Introduction

This moot court is based on *Doe v. Hopkinton Pub. Schs.*, a First Circuit case. The issue is whether Hopkinton Public Schools' decision to suspend Doe and Bloggs (Petitioners) was consistent with the First Amendment and *Tinker v. Des Moines Independent Community School District*, which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school.

The lesson should begin with an overview of the federal and state court system and a brief explanation of appellate advocacy and the difference between a trial and an appellate argument. Whereas trial advocacy is largely about developing a factual record and persuading a factfinder (typically a jury), appellate advocacy involves persuading judges that the lower court either correctly or incorrectly applied the law to the facts of the case.

To make the event as interactive as possible, first have the students read the summary of the facts. Then, lead a brief discussion of the First Circuit's decision. Next, ask students to take a stand "for or against" the majority decision. If one side lacks enough support, encourage students to challenge themselves to defend the position they disagree with. Being able to understand and represent the other side's arguments is the sign of a sharp legal mind.

Once students have taken sides, divide them into three groups: designate nine students as Supreme Court Justices and split the remaining students between Petitioners (Doe and Bloggs) and Respondent (Hopkinton Public Schools) groups. Members of the Petitioner and Respondent groups should discuss the fact pattern and applicable law and then prepare arguments to make during oral argument. The mock justices should prepare questions they plan to ask.

Instructions for the Students

Start with the FACT PATTERN, BRAINSTORMING SHEET & ARGUMENT SHEET. First, review and discuss the case (fact pattern) with your group members. Then, work through the sheets, which will help your group prepare your arguments. During the discussion period, you will need to select two to four representatives who will act as the advocates during the moot court. These representatives (advocates) from each side will present a brief argument that reflects their group's strongest points. The ARGUMENT SHEET will help you craft responses to any questions the Supreme Court Justices might ask during oral argument.

Advocates will have fifteen (15) minutes to present their arguments to the Supreme Court. The Petitioner advocates may reserve up to five (5) minutes for rebuttal, which must be done at the start of the oral argument (kindly remind the Petitioner advocates to reserve time if they forget—a rebuttal is a powerful tool during oral arguments). The rebuttal should focus on responding to issues that Hopkinton's advocates raised during their oral argument.

During oral argument, the Supreme Court justices can interrupt advocates at any time to ask questions. All students in the Petitioner and Respondent groups, even those who are not advocates, can raise their hand to answer questions posed by the justices if their advocates need assistance or do not have a satisfactory answer. At the end of oral argument, the justices will decide the outcome of the appeal.

BRAINSTORMING SHEET

Which side do you represent?	
Your Group's Arguments (Rank from best to worst):	
Opposition's Arguments (Rank from best to worst):	Counterarguments To Opposition's Arguments:

Possible Supreme Court Questions:	Responses To Supreme Court Questions:

FACT PATTERN: *Doe v. Hopkinton Pub. Schs.*[1]

Roe was a former student at Hopkinton High School (Respondent) ("School"). During the 2018-2019 school year, Roe was a ninth-grade member of the School's hockey team. Doe and Bloggs ("Petitioners") were tenth-grade students and also members of the hockey team.

Beginning in December 2018, Roe's parents filed a complaint with the School's hockey coach, alleging that a student on the hockey team had taken photos and videos of Roe at a team dinner without Roe's consent. The complaint added that the other members of the team would look at and whisper about Roe at the dinner. This particular team dinner was organized by another member of the team—not by Doe or Bloggs—and took place at a local restaurant. No School official had any involvement in planning or organizing the dinner.

Roe's father filed a second formal bullying complaint with the school administration on February 4, 2019. This second complaint alleged that students on the hockey team had continued to take unauthorized, disparaging photographs and videos of Roe—both outside of school and while at school, including in the team locker room. The complaint additionally alleged that several members of the hockey team, including Petitioners, circulated these videos and photographs, as well as other disparaging messages about Roe, among themselves in a Snapchat group chat. In a supplementary email to school administrators, Roe's parents stated that the alleged bullying isolated Roe from the hockey team and had a negative impact on Roe's learning and well-being.

In response, the School commenced an investigation to determine (1) whether the alleged acts occurred; and (2) if they did, whether they violated the School's bullying policy. Hopkinton's Bullying Policy defined bullying as follows:

> *[T]he repeated use by one or more students or by a member of a school staff of a written, verbal, or electronic expression, or a physical act or gesture, or any combination thereof, directed at a target that:*
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> - *causes physical or emotional harm to the target or damage to the target's property;*
> - *places the target in reasonable fear of harm to him/herself, or of damage to his/her property;*
> - *creates a hostile environment at school for the target;*
> - *infringes on the rights of the target at school; or*
> - *materially and substantially disrupts the education process or the orderly*

[1] 19 F.4th 493 (1st Cir. 2021). The below facts are based on *Doe* but have been altered to some extent. Please do not rely on any facts about this case except those listed here.

operation of a school.[2]

The School appointed Assistant Principals Josh Hanna and Justin Pominville ("Investigators") to lead the investigation. The Investigators conducted interviews with Roe and his parents, members of the hockey team, and the coach of the hockey team. The investigation confirmed the existence of a Snapchat group, which dated back to at least January 2019. Members of the group chat included Petitioners and other students on the hockey team. Roe was not a member of the group chat. The Investigators found photos and videos of Roe taken without his consent. Some but not all of these videos and photos were clearly taken on school property (e.g., on the school bus). In addition to the photos and videos circulated in the group chat were messages including "demeaning and expletive-laced comments regarding Roe's appearance, . . . parents, and grandmother."[3] One message read: "Are [Roe]'s parents ugly too [o]r did he just get bad genes".[4]

The Investigation ended on February 8, 2019, when the Investigators sent their report to the principal and the district superintendent. The report concluded that Petitioners "were aware of, joined, participated in, and encouraged the bullying."[5] According to the report, the bullying, as carried out in the Snapchat group chat, included the following:

a. Photos of [Roe] taken without his consent
b. Videos of [Roe] taken and posted without his consent
c. Photos of [Roe's] parents with disparaging comments on their appearance
d. Disparaging comments regarding [Roe]'s appearance, voice, and anatomy
e. Attempts to get [Roe] to say inappropriate statements and record him doing this[.][6]

Notably, however, neither Petitioner personally took any of the photos or videos, and neither attempted to get Roe to make inappropriate statements. Additionally, although both Petitioners were in the group chat, neither was the original sender of the allegedly harassing messages.

The report found that the above conduct violated the School's bullying policy and "caused emotional harm to [Roe], creating a hostile environment for him during school-sponsored events and activities and infringed on his rights at school."[7]

The School suspended all eight members of the Snapchat group from the hockey team for the remainder of the season. In addition, after conducting an individualized hearing that provided each accused student an opportunity to be heard, the School principal suspended Doe from school for three days and Bloggs from school for five days. Roe began mental health treatment, and he left the School at the end of the school year.

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[2] *Id.* at 499.
[3] *Id.* at 500.
[4] *Id.*
[5] *Id.* at 501.
[6] *Id.*
[7] *Id.*

Respondents brought suit in federal court, alleging that their suspensions were unconstitutional. Respondents' argument is that the School impermissibly punished them for participating in the Snapchat group chat (i.e., for exercising their First Amendment right of free speech). The district court rejected Respondents' claim, and the First Circuit affirmed.

Imagine now that the Supreme Court of the United States has granted certiorari.[8] You must argue either that the First Circuit got it right (and the Supreme Court should affirm the First Circuit's judgment) or that the First Circuit got its decision wrong (and the Supreme Court should reverse).

PRIMER ON THE LAW

Decisions by the Supreme Court of the United States have held that almost all the provisions of the Bill of Rights, which initially limited only the federal government, now restrict state governments as well. The same Supreme Court, however, has not automatically ruled that the guarantees of the Bill of Rights apply in the same way or, in some cases, at all to juveniles. **The question, therefore, is how the guarantee of the First Amendment right to free speech affects the ability of school officials to discipline students in public schools**.

In terms of the First Amendment's guarantee of free speech, the case of *Tinker v. Des Moines Independent School District* (1969), constitutes an important benchmark. In *Tinker*, five students in Des Moines, Iowa, decided to wear black armbands to school in protest of the Vietnam War and were suspended by the School District as a result. The children and their parents brought suit in federal court, challenging their suspension as a violation of their First Amendment right to freedom of speech. The Supreme Court held that students entering public school property do not forfeit their First Amendment free speech rights. Writing for a seven-member majority, Justice Abe Fortas wrote:

> The wearing of an armband for the purpose [of opposing the war in Vietnam] . . . is the type of symbolic act that is within the Free Speech Clause of the First Amendment. . . . It [is] closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. . . . [The wearing of the armband] does not concern aggressive, disruptive action. . . . There is here no evidence whatever of petitioners' [the Tinkers'] interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. . . . [T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

[8] When the Supreme Court issues a writ of certiorari, it agrees to hear an appeal of the case.

Thus, in order to justify the suppression of speech, the school officials must be able to prove that the conduct in question would "materially and substantially interfere" with the operation of the school—a high standard.[9]

Subsequent decisions, however, have upheld the right of school authorities to suspend a student in a number of circumstances. First, in *Bethel School District No. 403 v. Fraser* (1986), Matthew Fraser, a high school senior, was suspended for two days by the School District after he gave a speech at a school assembly of 600 high schoolers supporting his friend's candidacy for a student government position. Some in the audience believed Fraser's speech was a graphic sexual metaphor and full of sexual innuendos. Fraser brought suit in federal court challenging his suspension as a violation of his First Amendment right to freedom of speech. The Supreme Court held that school officials may properly punish student speech with suspension if they determine that speech to be lewd, offensive, or disruptive to the school's basic educational mission. Writing for the seven-member majority, Chief Justice Warren Burger distinguished between political speech which the Court previously had protected in *Tinker* and the supposed sexual content of Fraser's speech at the assembly. The Court concluded that the First Amendment did not prohibit schools from prohibiting vulgar and lewd speech since such discourse was inconsistent with the "fundamental values of public school education."[10]

Next, in *Hazelwood School District v. Kuhlmeier* (1988), Cathy Kuhlmeier and two other students were staff members on Spectrum, the school newspaper at Hazelwood East High School. During the spring semester, the school principal reviewed a draft of the newspaper containing two articles on the topics of teen pregnancy and divorce and found them to be inappropriate. The principal ordered that the two articles be withheld from publication. Kuhlmeier argued that this decision violated her First Amendment rights to freedom of speech and brought suit against the School District. The Supreme Court held that educators did not violate the First Amendment by exercising editorial control over the content of student speech so long as their actions are "reasonably related to legitimate pedagogical concerns." In a 5-to-3 decision authored by Justice Byron White, the Court determined that schools must be able to set high standards for student speech disseminated under their supervision, and that schools retained the right to refuse to sponsor speech that "might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order." Thus, the court held that the principal's decision represented a legitimate pedagogical concern, and the student's First Amendment rights, under *Tinker*, were not violated.[11]

[9] Tinker v. Des Moines Independent School District, 393 U.S. 503, 505, 505-06, 508, 511 (1969).
[10] Bethel School District No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
[11] Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273 (1988).

In *Morse v. Frederick* (2007), Joseph Frederick, a high school senior, was suspended by the principal (Deborah Morse) for ten days after he displayed a large banner reading "Bong Hits 4 Jesus" at a school-supervised off-campus event. Morse justified her decision by citing the school's policy against material that promotes the use of illegal drugs. Fredrick sued, claiming a violation of his First Amendment right to freedom of speech. Fredrick lost in the district court, but the Ninth Circuit reversed, holding that under *Tinker*, student speech is protected except where the speech would cause a disturbance. On appeal, the Supreme Court reversed, holding that *Tinker* does not extend to this case and school officials may prohibit student speech that can reasonably be interpreted as promoting illegal drug use. Writing for a 5-4 majority, Chief Justice John Roberts held that Frederick's message, though "cryptic," was reasonably interpreted as promoting marijuana use. The Court also stated that the free speech rights of public school students are not as extensive as those that adults normally enjoy, and that the highly protective standard set by *Tinker* would not always apply. Ultimately, determinations about when speech is disruptive to the school's work or mission are largely left to the school board.[12]

Mahanoy Area School District v. B.L. raised the issue of what protection student speech is due when the speech occurs off campus but might interfere "with the school's work or . . . the rights of other students to be secure and to be let alone." One Saturday, while hanging out with a friend at a local store, B.L. decided to take a photo of herself and her friend with their middle fingers raised and post the photo to her Snapchat story. The snap was visible to about 250 "friends," many of whom were Mahoney Area School District students and some of whom were cheerleaders. The snap was accompanied by a puerile caption: "Fuck school fuck softball fuck cheer fuck everything." To that post, B.L. added a second: "Love how me and [another student] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else?". The school responded by suspending B.L. from cheerleading. A three-judge panel for the Third Circuit Court of Appeals upheld the District Court's ruling, finding that *Tinker* did not apply to students' speech off campus. Such speech, however offensive, is protected unless school authorities could meet the highest standard for non-protected speech (*i.e.*, that such speech would incite immediate violence). In 2021, the Supreme Court of the United States affirmed the Third Circuit's holding.[13]

Finally, in *Doe v. Hopkinton Pub. Schs.*, the First Circuit reaffirmed that where a school's determination about whether student speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is reasonable, that determination is due deference.[14] Noting that Petitioners were aware that members of the Snapchat group were bullying Roe (e.g., by sending nonconsensual photos and videos of Roe), the court held that "[t]he School reasonably concluded that [Petitioners'] messages and participation in the group

[12] Morse v. Frederick, 551 U.S. 393 (2007).
[13] Mahanoy Area Sch. Dist. v. B.L., 141 S.Ct. 2038, 2043-44, 2048 (2021).
[14] 19 F.4th 493, 505 (1st Cir. 2021).

fostered an environment that emboldened the bullies and encouraged others in the invasion of Roe's rights."[15] The court did, however, note that "there may be circumstances in which encouragement is so minimal or ambiguous . . . or knowledge of direct bullying so lacking, that a school's punishment of certain speech would be unreasonable."[16]

[15] *Id.* at 508.
[16] *Id.*

ARGUMENT SHEET

Look over these arguments below. Note whether they help Doe (Petitioner) or Hopkinton Public Schools (Respondent). You can also decide the arguments help both sides (B) or neither side (N).

_____The messages, photos, and videos circulated in the Snapchat group chat here are more materially and substantially disruptive of the work and discipline of the school than was the Snap sent by B.L.

_____Unlike the snap sent in B.L., which was seen by around 250 people, the Snapchat group—and the disparaging messages about Roe—was seen by far less people.

_____The First Circuit's decision in *Doe* held that a school's pedagogical interest extends to off-campus circumstances. Here, many of the photos of Roe were taken off-campus, but some were taken on-campus.

_____Petitioners did not physically harass Roe, and they did not personally take any of the nonconsensual photos or videos circulated in the Snapchat group chat. The district court found that "[t]here is no evidence in the record of any non-speech conduct by Bloggs or Doe directed at Roe, except for their failure to intervene when other students mistreated him, which is certainly insufficient alone to constitute bullying."[17]

_____Petitioners did not intend or expect for Roe to see the messages in the Snapchat group, given that posts on Snapchat are not permanent and disappear relatively quickly.

_____With the increased emphasis on "virtual" schooling, there is really no wall between what goes on in the physical school and the activities of students outside school.

_____*Tinker,* while acknowledging that students do not give up their First Amendment rights when they are in school, did not equate the classroom to the public square.

[17] *Id.*

_____In *Hazelwood School District v. Kuhlmeier*, the Supreme Court upheld the authority of a school to censor articles in the school newspaper.

_____"[The Supreme Court's decisions] have fashioned the principle 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 of law violation except where such advocacy is directed to inviting or producing imminent lawless action and is likely to incite or produce such action."

You are a Supreme Court Justice hearing the case. Please answer the following questions. REMEMBER TO REFERENCE THE FACTS OF THE CASE AND THE CLASSIFYING ARGUMENTS.

1. Imagine that you are listening to the oral arguments of the attorneys representing the Petitioners (Doe and Bloggs). What two questions would you ask?

   A.

   B.

2. Imagine that you are listening to the oral arguments of the attorneys representing the Respondent (Hopkinton Public Schools). What two questions would you ask?

   A.

   B.

3. At the conclusion of hearing the case, you have to write a court opinion ruling either in favor of the Petitioners or the Respondent.

Resources
***Tinker*:** https://www.oyez.org/cases/1968/21
***Bethel School District*:** https://www.oyez.org/cases/1985/84-1667
***Hazelwood School District*:** https://www.oyez.org/cases/1987/86-836
***Morse v. Frederick*:** https://www.oyez.org/cases/2006/06-278