IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYTHE

JACK HART, *Plaintiff,* v. ANDREW FLIGHT, SUPERINTENDENT OF WYTHE DEPARTMENT OF EDUCATION, MARSHALL COUNTY SCHOOL BOARD, AND PHYLLIS BEARD, PRINCIPAL, MARSHALL COUNTY HIGH SCHOOL, *Defendant*.	))))))))))))	Case No. 20:14-cr-23185-JK

MEMORANDUM AND ORDER

J. Kelley, District Judge:

Currently before the Court is the Defendants' motion for summary judgment in Jack Hart's ("Hart's") lawsuit under 42 U.S.C. § 1983 against Wythe Department of Education, Marshall County School Board, and Marshall County High School ("Defendants"), arising from Defendants' policy of disciplining students' behavior off-campus.[1]

First, Hart contends that Defendants violated his Second Amendment rights when they suspended him for having a gun in the background of an online class. Second, Hart contends that the Defendants violated his First Amendment rights when sanctioning him for liking social media messages criticizing the school and his suspension.

This Court finds that Defendants' disciplinary action for Hart's off-campus speech and off-campus possession of a firearm is constitutional. For the reasons set out below, this Court hereby grants summary judgment to Defendants.

[1] Section 1983 provides citizens a private right of action for money damages against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" violates their constitutional rights.

RELEVANT BACKGROUND

Jack Hart, who turned 18 on March 1, 2020, is a senior at Marshal County High School, a public high school in the Marshall County School District. As a global health pandemic swept the nation in early March 2020, the Marshall County School Board, at the urging of Superintendent Andrew Flight, declared that all students would attend classes via the online video platform, Viid, starting on March 16, 2020. The Board's policy requires students to have their cameras on during class and to mute themselves unless called on. The Board also provided laptops to students who lacked one.

Jack was an honors student with a 4.0 GPA. He was on track to become his graduating class' valedictorian. On March 31, 2020, Jack's Advanced Placement Literature class was taking a pop quiz. Jack normally attended his online classes seated at his desk in his bedroom. However, that day, Jack's internet connection was cutting out, so he attended class from the family living room, closer to his home's internet router.

Jack wore noise-cancelling headphones while taking his quiz. His microphone was muted and his laptop volume was silenced, but his camera was on so the teacher could monitor the students. Focused on the quiz, which he was taking on his laptop, Jack had minimized the Viid window so that he would not be distracted.

In the few weeks since quarantine started, Jack's neighborhood had reported increased break-ins. Jack's father had grown incredibly worried about his home's safety and had taken to checking and cleaning his guns every day. Jack's father also insisted that Jack clean his shotgun regularly. The guns were stored in a safe beside the TV console located in the living room, which opened with the touch of either Jack's or his father's fingerprint. Jack's father retrieved his gun,

sat down in his recliner in a corner of the living room and proceeded to inspect and clean the gun. Jack, preoccupied with taking his quiz, was initially unaware that his father was in the room.

After Jack uploaded the quiz, he realized he had about 30 minutes before the time for taking the quiz would be up and the instructional period of class would resume. He got up to get a glass of water and noticed his father cleaning his gun in the corner. Jack got his water and retrieved his own shotgun from the safe and checked to ensure the gun was in proper working order. He contends that he forgot the Viid was still "live," meaning those in the virtual classroom space could still see him, because it was minimized. A few minutes before he was scheduled to return to class, he put his shotgun in the safe and returned to his computer to log back into Viid. When he maximized the program, he realized it had been running the whole time and he became aware his teacher was trying to get his attention.

Jack also noticed the chat box of Viid was full of messages from his teacher sent within the span of about two minutes: "Jack, is that a gun?!" "Jack?" "I'm calling the police." Jack also received two private messages from students who had noticed the gun. One asked "Dude, is that your gun? And what is your Dad pointing his gun at?" Another said, "Hey! You are in class with a gun?!? That is so not cool!"

Jack immediately turned around, saw his father checking the sight of his gun by looking down the barrel and pointing the gun at a picture on the wall. Jack yelled at his father, telling him that everyone in the class could see him. Jack's father quickly put the gun in the safe and left the room. Jack apologized to his teacher and to the class. The chat box filled with comments and questions about the guns, with some students expressing dismay. Jack's teacher ended class early.

A police officer soon arrived at Jack's house and said he was there to address an issue reported from Jack's school. Jack's father allowed the officer to enter the home and showed him

where the family stored their weapons. Finding that all of the guns were legally owned and safely secured, the officer closed the investigation, left, and reported his findings to the school.

Later in the afternoon, Jack and his father received emails from the school's principal letting them know Jack was immediately suspended for three days for violating the State's Gun-Free School Act ("the GFSA"). The GFSA had always prohibited the possession of firearms on school property or at school functions. With the move to a virtual format, as part of the pandemic emergency legislation, the state had updated the GFSA. In pertinent part, the GFSA now states:

> There is zero tolerance for a student's use of firearms: this includes firearms brought onto school property, a school bus, or any location where any activity sponsored by the school is presently being conducted *including any virtual format. While classes are conducted online, students may not have any weapons visible on camera.* Disciplinary action includes immediate suspension and potential expulsion.

After unsuccessfully pleading with the school to lift the suspension, Jack's father contacted a journalist friend and told him what happened. *The Marshall News* ran a story the next morning with the headline "Glimpse of Gun on Viid During Virtual Class Leads to Police Investigation and Student's Suspension." In the article, the school released the following statement:

> We take the safety of all our students and staff very seriously. Safety is our number one priority, and we will continue to ensure a safe school environment whether in-person or distance learning is taking place. Marshall High School is still reeling from an attempted on-campus shooting that took place less than two months ago.[2] The last thing we can tolerate is inflicting students with the pain and trauma of seeing a gun in a classroom.

By week's end, the story had gone viral, with major national media outlets covering the incident and interviewing Jack and his father.

[2] It appears that in a completely unrelated incident near Valentine's Day, a former Marshall High student intended to infiltrate the school's Valentine's dance and shoot his ex-girlfriend and her date, who are current Marshall High students. That student posted his intentions on social media, and police were able to prevent the shooting.

On April 8, 2020, Marshall High School again emailed Jack and his father. The school wrote that due to “shameful and disgraceful social media posts liked by Jack, the school has no choice but to remove Jack from valedictorian consideration and revoke his ability to deliver a graduation speech.” The school referred to multiple posts “liked” by Jack on Picagram, a social media picture sharing app. On Picagram, users can "like" an image by tapping on a heart-shaped icon under the post or tapping on the image itself. The person who posted the photo will receive a notification that someone has “liked” his or her post. The "like" is visible to anyone who can see the image. Through a similar process, users can also "like" comments left by other users on a post.

Specifically, Jack was a member of a public group on Picagram called “Second Amendment Revolution.” Following his suspension, Jack “liked” a photo series shared to the account. The first photo featured a screenshot of the *Marshall News* article. The second photo included a screenshot of contact information listed on the high school’s website. The caption read: “What has this world come to?! Call, email, blast this school for trying to ignore the Second Amendment!!!” That photo received 900 likes and 53 comments. Jack also “liked” a comment where a user wrote “F--- this school.” The account later posted a screenshot of comments left on the school’s own Picagram account. All the comments shown criticized the school for calling the police and suspending Jack. The caption read: “Great work everyone. Let’s continue to defend the Second Amendment. Keep emailing and commenting. Let them know they can’t infringe on the Constitution!” Jack “liked” that photo and also “liked” a comment that read: “If students and teachers could be f--ing armed, we wouldn’t have a mass shooting in schools problem to begin with. #armtheschools.”

One student at Marshall High School screenshotted the photos and comments that Jack “liked” and sent the images to the school board. Within days, news of Jack’s social media conduct

had spread, and parents and students voiced concern about Jack's behavior, with some saying the conduct triggered memories of the attempted shooting at the Valentine's dance. Amid these concerns, the school principal and other administrators continued to field hundreds of daily emails and online comments from advocates of the Second Amendment.

In pertinent part, the school's Social Media Policy states:

> Students must at all times respect their school, teachers and other school officials, and fellow students. Students may not use the internet to target the students or the school. This includes the use of foul language, threatening language and inappropriate gestures aimed at the student body or the school environment. There will be no tolerance for any negative information regarding the school or the student body shared on the internet.

Defendants concede that Jack "liked" the social media posts off of school property and at times when no school events were in progress.

Procedural History

On April 20, 2020, Hart filed a § 1983 claim challenging the constitutionality of the GFSA and the school's Social Media Policy. Hart claims that the GFSA, as-applied to him, violates his Second Amendment rights because the firearm in question was possessed in the safety of his home. Hart also asserts that Defendants violated his rights to free speech under the First Amendment by disciplining him for speech he made off-campus.[3]

LEGAL STANDARD

To succeed on a motion for summary judgment, the moving party must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). No material facts are in dispute. Therefore, this Court will turn to legal principles to determine whether the defendants are entitled to judgment as a matter of law.

[3] Hart did not raise any other constitutional claims.

DISCUSSION

A. Second Amendment Challenge to the GFSA

Hart first argues that the GFSA, as applied to a student off-campus, infringes on the student's rights under the Second Amendment. The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

In *District of Columbia v. Heller*, the Court provided a brief two-step framework for evaluating the constitutionality of a firearm regulation. 554 U.S. 570, 625-30 (2008). The Court then determined that "the inherent right of self-defense has been central to the Second Amendment right," and that the District of Columbia's law "would fail constitutional muster" under any level of scrutiny because it infringed on that right. *Id.* at 628-29. *See also McDonald v. City of Chicago*, 561 U.S. 742 748 (2009) (Second Amendment enforceable against the states through the Fourteenth Amendment). But, the Court also noted that longstanding limitations on the right were not impacted by its decision in *Heller*: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws *forbidding the carrying of firearms in sensitive places such as schools and government buildings* . . . ."554 U.S. at 626-27 (emphasis added).

In the wake of *Heller*, most of the circuits utilize *Heller*'s two-step approach to resolve Second Amendment claims. First, a court will determine "whether the challenged law burdens conduct that falls within the scope of the Second's Amendment guarantee." *Gould v. Morgan,* 907 F.3d 659, 668-69 (1st Cir. 2018). If the conduct is found to fall within Second Amendment protection, the court must then determine which level of scrutiny to apply and whether the law survives that level of scrutiny. *Id.* at 669.

For instance, the Second Circuit has primarily applied intermediate scrutiny, *see New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 51 (2d Cir. 2018), and a similar burden-weighing test has been used by the Seventh Circuit, *see Horsley v. Trame*, 808 F.3d 1126, 1131 (7th Cir. 2015). In *Horsley*, a teenager challenged an Illinois law that required young people to obtain a parent's consent before receiving a gun license. *Id.* There, the court held the law "substantially related to the achievement of the state's interests," which was primarily to protect public safety. *Id.* at 1132. And while the Eastern District of North Carolina has applied strict scrutiny, *see Batman v. Perdue*, 881 F. Supp. 2d 709, 715 (E.D.N.C. 2012), this Court finds that the appropriate test, especially when the Second Amendment interest is one that has historically been reasonably regulated in sensitive places, such as the Marshall County High School.

It is imperative to tread carefully here given the magnitude of harm that gun violence has imposed on our country's schoolchildren. This Court should not disturb the long-held assurance that restrictions on guns in or near schools are "presumptively lawful regulatory measures." *Id.* at 626-27, n. 26. While *Heller* was principally concerned with "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Id.* at 634-35, the facts here concern the carrying and possession of guns at school. Hart places extraordinary emphasis on a right to self-defense, but this right, in the realm of schools with young students present, is wholly inappropriate.

There are scant post-*Heller* cases that address firearm regulations in sensitive places. The Fourth Circuit, for example, has applied different standards to Second Amendment challenges depending on the context. It has held that intermediate scrutiny should be applied when reviewing a regulation that prohibits a person convicted of a misdemeanor crime of domestic violence from possessing a firearm. *See United States v. Chester*, 628 F.3d 673, 677 (4th Cir. 2010). Further, the Fourth Circuit has held that strict scrutiny should not be used across the board in Second

Amendment challenges as it "would likely foreclose an extraordinary number of regulatory measures" and drastically limit the abilities of legislators. *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011). And, although, the Fourth Circuit might apply strict scrutiny if the court assumed that the law would infringe on the fundamental right of self-defense in one's home, the court also recognized that once outside the home environment, "a lesser showing is necessary." *Id.*

Here, however, this Court is faced with a difficult question about the scrutiny to be given to government regulations that involve a sensitive place as recognized by *Heller*, given that the sensitive place in this instance is also a home. This Court agrees with Defendants that because today's homes have been transformed into a school environment, due to the unique nature of online learning, they constitute sensitive locations requiring only intermediate scrutiny.

Defendants' gun-free policy satisfies intermediate scrutiny. The interest of preventing harm to children has long been established as "compelling." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). Seeing a person with a gun in class – whether in person or live in video – is no doubt detrimental to a child's learning and corrupts the idea of safety in the classroom. It is unquestionable that our nation's schools have suffered tremendously from gun violence. While some students are currently participating in online learning, gun violence continues to endanger minors across this nation. Here, at worst, the school board's policy is perhaps troublesome in that if forces a parent, guardian, or student to move their firearms out of sight of a student's camera. It does not, however, severely restrict a gun owner from owning a gun in his home in any way.

Accordingly, the prohibition of the possession of firearms in any activity sponsored by the school, whether in-person or virtual, is substantially related to the important government interest of protecting minors. The school board did not violate the Second Amendment by disciplining Hart for the display of a firearm while in class.

B. First Amendment Challenge to the School's Social Media Policy

Next, Hart argues that his Free Speech rights were violated when he was disciplined for speech he made off-campus and that the school's social media policy, as applied to students off-campus, violates the First Amendment.

The First Amendment to the Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This case raises the difficult question of whether a school can sanction a student for speech emanating from the "liking" of social media posts, while off-campus, that criticizes the school.

In the school environment, free speech is vital to encourage diverse thinking in young minds. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

In the case of *Tinker v. Des Moines Indep. Sch. Dist.*, the Court remarked that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. 503, 506 (1969). The Court held that suspending students for wearing black armbands in school violated the First Amendment, because the armbands did not lead to "substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." *Id.* at 514. The traditional *Tinker* analysis requires schools to justify their restrictions on student speech by showing that the speech is "reasonably" expected to substantially disrupt or materially interfere with the school's activities. *Id.* Additionally, the Court noted that undifferentiated fear would *not* be enough to justify disciplinary action. *Id.* at 508.

But however vital free speech is, the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). It is indisputable that First Amendment protections are

not absolute. Threats of violence, for example, known as true threats, are a well-established category of unprotected speech. *See Watts v. United States*, 394 U.S. 705, 708 (1969). Over time, the Supreme Court has held that vulgar speech in school and speech promoting illegal activity at a school-sponsored event are not entitled to First Amendment protection. *See Fraser*, 478 U.S. at 678; *Morse v. Frederick*, 551 U.S. 393, 436 (2007).

In addition to student speech cases, the Supreme Court has also provided some guidance on First Amendment protections in the realm of social media. In *Reno v. ACLU*, the Court recognized the challenges a "new marketplace" like the internet poses on free speech. Applying existing First Amendment doctrines, the Court found that "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." 521 U.S. 844, 885 (1997).

When considering whether a school may regulate student speech in an off-campus arena, some circuits have considered whether it was foreseeable that the speech would reach the school, *see e.g. Wisniewski ex rel. Wisniewski v. Board of Education*, 494 F.3d 34, 38 (2d Cir. 2007); while others consider the nexus or connection to the school, *see Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011). The Fifth Circuit rejected adopting any of the approaches advocated by the other circuits and instead held that *Tinker* applies to some off-campus speech, depending on the facts of the case. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015).

While student expression is vital in the development of young minds, the right to free speech "is not absolute at all time[s] and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Schools are faced with a tough balancing act, especially in today's world where school violence has become more prevalent. Federal and state courts have grappled with

this unique task, particularly as student activity moves online. While the digital era has altered the ways that students communicate, the goal of schools must remain the same: to protect our students.

Tinker, *Fraser*, and *Morse* may predate the world of online learning, but their guidance cannot be discarded. The guidance in *Tinker* and its progeny is clear: schools can discipline student speech when the student's speech creates "disorder or disturbance." *Tinker*, 393 U.S. at 508. Hart "liked" several messages urging online followers to bombard the school with emails to reinstate him as valedictorian and allow him to deliver his graduation speech. Hart also "liked" comments that attacked the school, and that said school shootings would be avoided if students and teachers could be armed on-campus. For days after Hart's suspension, the school's principal received an influx of emails from people calling for his resignation and demanding for the disciplinary actions against Hart to be lifted. Other school administrators and faculty who had their emails listed on the school's website received similar messages. The school's social media account was also bombarded with similar messages. Additionally, the school received messages from alarmed parents and students regarding Hart's online behavior.

This is exactly the kind of speech that cannot be tolerated by schools that strive to keep the entire student body safe. School administrators may prohibit student expression that will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513. Hart's speech materially and substantially disrupted his school. In addition to causing an onslaught of negative attention regarding gun safety on campus and disrupting the workdays of multiple school officials, several students said they found Hart's "liking" of the posts and comments triggering as it came mere weeks after the school suffered an attempted shooting. Additionally, Hart may also be disciplined for expressive conduct, even conduct occurring off school grounds, because his conduct has a sufficient nexus to the school. *See Kowalski*, 652 F. 3d at 577.

Hart does not seriously dispute the disruptive character of his speech but instead argues that his speech is outside of the school's control because it was made from his home. It is irrelevant that Hart made his speech from the comfort of his home on his personal cellphone. Hart further argues that his actions should not be considered speech because he merely pressed a button indicating his agreement with the content. However, the internet is not a singular place and Hart's liking of the content in question indicates his approval of those messages. *See Shen v. Albany Unified Sch. Dist.*, Nos. 3:17-cv-02478-JD (lead case), 3:17-cv-02767-JD, 3:17-cv-03418-JD, 3:17-cv-03657-JD, 2017 WL 5890089 *15 (N.D. Cal. Nov. 29, 2017) ("[t]his action broadcasts the user's expression of agreement, approval, or enjoyment of the post . . .").

Hart's phone may have been in his home, but his online conduct could reasonably be expected to reach the school. Our reasoning parallels other circuits which have upheld a school's disciplinary conduct toward off-campus student speech because it caused a substantial disruption. *See e.g.*, *Doninger v. Niehoff*, 527 F.3d 41, 50-51(2d Cir. 2008); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 757-59, 765-67 (8th Cir. 2011).

The school district did not violate the federal constitution by punishing Hart or liking the social media posts in question.

Conclusion and Order

This Court finds that the Marshall County School Board's disciplinary action against a student for displaying a gun virtually at school did not violate the Second Amendment, and that the Marshall County School Board's disciplinary action against a student's off-campus speech similarly did not violate the First Amendment. Therefore, this Court finds that the Defendants are entitled to judgment as a matter of law. For the aforementioned reasons, this Court GRANTS Defendant's Motion for Summary Judgment.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

No. 20-0415

JACK HART, *Appellant,*

v.

ANDREW FLIGHT, SUPERINTENDENT OF WYTHE DEPARTMENT OF EDUCATION, MARSHALL COUNTY SCHOOL BOARD, AND PHYLLIS BEARD, PRINCIPAL OF MARSHALL COUNTY HIGH SCHOOL, *Appellee.*

Appeal from the United States District Court
for the District of Marshall
Janet Kelley, District Judge, Presiding

Argued and Submitted July 28, 2020
Before Joseph Kipi, Chief Judge and Helen Spellman and Matthew Pinckney, Circuit Judges

Opinion by Judge Spellman, in which Chief Judge Kipi joins, and in which Judge Pinckney joins as to part I only. Dissenting Opinion as to Part II by Judge Pinckney.

September 18, 2020

OPINION

SPELLMAN, Circuit Judge:

This is an appeal from the Marshall County District Court's grant of summary judgment to the Marshall District School Board, from Appellant Jack Hart's section 1983 claims that the school board violated his Second Amendment rights when it suspended him from school for possessing a shotgun in his own home, and further violated his First Amendment rights when it stripped him of his graduation honors because he approved of messages posted on social media.

We must determine (1) whether the district court erred in holding that the school's Gun Free Safety Act did not violate the Appellant's Second Amendment right to bear arms; and (2) whether the district court erred in holding that the school's social media policy did not violate

Appellant's First Amendment right to freedom of expression. After review, this Court now vacates the grant of summary judgment and remands for proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL HISTORY

Appellee is a school board located in the State of Wythe. Appellant, Jack Hart, attends a high school located in the Marshall School District. The facts underlying this appeal were adequately summarized by the district court and are undisputed. Accordingly, they will not be repeated at length here.

STANDARD OF REVIEW

This Court reviews a district court's legal conclusions de novo, meaning that we are not bound by the district court's legal conclusions and may come to new conclusions of our own. *See Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376 (6th Cir. 1999).

DISCUSSION

A. Second Amendment: *The GFSA Does Not Survive Under Any Level of Scrutiny*

It is a particularly unchartered area to determine whether a school can discipline a student for owning a gun in his own home while the student attends class online.

First, it must be determined whether the school's policy "imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *United States v. Chester*, 628 F.3d 673, 677, 680 (4th Cir. 2010). It cannot be seriously questioned that the school's policy burdens conduct protected by the Second Amendment. There can only be one conclusion here: the challenged regulation strikes at the very core of the Second Amendment which protects a citizen's fundamental right to bear arms in the home for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008).

Next, the appropriate the level of scrutiny must be determined. While certain facts here are novel, there is no reason to depart from *Heller* as the school's policy regulates firearms possession for the purpose of self-defense in one's home – the precise type of location of which *Heller* spoke. While some claims merit scrutiny under "some form of means-ends scrutiny," there is no need for such analysis when the restriction is a categorical ban on the possession of firearms in one's own home. *United States v. Marzzarella*, 614 F.3d 85, 89 (3rd Cir. 2010). Such a ban would fail constitutional muster under any level of scrutiny.

Appellee contends that the updated Gun-Free School Act (GFSA), which prohibits the display of a firearm in class while remote learning is in session, is not a categorical ban but rather a temporary restriction that is operational solely during class time. Appellees also contend that today's ongoing pandemic has redefined a school's physical parameters due to the move to online learning. According to Appellees, the classroom, due to its virtual nature, now occupies a student's home and the same standards that would be expected of students during in-person schooling, must be adhered to during online classes. Accordingly, Appellees would like this court to eviscerate the Second Amendment protection that a home traditionally carries. Instead, Appellee would like us to hold that where an individual's right under the Second Amendment conflicts with a sensitive space, such as a school zone, *Heller* unambiguously forecloses a Second Amendment challenge.

In *Heller*, the Court recognized constitutional limits to the Second Amendment and characterized these examples as "presumptively lawful regulatory measures." *Heller*, 554 U.S. at 627, n. 26. Particularly, the Court said, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms … in sensitive places such as schools." *Id.* at 626. Therefore, a level of scrutiny determination turns on whether we are dealing with a sensitive place such as a school environment or self-defense in a home.

This was not a sensitive place such as a school zone. As stated in *Tinker v. Des Moines Indep. Sch. Dist.* – in dealing with another constitutional right – a student does not "shed their constitutional rights … at the schoolhouse gate." 393 U.S. 503, 506 (1969). So, where does that schoolhouse gate begin and end? Significantly, the word chosen by the Supreme Court in *Heller* was "in" as opposed to terms like "near," "around," or "related to" a sensitive place. This suggests that the Court was referring to an actual school building and not buildings partially related to school functions. For example, other circuits have held that extensions of sensitive places are usually properties owned or controlled by the same entity. *See United States v. Dorosan*, 350 Fed. Appx. 874 (5th Cir. Oct. 14, 2009).

It certainly cannot be said that a student sheds their constitutional rights in their own home. Appellee's contention that a virtual classroom turns a home into a school environment defies logic. Is a student engaging in a school operation when he does his homework at home? Or when he practices an instrument for the school band or rehearses for the school play? Such logic would completely alter the rights of a homeowner, and that is something this court is not prepared to do.

Therefore, this was not a sensitive place, such as a school, but instead was a student's home, where he and his family possessed a Second Amendment right to possess guns for the "core protection" of self-defense. *Heller*, 554 U.S. at 634. Violation of that principal tenant, would fail "[under] any of the standards of the scrutiny." *Id.*

Thus, this Court will apply a strict scrutiny analysis, which "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). The government has a legitimate interest in protecting school children from gun violence, but the regulation is not narrowly tailored to serve that interest. Nothing about possessing a weapon in

your own home while you are attending school from your home, places other students at risk, who are also attending school from the privacy of their own homes. Instead, the GFSA has implemented a complete ban on firearm possession, not just for the student but for anyone in his home and prohibits conduct that is at the very core of the Second Amendment.

Accordingly, Appellee's policy infringes on the historical right to own guns in one's own home. Appellant and his father keep guns in their home for self-defense. The Marshall County School Board has infringed on a historically recognized right. A national pandemic, while utterly devasting, does not justify this constitutional infringement. Accordingly, Appellees violated Hart's Second Amendment right.

B. First Amendment

Tinker and its progeny involved *on campus* speech. While the Supreme Court is silent on off-campus student speech, it has alluded to the fact that schools do not have the authority to punish speech made off-campus by students. For example, in *Bethel School District No. 403 v. Fraser*, Justice Brennan wrote in his concurrence that vulgar, lewd or plainly offensive language made outside the school could not be penalized merely because school officials find it inappropriate. 478 U.S. 675, 688 (1986). A tweaked *Tinker* analysis, like the approaches applied varyingly by several sister circuits, is not necessary because *Tinker* does not apply to off-campus speech.

Hart was unquestionably away from school property when he "liked" the posts in question. He "liked" the posts from his personal phone, outside of school hours. In fact, due to the pandemic, the school was not even open to students. In disciplining a student for his speech, the school must show that "its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint." *Tinker*, 393 U.S. at 509. Hart's "liking" of gun-related posts and comments targeting the school's disciplinary action are

exactly the kind of unfavorable speech *Tinker* said schools could not regulate. The speech also does not fall under *Fraser* because while Hart "liked" some posts that featured vulgar commentary, *Fraser* again controls only on-campus speech.

Even if we were to apply a *Tinker* analysis, it's hard to fathom how these posts, which were not made by Hart and merely "liked" by Hart, outside of the classroom, could have substantially disrupted the school. Disciplining Hart for "liking" such posts is tantamount to disciplining an audience for clapping at a vulgar joke. By turning to social media to express his thoughts and frustration, Hart did not bring his speech to campus or within the purview of school administration.

Appellee violated the Constitution by punishing Hart for "liking" the social media posts in question. Thus, for the reasons stated above, we reverse the order of the district court.

CONCLUSION

Ultimately, the district court erred in determining whether the Marshall County School Board's two disciplinary policies violated the Constitution. Appellant is protected by the Second Amendment in possessing a firearm while attending online classes from his home. Furthermore, the "liking" of questionable social media posts did not substantially disrupt his high school environment, and the Marshall County School Board violated Hart's First Amendment rights. Therefore, the decision of the district court is VACATED. The case is REMANDED for further proceedings consistent with this opinion.

PINCKNEY, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority on the Second Amendment issue.

I, however, would affirm the grant of summary judgment as to the First Amendment issue. Although I agree that there is no evidence to suggest a material disruption of class work or substantial disorder in the school was created by appellant's speech, certain aspects of that speech

could rightfully be seen as "threatening." I think we are better suited to analyze the facts here under the true threat doctrine. It is a touchstone of the First Amendment that speech may be regulated if it constitutes a "true threat." *Watts v. United States*, 394 U.S. 705 (1969). This kind of analysis is more appropriate when evaluating the impact of a student's online speech on the student environment. Moreover, this is the only kind of analysis that should be followed when evaluating a school's control of a student's off-campus speech as the Supreme Court has never said that a student's First Amendment rights are lessened off-campus.

In analyzing the true threat underlying a student's speech, we should look at whether a reasonable person in the student's position would view the statement in question as a serious expression of intent to harm or assault an individual. *See Lovell v. Poway Unified School District*, 90 F. 3d 367, 372 (9th Cir. 1996). To do so, we must consider the entire factual context surrounding the alleged threats. Against the backdrop of today's pandemic which has shuttered students indoors, and considering the outcry against Appellant's suspension, encouraging those who advocate for overwhelming the school and effectively bringing it to its knees is threatening. In light of such a threat, the school must have the authority to discipline a student's off-campus speech in order to preserve the educational rights of all of its students.

SUPREME COURT OF THE UNITED STATES

October Term 2020

Docket No. 2020-08-20

ANDREW FLIGHT, SUPERINTENDENT OF WYTHE DEPARTMENT OF EDUCATION, MARSHALL COUNTY SCHOOL BOARD, AND PHYLLIS BEARD, PRINCIPAL OF MARSHALL COUNTY HIGH SCHOOL,
Petitioners,

v.

JACK HART,
Respondent.

The Petition for Certiorari is hereby GRANTED. The Court certifies for argument the following two questions:

1. Where the public school house and one's home share a common space, does regulation of a student's possession of a firearm in his home violate the Second Amendment?
2. Does a school's regulation of a student's off-campus interactions on social media violate the First Amendment?