), but that speech related to possible political coercion within the district attorneys' office related to a matter of public interest). The Court determined that this close inquiry was necessary because otherwise "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149; *see also Snelling v. City of Claremont*, 155 N.H. 674, 678-84 (2007) ("A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community. If an employee speaks out only on a matter of personal interest, the First Amendment value of his words is low. Whether the speech addresses a matter of public concern is determined from the content, form, and context of the statements as revealed by the whole record.") (internal citations omitted). "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (holding the plaintiff's statement that she hoped a second assignation attempt against President Reagan would be successful qualified as speech on a matter of public concern). "Speech that expresses hostility toward racial or religious minorities may be of particularly low First Amendment value at the next step of the *Pickering* balance test . . . but its distasteful character alone does not strip it of all First Amendment protection." *Hernandez v. City of Phoenix*, 43 F.4th 966, 978-79 (2022) (holding that a police officer's anti-Muslim Facebook posts qualified as speech on matters of public concern).

While the First Circuit Court of Appeals has generally approached questions of whether employee speech involves a "matter of public concern" as fact-dependent inquiries, it has also determined that "[i]f the topic of the speech 'is clearly a legitimate matter of *inherent* concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the "form and context" of the expression.'" *Curran v.*

Cousins, 509 F.3d 36, 46 (1st Cir. 2007) (*quoting Baron v. Suffolk County Sheriff's Dep't*, 402 F.3d 225, 233 (1st Cir.2005)(abrogated on other grounds)). Such matters of inherent concern include official malfeasance, abuse of office, and neglect of duties. *Id.*

As a final note, the court has further recognized that speech should be analyzed separately. Therefore, the mere fact that some speech is protected does not prevent an employer from enacting discipline for unprotected speech. *Waters v. Churchill*, 511 U.S. 661, 681 (1994) ("An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements."); *Curran*, 509 F.3d at 48 (noting that the fact that "some of [the public employee's] speech expressed topics of value in the civil discourse does not render all of his speech protected").

2. Citizen Speech v. Official-Capacity Speech

As noted above, in order to be protected, speech must not only relate to a matter of public concern, but the individual must be speaking as a citizen. The Court has held that the dispositive inquiry for this question is not whether the employee engaged in the speech at work, but whether the speech was made pursuant to the employee's official duties. If so, they are "not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22; *see, e.g.*, *Foley v. Town of Randolph*, 598 F.3d 1, 6-9 (holding that a Fire Chief was speaking in his official capacity when, while in uniform and on-duty, he raised budget and staffing concerns related to the Fire Department during a press inquiries at the scene of a fatal fire).

3. Adequate Justification - Disruption

To the extent an employee speaks as a citizen on a matter of public concern, the court is then "required to balance the significance of the interests served by the public-employee speech—including the employee's interests in communicating, and the interests of the community in receiving, information 'on matters of public importance'—against the governmental employer's legitimate interests in preventing unnecessary

disruptions and inefficiencies in carrying out its public service mission." *O'Connor v. Steeves*, 994 F.2d 905, 915 (1st Cir. 1993).

Focusing first on the interests served by the public-employee speech, in performing this balancing, it is appropriate for the court to consider the speaker's motives, *id.* ("[I]nsofar as self-interest is found to have motivated public-employee speech, the employee's expression is entitled to less weight in the *Pickering* balance than speech on matters of public concern intended to serve the public interest") and whether the "public-employee expression is done in a vulgar, insulting, or definite manner", *Jordan*, 428 F.3d at 74 (stating that such speech is entitled to less weight under *Pickering*), as well as the strength of the public's interest in the speech at hand. *O'Connor*, 994 F.2d at 915-16 (determining that where the employee's "disclosures concerned alleged abuse of public office on the part of an elected official, a matter traditionally occupying "the highest rung of the hierarchy of First Amendment values," the balancing test favored protection for the speech, even though the employee's speech was self-motivated).

On the other side of the balancing – the government's interest in preventing disruptions and inefficiencies – the Court has recognized that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services" and that, because "[p]ublic employees . . . often occupy trusted positions in society[, w]hen they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Garcetti*, 547 U.S. at 418-19; *see also Davignon v. Hodgson*, 524 F.3d 91, 104 (1st Cir. 2008) ("Maintaining discipline and harmony in the workplace is a valid governmental interest."). To make this showing, a public employer "need not show actual adverse effect" or "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Curran*, 509 F.3d at 49 (internal quotation marks omitted). Instead, courts give "[s]ignificant weight . . . to the public employer's reasonable predictions of disruption." *Id.* (holding that employee's public postings likening Sheriff to Hitler had limited First Amendment value and created a substantial risk of disruption within the sheriff's department that outweighed the public interest in the speech); cf. *Davignon*, 524 F.3d 91 (holding that "mere incantation of the phrase 'internal harmony in the workplace" is insufficient to carry government's burden where the record does not include "even the specter of such harm").

In performing this assessment, the public employer can also consider whether the employee expressed themselves in a particularly vulgar or offensive manner. *Waters*, 511 U.S. at 672 ("The First Amendment demands a tolerance of verbal tumult, discord, and even offensive utterance, as necessary side effects of the process of open debate[, b]ut we have never expressed doubt that a government employer may bar its employees from using . . . offensive utterance to members of the public or to the people with whom they work.") (internal quotation marks and citations omitted); *Curran*, 509 F.3d at 49 (stating that, "[t]he Supreme Court has flatly rejected that defense [referencing, the cases establishing that "vehement, caustic, and sometimes unpleasantly sharp attacks" are protected by the First Amendment outside the employment context] in the public employee cases," and citing *Waters*).

Relevant factors to consider when assessing if the employer has an adequate justification to terminate the employee include:

> Whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (5) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.

Brickey v. Hall, 828 F.3d 298, 304 (4th Cir. 2016); *see also Davignon*, 524 F.3d at 104 *(citing Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988)). For example, in *Durstein v. Todd*, 2022 U.S. Dist. LEXIS 156119 (W.Va. Aug. 30, 2022), the plaintiff was fired for posting anti-Muslim and racist tweets. In finding that the firing was justified, the court noted that the tweets directly conflicted with the plaintiff's job duties. She worked as a social studies and world history teacher, and one of the goals of the course she taught was to "outline the origins of religion in the Middle East . . . ." *Id.* at *20. In addition, the plaintiff's speech actually disrupted the functioning of the school because students said they did not want to have her as a teacher, teachers said they were not comfortable working with her, and the school was inundated with complaints. *Id.* at *22 – 24; *see also Hernandez v. City of Phoenix*, 43 F.4th 966, 979 (9th Cir. 2022) ("[P]olice departments may permissibly consider the special status officers occupy in the community when deciding what limitations to place on officers' off-duty speech. . . . Speech by a police officer that suggests bias against

racial or religious minorities can hinder that officer's ability to effectively perform his or her job duties and undermine the department's ability to effectively carry out its mission."); *Bennett v. Metro. Gov't of Nashville & Davidson Cty.*, 977 F.3d 530, 539-41 (6th Cir. 2020)(explaining that the plaintiff's racist tweet impaired harmony among co-workers as it led to a 'nonstop conversation' in the office and ultimately the County needed to call in a counselor and impacted the plaintiff's ability to do her job because her role depended on teamwork, and her coworkers no longer trusted her); *Locurto v. Giuliani*, 447 F.3d 159, 179-80 (2nd Cir. 2006) ("Police officers and firefighters alike are quintessentially public servants. . . . it is not difficult to see how such an officer who expresses racist views in certain situations could damage the efficient operation of the NYPD.")

B. Public Employee Speech – RSA 98-E Protections

In addition to protections provided under the First Amendment, public employees in New Hampshire also have a statutory right to free speech, under RSA 98-E. RSA 98-E:1 states:

> "Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings."

The only limitation on this right is outlined in RSA 98-E:3, which states that, "Nothing in this chapter shall suspend or affect any law relating to confidential and privileged records or communications." For the purpose of the statute, "confidential records and communications shall include communication or records relating to investigations for law enforcement purposes and collective bargaining proceedings." RSA 98-E:3. However, as outlined in Section 1 of the statute, to be protected, such statements must be made as an individual and publicly. *See also Clark v. N.H. Dep't of Employment Security*, 171 N.H. 639, 652-53 (2019) (determining that use of "publicly" in RSA 98-E:1 excludes

"private conversations behind closed doors" from the statute's protection "unless a public record of the meeting was created and published").

Where RSA 98-E permits public employees to engage in protected speech in their individual capacities related to *all matters* regarding their public employer and/or its policies (excluding confidential and privileged matters), the New Hampshire Supreme Court has held that the protections of RSA 98-E are in broader than a public employee's right to free speech under the First Amendment, because it's protection is not limited to speech related to "matters of public concern." *Appeal of Booker*, 139 N.H. 337, 340-41 (1995). Additionally, given the strongly protective language utilized by the legislature in RSA 98-E:1, the Court further held that "[RSA 98-E:1] serves to free a State employee's speech rights from the limits imposed by the *Pickering* . . . balancing test." *Booker*, 139 N.H. at 341. In *Booker*, the Court eschewed the *Pickering* balancing test and limited its analysis of the employee's RSA 98-E claim to whether the employee spoke as an individual (finding he did) and whether he expressed an "opinion" as opposed to a fact. *Id.* On the latter issue, the Court upheld the underlying agency's determination that the employee's statements, related to whether children inefficiencies within DCYF had led to the death of children, constituted an informed opinion entitled to protection, but noting that "[w]e do not decide today whether a State employee would lose protection under RSA 98–E:1 if the employee made inaccurate statements of fact while discussing publicly a matter concerning the State or its policies." *Id.* at 343.

III. Student Speech

While adults have wide latitude in terms of what they are permitted to say in public discourse, Courts have consistently held that minor students do not have identical freedoms. In the school setting, courts have recognized that certain articulable pedagogical concerns may be grounds to restricting a student's speech.

The analysis for whether certain speech can be limited by a school district depends on whether and to what degree that speech caused a material disruption of schoolwork or discipline, or substantially harms the rights of other students.

A. Cases Using "Substantial Disruption" Analysis Under Tinker

1. Tinker: Whether Speech Causes "Substantial Disruption"

Tinker held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). Did the speech cause a substantial disruption to the learning environment at the school? This is what Tinker posits.

Tinker discussed what the Court called "pure speech" because it did not have an appreciable impact on the ability of the school to function or on the rights of other students. It was simply a passive expression of a political opinion. It is also notable that the school's discipline in Tinker was based on its fear and anticipation that substantial disruption would occur, as opposed to a reaction to actual disruption.

Later cases have sought to tackle so-called aggressive speech while using the same overall framework for "substantial disruption" that was laid out in Tinker, while other cases have discussed other scenarios where schools have an interest in limiting speech without using the "substantial disruption" test.

2. Political Speech that Causes Disruption

The Court addressed the issue of political speech that causes disruption in *West v. Derby Unified School District #260*. In that case, the school district had experienced racial tensions that precipitated the passing of a Racial Harassment policy, whose chief aim was to address and reduce this tension. Given the history of racial tension at the school, the Court held that "administrators' and parents' concerns about future substantial disruptions from possession of Confederate flag symbols at school reasonable. The fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean the district was required to sit and wait for one." *West v. Derby Unified School District #260*, 23 F.Supp. 2d 1223, 1232-33 (1998).

Therefore, a school need not cite to actual disruption if it can make an articulable justification for limiting a student's speech.

Noting that for some, the sole meaning of the Confederate flag may not be intended to connote enslavement of African Americans, but nonetheless, given the context of the flag's history and the school's history with racially charged incidents, it was reasonable

for the school to prohibit the use of those flags as they likely would have caused a disruption.

B. "Substantial Disruption" Caused by Off-Campus Speech

The Court in *Tinker* held that "conduct 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." *Tinker*, 393 U.S. at 513.

The Court's opinion in *Mahanoy* acknowledged several instances where off-campus speech may require regulation by a school in the name of either promoting pedagogical concerns or protecting the rights of other students, to include "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." *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2045 (2021). Furthermore, the Court declined to provide an exhaustive list of all instances where off-campus speech might be beholden to school regulation – particularly in the digital age.

While the Court did not provide additional guidance in this area, it did list three features of off-campus speech that typically "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway." *Id*. at 7. First, schools do not stand *in loco parentis*, or "in the place of parents," when dealing with off-campus speech. *Id*. The Court cited such speech as being a parent's responsibility. Second, the nature of off-campus speech requires courts to be more wary of a school's desire to curb that speech, and that "the school will have a heavy burden to justify." Id. Finally, schools have a certain interest in protecting the "'marketplace of ideas'" espoused by their students in the context of off-campus speech. *Id*.

The Court's opinion in *Mahanoy* makes evident that a school's ability to limit a student's First Amendment right to free speech is limited insofar as off-campus speech is concerned.

Under the specific facts of *Mahanoy*, the Court held that the student's speech was protected. The fact that her language was considered profane was "weakened

considerably by the fact that B.L. spoke outside the school on her own time." *Id*. at 9. Furthermore, the school did not stand *in loco parentis.* The level of disruption amounted to, "at most, 5 to 10 minutes of an Algebra class 'for just a couple of days' and that some members of the cheerleading squad were upset." *Id*. at 10. The Court reasoned that this did not rise to a level beyond a mere desire by the school to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. Finally, a general claim that the student's comments might injure team morale only amounted to "undifferentiated fear or apprehension" as discussed in *Tinker*, which does not outweigh a student's First Amendment rights to free expression. *Id*. at 508.

C. Cases Allowing for Limiting Speech Under Other Circumstances

1. Indecent, Lewd, or Vulgar Speech at School

Courts have also recognized that schools are tasked with preparing students to be citizens, holding that "these fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these 'fundamental values' must also take into account consideration of the sensibilities of others…The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Bethel School District v. Fraser*, 478 U.S. 675, 681 (1986).

For speech that was deemed to have been lewd and indecent, the Court held that a school was justified in punishing the student, as the speech at issue would "undermine the school's basic educational mission." *Id*. at 685.

The Court in *Fraser* declined to use its "substantial disruption" test espoused in *Tinker*. The opinion does, however, make clear that Fraser's lewd speech was not political in nature and noted that "there is no suggestion that school officials attempted to regulate [Fraser's] speech because they disagreed with the views he sought to express." *Id*. at 683.

2. Speech that can be Reasonably Perceived as Bearing the Imprimatur of the School

In cases such as *Hazelwood v. Kuhlmeier*, where the speech at issue was produced in a school-sponsored newspaper, the Court has held that a "substantial disruption" need not be articulated; instead, "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." *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 273 (1988). This is because the speech can be reasonably perceived as bearing the school's imprimatur.

Note that the *Kuhlmeier* Court, like in *Fraser*, declined to engage in the *Tinker* analysis for determining whether speech caused a "substantial disruption."

3. Speech Promoting Illegal Drug Use During a Class Trip

Students' speech that violates a school policy designed to promote its educational mission, such as teaching about the dangers of illegal drugs, can be limited as well. The Court in *Morse v. Frederick* engaged in an analysis that concluded that part of a school's educational mission in this country is to educate children about such dangers (holding that "student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse)." *Morse v. Frederick*, 551 U.S. 393 (2007).

D. Reading Materials

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

- Students' black armbands worn in opposition to the Vietnam were deemed to be "pure speech" that did not cause a "substantial disruption" in the school's mission to teach its students, and was not aggressive speech that posed a danger to other students.

Dambrot v. Central Michigan University, 839 F.Supp 477 (1993).

- University policy against hate speech was struck down because it was too overbroad.

West v. Derby Unified School District #260, 23 F.Supp. 2d 1223 (1998).

- School's policy against racial symbols, including the Confederate flag, was constitutional as within school's purview to teach socially appropriate behavior. The school's concerns about problems that could arise from possessing the flag were reasonable.

Saxe v. State College Area School District, 240 F.3d 200 (2001).

- Harassment policy was too overbroad because it didn't just prohibit conduct deemed unlawful under Title VII and Title IX, and it covered more speech than was laid out in Tinker's substantial disruption test.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

- Restriction on the content in a school newspaper was held to be constitutional, as the newspaper was school sponsored and articles might be deemed to have the imprimatur of the school.

Bethel School District v. Fraser, 478 U.S. 675 (1986).

- School's disciplinary action against student who violated school's "disruptive conduct rule" when he made sexual innuendo-laden speech in support of nominating a fellow student for class office was deemed constitutional.

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

- Student, who unfurled a giant banner stating "BONG HiTS 4 JESUS" across the street from his school during school hours was appropriately punished as the sign was reasonably interpreted to promote illegal drug use, which schools have a legitimate pedagogical concern in educating on the dangers of such use.

Mahanoy Area School District v. B.L., 141 S. Ct. 2038 (2021).

- Student's off-campus Snapchat post, which was viewed by members of the student body, was deemed protected speech. The Court cited a higher burden that schools seeking to limit speech must meet where the speech takes place off-campus and the school does not stand *in loco parentis*.

IV. Attorney Speech

A. Regulation of Attorney Speech – ABA Model Rule v. New Hampshire Rule of Professional Conduct 8.4(g)

In August 2016, the American Bar Association approved Model Rule of Professional Conduct 8.4(g). Under the amendment, it is misconduct for an attorney to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." Comment [4] states that the Rule applies to harmful verbal or physical conduct that manifests bias or prejudice towards others, and explains that:

> conduct related to the practice of law ... includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

Model Rule 8.4(g)'s overarching purpose was to eliminate discrimination and harassment in a wide range of "conduct related to the practice of law." Many legal commentators questioned whether the broad scope of the rule would have a chilling effect on attorney speech and improperly regulate the constitutionally protected speech of attorneys who express viewpoints in private settings, such as legal social activities and the operation or management of law firms.

Because the Model Rule is just a model, it does not apply in any jurisdiction. Each state court has considered whether to adopt Model Rule 8.4(g). The State of New Hampshire adopted a modified version of Rule 8.4(g). The State of Vermont adopted Model Rule 8.4(g) verbatim. Thirty-nine states have some regulation of attorney conduct constituting discrimination or harassment.

1. New Hampshire Rule of Professional Conduct 8.4(g)

NH Rule of Professional Conduct 8.4(g) states:

> It is professional misconduct for a lawyer to. . .take any action, while acting as a lawyer in any context, if the lawyers knows or it is obvious that the action has the primary purpose to embarrass, harass or burden another person, including conduct motivated by animus against the other person, based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. This paragraph shall not limit the ability of the lawyer to accept, decline or withdraw from representation consistent with other Rules of Professional Conduct, nor does it preclude a lawyer from engaging in conduct or speech or from maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

The Comment to New Hampshire Supreme Court 8.4(g) states that New Hampshire's Rule is intended to govern the conduct of lawyers in any context in which they are acting as lawyers. The rule requires that the proscribed action be taken with the primary purpose of embarrassing, harassing or burdening another person, which includes an

action motivated by animus against the other person based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. The rule does not prohibit conduct that lacks this primary purpose, even if the conduct incidentally produces, or has the effect or impact of producing, the described result.

2. ***Vermont Rule of Professional Conduct 8.4(g)***

Adopting the ABA Model Rule, Vermont Rule of Professional Conduct 8.4(g) states:

> It is professional misconduct for a lawyer to. . .engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comments 3 and 4 of the Vermont Rule state that the "practice of law" includes:

- Representing clients
- Interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law
- Operating or managing a law firm or law practice
- Participating in bar association, business or social activities in connection with the practice of law.

Discrimination and harassment includes:

- Harmful *verbal* or physical conduct that manifests bias or prejudice towards others
- Sexual harassment and derogatory or demeaning verbal conduct
- The substantive law of antidiscrimination and antiharassment statutes and case law may guide application of paragraph (g).
- Paragraph (g) does not prohibit conduct undertaken to promote diversity

The Vermont Rule addresses conduct related to socioeconomic status, while the New Hampshire Rule does not. The Comments to the Vermont Rule defines the "practice of law" to include "operating or managing a law firm or law practice" and "participating in bar association, business or social activities in connection with the practice of law," while

the Comment to the New Hampshire Rule does not specifically define what constitutes "acting as a lawyer in any context."

B. Regulation of Attorney Speech – First Amendment Protections

When a disciplinary rule implicates a lawyer's First Amendment rights, the court balances those constitutional rights against the State's interest in regulating the activity in question. *Gentile v. State Bar of Nev.,* 501 U.S. 1030, 1075 (1991). It is well-established that attorneys are entitled to the same level of First Amendment protection as non-attorneys unless the state has a compelling interest in regulating some aspect of their speech or conduct. *NAACP v. Button,* 371 U.S. 415, 438 (1963). Lawyer speech that advances client interest, checks governmental power, or advocates on matters of public concern is provided the utmost protection under the First Amendment. *See, e.g.*, *Matter of Abrams*, 488 P.3d 1043, 1051 (Colo. 2021) (citing a collection of US Supreme Court cases protecting attorney speech).

However, given the vital role that the justice system plays in our society, courts recognize the state's unique interests in regulating the legal profession. The state's interest "in regulating lawyers is especially great since lawyers are essential to the primary function of administering justice, and have been historically 'officers of the court.'" *In Re Primus,* 436 U.S. 412, 422 (1978). Moreover, "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard" because the lawyer in that role is an officer of the court. *See Gentile,* 501 U.S. at 1074-75 (extrajudicial speech about a pending case); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 449 (1978)(in-person solicitation of accident victims); *Fla. Bar v. Went for It, Inc.,* 515 U.S. 618, 635 (1995)(direct-mail solicitation of accident victims).

Disciplinary rules regulating attorney speech have primarily been challenged based on overbreadth and vagueness. To establish that a regulation is constitutionally overbroad, a litigant must prove that (1) the regulation's overbreadth is real and substantial in comparison to its legitimate reach and (2) there is no adequate limiting construction that sufficiently narrows the regulation's application. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). This inquiry focuses on whether the regulation illegitimately proscribes any protected speech and whether any potential overbreadth can be cured by limiting construction. Undue vagueness in state regulation is rooted in the Fourteenth Amendment right to procedural due process and requires that individuals have adequate

notice of prohibited conduct so that they can confirm their actions accordingly. A state-imposed sanction violates due process if the underlying regulation "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *United States v. Williams*, 553 U.S. 285, 304 (2008). A heightened vagueness standard applies where the regulation in question threatens to inhibit protected speech. *See Matter of Abrams*, 488 P.3d at 1052.

To date, there has been limited case law interpreting Rule 8.4(g) under these constitutional standards. Some states have recognized that states have a compelling interest in eliminating expressions of bias from the legal profession, to promote public confidence in the system, and to ensure effective administration of justice. *Id.* Eliminating expressions of bias from the legal profession serves to protect clients and other participants in the justice system from discrimination and bias, and the use of derogatory or discriminatory language that singles out individuals involved in the legal process damages the legal profession and erodes confidence in the justice system. *Id.*

Some States' Rule 8.4(g) analogs have upheld regulation of attorney speech imposing discipline for discriminatory, harassing or offensive conduct. Indiana applied its version to discipline attorneys for speaking "in pejorative terms" about a client's race and publicly attacking Jews for "their alleged involvement in the 9/11 attacks." *In re Epstein*, 87 N.E.3d 470, 470 (Ind. 2017); *In Re Dempsey, 986 N.E.2d 816*, 816 (Ind. 2013). And Wisconsin used its version to discipline attorneys for making sexist remarks to a client and insulting the court and witnesses with offensive remarks concerning religion and sex. *In re Baratki*, 902 N.W.2d 250, 251 (Wis. 2017); *In re Isaacson*, 860 N.W.2d 490, 495 (Wis. 2015); *In re Kratz*, 851 N.W.2d 219, 221-22 (Wis. 2014); *see also* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice, 30 Geo. J. Legal Ethics 195, 238-40 (2017)* (collecting additional cases of attorney harassment and discrimination).

The U.S. District Court for the District of Connecticut recently dismissed a First Amendment and vagueness challenge to Connecticut's version of Model Rule 8.4(g) for lack of standing. *Cerame v. Bowler*, 2022 WL 3716422, at *5 (D. Conn. Aug. 29, 2022). The plaintiffs claimed that Connecticut's rule chilled their speech on "controversial legal issues" like free-speech rights and critical race theory. The court observed that none of

the plaintiffs' desired speech "fall[s] within the explanation of what constitutes discrimination or harassment," and that the plaintiffs could not show "a well-founded fear" of disciplinary proceedings or sanctions. *Id.* The plaintiffs' fear that their speech would "be taken out of context and be the basis for a disciplinary proceeding" was too "conjectural" to confer standing. *Id.*

New Hampshire Rule of Professional Conduct 8.4

C. Reading Materials

The State of New Hampshire Advisory Committee on the Rules, Supreme Court, Amended February 2019 Report, pp. 5-18 (discussing deliberations on Rule of Professional Conduct 8.4)

Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, The Georgetown Journal of Legal Ethics, Vol. 31:31-76 (2018).

Point-Counterpoint, *A Speech Code for Lawyers?*, Judicature, Duke Law Center for Judicial Studies, Vol. 101, No. 1 (Spring 2017)

Matter of Abrams, 488 P.3d 1043 (Colo. 2021)

> Attorney who used "anti-gay" slur in an email to clients to describe presiding judge in client's case was proscribed by Colorado professional conduct rule prohibiting attorneys in the course of representing a client from referring to an individual involved in the legal process with language that exhibits bias or animus on the basis of sexual orientation. Colorado Professional Conduct Rule did not violate the freedom of speech provision of the First Amendment.