

NO. 20-01320

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

C1.G., on behalf of his minor son, C.G., the aggrieved party,

PLAINTIFF-APPELLANT,

v.

SCOTT SIEGFRIED, Superintendent of Cherry Creek School District, CHRIS SMITH, Chief of Staff for the Educational Services Center of Cherry Creek School District, RYAN SILVA, Principal of Cherry Creek High School, KEVIN UHLIG, Assistant Principal at Cherry Creek High School, BRYNN THOMAS, Dean at Cherry Creek High School, and CHERRY CREEK SCHOOL DISTRICT NO. 5,

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
District of Colorado (Denver)
Case No. 1:19-CV-03346-RBJ

The Honorable R. Brooke Jackson, United States District Court Judge

**BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF PLAINTIFF-APPELLANT C1.G., ON BEHALF OF HIS
MINOR SON, C.G., THE AGGRIEVED PARTY AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: September 16, 2021

By: /s/ Sophia Cope
Sophia Cope

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST	1
INTRODUCTION.....	2
ARGUMENT	4
I. THE SUPREME COURT HELD IN <i>MAHANAY</i> THAT SCHOOL OFFICIALS MAY RARELY PUNISH STUDENT OFF-CAMPUS SPEECH—EVEN ON SOCIAL MEDIA.....	4
A. Over Fifty Years of Supreme Court Precedent Limits the Avenues for Punishing Public School Students’ Speech, Especially Off-Campus Speech	4
B. The <i>Mahanoy</i> “Features” of Off-Campus Speech Counsel Against Special Rules for Off-Campus Social Media Speech	11
II. SOCIAL MEDIA PLAYS A CENTRAL ROLE IN YOUNG PEOPLE’S LIVES AND SCHOOL OFFICIALS’ EXERCISE OF CENSORIAL POWER OVER IT IS A SIGNIFICANT FREE SPEECH INTRUSION	16
A. Surveys Quantify the Power of Social Media for Young People.....	17
B. Examples Abound of Young People Using Social Media for Protected Activism	20
CONCLUSION	29
CERTIFICATE OF COMPLIANCE	31
CERTIFICATE OF DIGITAL SUBMISSION	32
CERTIFICATE OF SERVICE.....	33

TABLE OF AUTHORITIES

Cases

<i>Bethel School District No. 403 v. Fraser</i> , 478 U.S. 675 (1986)	5, 6, 8
<i>C.I.G. ex rel. C.G. v. Siegfried</i> , 477 F. Supp. 3d 1194 (D. Colo. 2020)	10, 11
<i>Hazelwood School District v. Kuhlmeier</i> , 484 U.S. 260 (1988)	6, 8
<i>Healy v. James</i> , 408 U.S. 169 (1972)	4
<i>Mahanoy Area School District v. B.L.</i> , 141 S. Ct. 2038 (2021)	<i>passim</i>
<i>Morse v. Frederick</i> , 551 U.S. 393 (2007)	6, 7, 8
<i>Packingham v. North Carolina</i> , 137 S. Ct. 1730 (2017)	15, 19
<i>Reno v. American Civil Liberties Union</i> , 521 U.S. 844 (1997)	14, 15, 19
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Greta Thunberg (@gretathunberg), Instagram24

Greta Thunberg, Facebook.....24

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Snapchat Support, *My Story*16

Social Media, Social Life: Teens Reveal Their Experiences, Common Sense Media (2018).....17

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STATEMENT OF INTEREST¹

The Electronic Frontier Foundation (“EFF”) is a San Francisco-based, member-supported, nonprofit civil liberties organization that has worked for over 30 years to protect free speech, privacy, security, and innovation in the digital world. With 38,000 members, and harnessing the talents of lawyers, activists, and technologists, EFF represents the interests of technology users in court cases and policy debates regarding the application of law to the internet and other technologies. EFF filed briefs in other cases involving student speech rights on the internet, including in *Mahanoy Area School District v. B.L.* in the Third Circuit² and Supreme Court,³ and a similar case pending in the First Circuit.⁴

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

² Sophia Cope, *In Historic Opinion, Third Circuit Protects Public School Students’ Off-Campus Social Media Speech*, EFF Deeplinks Blog (July 31, 2020), <https://www.eff.org/deeplinks/2020/07/historic-opinion-third-circuit-protects-public-school-students-campus-social-media>.

³ *Schools Can’t Punish Students for Off-Campus Speech, Including Social Media Posts, EFF Tells Supreme Court*, EFF Press Release (March 31, 2021), <https://www.eff.org/press/releases/schools-cant-punish-students-campus-speech-including-social-media-posts-eff-tells>.

⁴ Naomi Gilens & Sophia Cope, *EFF to First Circuit: Schools Should Not Be Policing Students’ Weekend Snapchat Posts*, EFF Deeplinks Blog (Feb. 17, 2021), <https://www.eff.org/deeplinks/2021/02/eff-first-circuit-schools-should-not-be-policing-students-weekend-snapchat-posts>.

INTRODUCTION

The First Amendment protects the rights of public school students to speak in their communities to the same extent it protects adults’ speech rights—save for a few specific situations. Students have the right to express themselves off-campus even when they use, as they often do, the internet or social media. Student expression online is not so different from other student speech away from school—such as at a protest, in an op-ed, or in a private conversation—to justify school officials’ authority over it. This is true regardless of whether online speech is later brought onto campus by others.

The Supreme Court’s decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), was a landmark victory for student expression, acknowledging that students do not leave their free speech rights “at the schoolhouse gate.” *Id.* at 506. The *Tinker* Court admonished that school officials could not punish student on-campus speech *unless* it materially and substantially disrupted the school day, school officials reasonably forecast such a disruption, or the on-campus speech invaded the rights of other students. *Id.* at 513-14. In so holding, the Court sharply limited the censorial power of public school officials.

The Supreme Court’s recent decision in *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021), strongly affirmed *Tinker*’s powerful protection for

student speech. While the *Mahanoy* Court held that *Tinker* may sometimes permit public school officials to also regulate *off-campus* speech, *id.* at 2045, the Court rejected arguments that would have transformed the narrow path school officials may take to punish student speech into a highway giving school officials access to the whole of students' lives. The Court also refused to make a special rule for student speech generated off campus and shared on social media.

The facts of *Mahanoy* and the Supreme Court's holding in favor of the student in that case are relevant to determining the outcome of this case, as C.G.'s counsel has ably argued.

Amicus writes separately to emphasize that the fact that students may express themselves off campus using social media does not increase school officials' authority to regulate such speech. *See* Plaintiff-Appellant's Op. Br. at 33-34. To the contrary, the First Amendment should largely protect off-campus speech, including on social media, which generally does not implicate the narrow "regulatory interests" of public schools identified by the Supreme Court in *Mahanoy*. *See Mahanoy*, 141 S. Ct. at 2045. Indeed, a careful consideration of the "features" of off-campus social media speech demonstrates why it should, in most situations, be outside the control of school officials. *See id.* at 2046. And protecting off-campus social media speech is especially important today, as social media has become central to young people's lives.

ARGUMENT

I. THE SUPREME COURT HELD IN *MAHANNOY* THAT SCHOOL OFFICIALS MAY RARELY PUNISH STUDENT OFF-CAMPUS SPEECH—EVEN ON SOCIAL MEDIA

The Supreme Court recently affirmed that the authority of public school officials to punish students for what they say off campus is sharply limited. *Mahanoy*, 141 S. Ct. at 2045-46. In so doing, the Court rejected calls to transform *Tinker*—born from an on-campus context—into broad authority to regulate students’ out-of-school lives—including those lives played out on social media.

A. Over Fifty Years of Supreme Court Precedent Limits the Avenues for Punishing Public School Students’ Speech, Especially Off-Campus Speech

More than 50 years ago, the Supreme Court in *Tinker* made clear that the First Amendment protects the free speech rights of students and teachers in public schools. 393 U.S. 503, 505-06 (1969). The *Tinker* Court recognized that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution” and that “[t]hey are possessed of fundamental rights which the State must respect.” *Id.* at 511. As the Supreme Court confirmed three years later, the “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

The *Tinker* Court established that public school officials may not punish students for their constitutionally protected *on-campus* speech—in that case, the wearing of black armbands in school to protest the Vietnam War—except in a narrow set of circumstances: when school officials can demonstrate that (1) a student’s expression actually caused a material and substantial disruption on school premises, (2) school officials reasonably forecast such a disruption, or (3) the on-campus expression invaded the rights of others. *Tinker*, 393 U.S. at 513-14.

Tinker was a resounding victory for student speech—a powerful statement that public school students enjoy substantially the same free speech protections that all Americans enjoy against governmental censorship. The limited authority to punish student speech left open to public school officials by *Tinker* was justified by the governmental interest in being able to “prescribe and control conduct *in the schools*.” *Id.* at 506-07 (emphasis added).

The Supreme Court’s cases that followed *Tinker* identified additional contexts in which public schools can regulate student speech—and these narrow categories of student speech that are subject to special treatment all must occur on campus or as part of an official school activity.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), the Supreme Court upheld the punishment of a student who made lewd comments during an on-campus assembly. Justice Brennan emphasized that the school could

not have penalized the student had he “given the same speech *outside of the school environment* ... simply because government officials considered his language to be inappropriate.” *Id.* at 688 (Brennan, J., concurring in the judgment) (emphasis added).

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988), the Supreme Court upheld the censorship of two student articles that were to be published in the high school newspaper because this speech “might reasonably [be] perceive[d] to bear the imprimatur of the school.” The *Hazelwood* Court described *Tinker* as establishing that students “cannot be punished merely for expressing their personal views *on the school premises* ... unless school authorities have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students.” *Id.* at 266 (emphasis added). The Court further noted that schools may regulate certain speech “even though the government could not censor similar speech *outside the school.*” *Id.* (emphasis added).

Finally, in *Morse v. Frederick*, 551 U.S. 393, 397 (2007), the Supreme Court upheld a student’s punishment for speech promoting illegal drug use, delivered physically off campus but at a school-sponsored event. The *Morse* Court gleaned “basic principles” from *Fraser*, including that “the same speech in a public forum *outside the school context*” would be protected, but that students’ “First

Amendment rights [are] circumscribed ‘in light of the special characteristics of the school environment.’” *Id.* at 404-05 (quoting *Tinker*, 393 U.S. at 506). Several Justices, writing separately, further emphasized the point. In his concurrence, Justice Alito noted that *Tinker* allows schools to regulate “*in-school* student speech ... in a way that would not be constitutional in other settings.” *Id.* at 422 (Alito, J., concurring) (emphasis added). And three dissenting Justices also agreed with the majority that speech promoting illegal drug use, even if punishable when expressed at a public school, would “unquestionably” be protected if uttered elsewhere. *Id.* at 434 (Stevens, J., dissenting).

Mahanoy was thus the first case to consider public school officials’ ability to punish students for their *off-campus* speech. *See Mahanoy*, 141 S. Ct. at 2050 (stating that all prior Supreme Court student speech “cases involved either in-school speech or speech that was tantamount to in-school speech”). Although the *Mahanoy* Court did not go so far as to say that school officials could never invoke *Tinker* to punish student off-campus speech, the Court was clear that the situations in which they could were quite limited. *Id.* at 2046. As the Court stated, *Tinker* presents a “demanding standard.” *Id.* at 2048.

In *Mahanoy*, school officials suspended a student from the junior varsity cheerleading squad after she published a profane post to social media—a “snap” to her Snapchat account—from a local convenience store over the weekend. *Id.* at

2043. But none of the Supreme Court’s categorical exceptions applied. Although the post contained a vulgar gesture and language, it was not made during a school activity. *See Fraser*, 478 U.S. at 685. *See also Mahanoy*, 141 S. Ct. at 2047 (“The strength of this anti-vulgarity interest is weakened considerably by the fact that B.L. spoke outside the school on her own time.”). The post was clearly the student’s own speech and did not bear the school’s imprimatur. *See Hazelwood*, 484 U.S. at 271. And the post was not a pro-drug message conveyed during a school-sponsored event. *See Morse*, 551 U.S. at 405.

Instead, Mahanoy Area High School officials claimed authority to punish the student under *Tinker*, arguing that they were punishing speech that disrupted the school environment—even though she posted her social media “snap” while off campus and after school hours. *Mahanoy*, 141 S. Ct. at 2044. The high school further justified its punitive action on the ground that social media posts generated off campus could be widely shared among students and eventually appear on campus on students’ phones or computers. *See* Pet. Br. at 22, 37-39, 44-45 (Feb. 22, 2021),⁵ and Pet. Reply Br. at 8, 18 (April 16, 2021),⁶ *Mahanoy*, 141 S. Ct. 2038

⁵ Available at https://www.supremecourt.gov/DocketPDF/20/20-255/169539/20210222132816518_Mahanoy%20-%20Brief%20for%20Petitioner.pdf.

⁶ Available at https://www.supremecourt.gov/DocketPDF/20/20-255/175918/20210416115032164_Mahanoy%20-%20Reply%20Brief%20for%20Petitioner.pdf.

(No. 20-255). The Supreme Court rejected these arguments and affirmed that the high school’s punishment violated the student’s First Amendment rights. *Mahanoy*, 141 S. Ct. at 2043, 2047.

The Supreme Court held that *Tinker* may sometimes apply to off-campus speech. As the Court stated, “[W]e do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus.” *Id.* at 2045. The *Mahanoy* Court declined to state “precisely which of many school-related off-campus activities” may be regulated by public school officials. *Id.* As the Court elaborated,

[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as “off campus” speech and whether or how ordinary First Amendment standards must give way off campus to a school’s special need to prevent, e.g., substantial disruption of learning-related activities or the protection of those who make up a school community.

Id.

But in leaving open the possibility that public schools may regulate off-campus speech under *Tinker*, the *Mahanoy* Court nevertheless was deliberate in sharply limiting the circumstances in which school officials’ punitive power could creep into students’ private lives. The Court enumerated only four off-campus situations where the “school’s regulatory interests remain significant”:

[1] serious or severe bullying or harassment targeting particular individuals; [2] threats aimed at teachers or other students; [3] the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and [4] breaches of school

security devices, including material maintained within school computers. *Id.* at 2045. *But see id.* at 2057 (Alito, J., concurring) (“Perhaps the most difficult category involves criticism or hurtful remarks about other students. Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech.”).⁷ However, the Court emphasized that notwithstanding these situations, “the leeway the First Amendment grants to schools in light of their special characteristics is diminished” when it comes to off-campus speech. *Id.* at 2046. As Justice Alito stated, “If today’s decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.” *Id.* at 2059 (Alito, J., concurring).

⁷ Notably, in this case, C.G.’s off-campus social media speech, albeit ignorant and offensive, did not rise to the level of “serious or severe bullying or harassment targeting particular individuals” or “threats aimed at teachers or other students.” *See* Plaintiff-Appellant’s Op. Br. at 21-34. *Cf. C.I.G. ex rel. C.G. v. Siegfried*, 477 F. Supp. 3d 1194, 1206, 1208 (D. Colo. 2020) (district court disagreeing with C.G.’s argument that a finding that off-campus speech amounted to “substantial disruption” requires “intentional direction towards the school environment” or “a direct threat to the school or to a particular teacher or student”).

B. The *Mahanoy* “Features” of Off-Campus Speech Counsel Against Special Rules for Off-Campus Social Media Speech

Just as the school officials did in *Mahanoy*, the district court here wrongly concluded that supposedly unique characteristics of off-campus *social media* speech render it inherently subject to school officials’ oversight. That is, even though C.G.’s speech was uttered off school grounds and after school hours, that it was shared on social media conferred school officials with greater authority to punish C.G. As the district court stated, “The modern reality of social media is that off-campus electronic speech regularly finds its way into schools and can disrupt the learning environment.” *Siegfried*, 477 F. Supp. 3d at 1206. *See also id.* at 1208 (“It must be expected that most social media use will reach campus.”).

However, social media use generally fits well within the “three features of off-campus speech that often, even if not always, distinguish schools’ efforts to regulate that speech from their efforts to regulate on-campus speech.” *Mahanoy*, 141 S. Ct. at 2046. The *Mahanoy* Court held that the features of off-campus speech “*diminish* the strength of the unique educational characteristics that might call for special First Amendment leeway” in regulating student speech. *Id.* (emphasis added). Those features also support the conclusion that off-campus *social media* speech should receive the same First Amendment protection as any other off-campus student speech—that is, courts should not develop special rules that would

allow public schools to punish off-campus speech just because it was published on social media.

First, “a school, in relation to off-campus speech, will rarely stand *in loco parentis*.” *Id.* at 2046. The *Mahanoy* Court explained that this doctrine applies “where the children’s actual parents cannot protect, guide, and discipline them.” *Id.* There is no reason for a school to stand *in loco parentis* for a student’s use of social media outside of school. Indeed, parents are typically far better equipped to supervise their children’s use of social media both in and out of school, should they choose to do so.

Second, most powerfully, “from the student speaker’s perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day.” *Id.* If off-campus internet speech were inherently more punishable, then public school students would surely be over-regulated given their pervasive use of social media. *See infra* Part II. Indeed, in the age of the internet and mobile technology, there would be no meaningful limitation to public schools’ ability to reach into and regulate the private lives of students. This is particularly true given that “nearly 90% of the students in this country attend public schools.” *Id.* at 2052 (Alito, J., concurring). Thus, “courts must be more skeptical of a school’s efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind

of speech at all.” *Mahanoy*, 141 S. Ct. at 2046. *See also id.* at 2053 (Alito, J., concurring) (stating “it would be far-fetched to suggest that enrollment [in public school] implicitly confers the right to regulate what a child says or writes at all times of day and throughout the calendar year”). The fact that students regularly express themselves off campus via the internet generally or social media specifically cuts *against* expanding the authority of public schools to punish off-campus speech.

Third, “the school itself has an interest in protecting a student’s unpopular expression, especially when the expression takes place off campus.” *Id.* at 2046. As the *Mahanoy* Court recognized, “public schools are nurseries of democracy” with a duty to educate students to live in our representative democracy, in which the “free exchange [of ideas] facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People’s will.” *Id.* The internet is a highly popular medium for our nation’s young people to communicate endless ideas with each other and the rest of the world, *see infra* Part II, and so schools must not be able to easily punish students for social media speech due to its easily shareable and accessible nature.

Thus, a public school student who posts to social media while off school grounds or after school hours, and not at a school-sponsored event, is engaging in off-campus speech that should, in all but the most exceptional cases, be beyond the

reach of their school to punish—no different than a student who spends their weekend attending a protest, authoring an op-ed in a local newspaper, or volunteering for a political campaign.

It is now beyond dispute that the First Amendment applies even where, and actually because, new technologies amplify speech. In 1997, the Supreme Court considered provisions in the newly enacted Communications Decency Act that were intended, in part, to prevent children from accessing “indecent” and “patently offensive” sexual material online. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 859 (1997). That minors might be exposed to sexual content online was a novel problem at the dawn of the World Wide Web. But the *Reno* Court, in striking down the provisions as unconstitutional, explained that—despite the risks of the internet—“[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.” *Id.* at 885. That online speech could be rapidly spread around the world was a feature that supported an unqualified First Amendment right, not a reason to weaken its constitutional protection. As the *Reno* Court noted, “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.” *Reno*, 521 U.S. at 870.

This approach has not changed in the nearly 25 years since *Reno* was decided, even as online communications have evolved—and it was resoundingly affirmed when the Supreme Court had its first opportunity to consider social media specifically in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

Packingham addressed a state law that made it a felony for convicted sex offenders to access “social networking” websites where children might be users. *Id.* at 1733.

The Court explained that the “‘vast democratic forums of the Internet’ [citing *Reno*] and social media in particular,” were now “the most important places ... for the exchange of views,” and that “extreme caution” is necessary to avoid “suggesting that the First Amendment provides scant protection” online.

Packingham, 137 S. Ct. at 1735-36.

The reality of today’s internet demands this “extreme caution” before expanding the government’s reach to control speech online—including the reach of public schools to punish students for off-campus speech just because it was uttered on social media. The lesson from *Reno* and *Packingham* is clear: the First Amendment’s protections apply with full force to these powerful, growing channels for speech—and should continue to apply when public school students use them to speak while off campus.

II. SOCIAL MEDIA PLAYS A CENTRAL ROLE IN YOUNG PEOPLE'S LIVES AND SCHOOL OFFICIALS' EXERCISE OF CENSORIAL POWER OVER IT IS A SIGNIFICANT FREE SPEECH INTRUSION

Off-campus social media speech should rarely be within public schools' regulatory power—otherwise, given the pervasive use of social media by young people, school officials would be squarely in the middle of students' lives 24 hours a day.

Social media is a central means for young people to express themselves, connect with others, and engage in advocacy surrounding issues they care about. Students in the analog era would be well within their rights to attend a controversial protest or write a provocative op-ed over the weekend. Given the nature of digital communications and the relative ease of taking screenshots—even of communications intended to be accessible only by recipients for a fleeting number of hours⁸—it is now far easier for off-campus student speech to be brought on-campus by someone other than the original speaker. But students should remain free to express themselves off-campus and online—about even potentially controversial topics—without having to worry that school officials will reach into their private lives to punish that speech.

⁸ See Snapchat Support, *My Story* (Snapchat posts are viewable for 24 hours), <https://support.snapchat.com/en-US/a/my-story>.

A. Surveys Quantify the Power of Social Media for Young People

Social media has become an inextricable part of young people’s lives. As of 2018, 95 percent of U.S. teenagers, ages 13 to 17, reported that they have access to a smartphone, and 45 percent said that they use the internet “almost constantly.”⁹ As of 2015, almost 60 percent of teenagers used social media each day, spending an average of two hours online—numbers that have surely grown since then.¹⁰ One recent study found that 32 percent of young people, ages 13 to 17, consider social media to be either “extremely” or “very” important in their lives.¹¹ Instagram, Snapchat, and TikTok are the most popular social media platforms for teenagers, with, respectively, 84 percent, 80 percent, and 69 percent of teenagers reporting use.¹² Meanwhile, 34 percent of teenagers say that Snapchat is their favorite social

⁹ Monica Anderson & JingJing Jiang, *Teens, Social Media & Technology 2018*, Pew Research Center (May 31, 2018), <https://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/>.

¹⁰ *The Common Sense Census: Media Use by Tweens and Teens*, Common Sense Media, at 39 (2015), https://www.commonsensemedia.org/sites/default/files/uploads/research/census_researchreport.pdf.

¹¹ *Social Media, Social Life: Teens Reveal Their Experiences*, Common Sense Media, at 21 (2018), https://www.commonsensemedia.org/sites/default/files/uploads/research/2018_cs_socialmediasociallife_fullreport-final-release_2_lowres.pdf.

¹² *Taking Stock with Teens: 20 Years of Researching U.S. Teens*, Piper Sandler, at 19 (2020), http://www.pipersandler.com/private/pdf/TSWTs_Fall_2020_Full_Report.pdf.

media platform.¹³

Young people use social media for many different purposes, including self-expression and forming connections with other people. When asked about the positive impacts of social media, a majority of teenagers said that social media helps them “interact with people from different backgrounds and experiences” (69 percent), “find different points of view” (67 percent), and “show their support for causes/issues” (66 percent).¹⁴

Social media has increasingly become an important platform for activism. In 2018, just over half of American adults had used social media to engage in a civic activity in the past year.¹⁵ These activities included participating in issue- or cause-focused groups, encouraging other people to take action on issues they care about, and finding information on protests or rallies.¹⁶ The Supreme Court has recognized that “social media users employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought,’” from

¹³ *Id.*

¹⁴ Monica Anderson & JingJing Jiang, *Teens’ Social Media Habits and Experiences*, Pew Research Center (Nov. 28, 2018), <https://www.pewinternet.org/2018/11/28/teens-social-media-habits-and-experiences/>.

¹⁵ Monica Anderson et al., *Activism in the Social Media Age*, Pew Research Center (July 11, 2018), <https://www.pewinternet.org/2018/07/11/public-attitudes-toward-political-engagement-on-social-media/>.

¹⁶ *Id.*

“debat[ing] religion and politics” to “petition[ing] their elected representatives and otherwise engag[ing] with them in a direct manner.” *Packingham*, 137 S. Ct. at 1735-36 (quoting *Reno*, 521 U.S. at 870). *See also Rideout v. Gardner*, 838 F.3d 65, 75 & n.9 (1st Cir. 2016) (noting the “increased use of social media . . . in service of political speech,” specifically among “younger voters” (citations omitted)).

For the younger generations that have grown up with the internet, social media has become an especially important tool to raise awareness and spark social movements. It is more difficult for most people, including young people, to utilize traditional mediums, like broadcast television, as a means of participating in national debate, given the high barriers to entry. Social media, however, has allowed young people to find their voices and create awareness and dialogue around issues they care about. DoSomething.org, for example, is a nonprofit that engages young people in activism through Snapchat selfie challenges, Twitter debates, and text messaging campaigns, and has 5.5 million members,¹⁷ a majority

¹⁷ GuideStar, *Do Something, Inc.*, <https://www.guidestar.org/profile/13-3720473>. *See also* Heather L. Whitley, *How the CEO of DoSomething.org Uses FOMO to Inspire Social Change*, *Forbes* (Sept. 7, 2016), <https://www.forbes.com/sites/colehaan/2016/09/07/how-the-ceo-of-dosomething-org-uses-fomo-to-inspire-social-change-2/#39b93dc76473>.

of whom are between the ages of 13 and 25.¹⁸

B. Examples Abound of Young People Using Social Media for Protected Activism

Today, young people all over the world use social media as a tool to participate in political discourse, promote causes they believe in, and advocate for change.¹⁹

During the 2020 U.S. presidential campaign, many young people—often too young to vote—were active on TikTok as participants in so-called “hype houses” that advocated for political candidates, especially then-President Donald Trump and Senator Bernie Sanders, and more generally for conservative, liberal or even bipartisan viewpoints.²⁰ The social media network can be a powerful platform for expression: a Republican hype house account, for example, has amassed over one million followers.²¹ A 17-year-old TikTok user who backed Sen. Sanders said, “I

¹⁸ Alexis Manrodt, *The New Face of Teen Activism*, Teen Vogue (Apr. 8, 2014), <https://www.teenvogue.com/story/teen-online-activism>.

¹⁹ See, e.g., Lily Fletcher et al., *These Teenage Activists Are Shaping our Future*, Huck Magazine (June 1, 2018), <https://www.huckmag.com/perspectives/activism-2/teenage-activists-protest-worldwide-agents-of-change/>.

²⁰ Taylor Lorenz, *The Political Pundits of TikTok*, N.Y. Times (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/style/tiktok-politics-bernie-trump.html>.

²¹ Republican Hype House (@therepublicanhypehouse), TikTok, <https://www.tiktok.com/@therepublicanhypehouse?>.

feel like I am making an impact on the election even though I can't vote.”²²

Other young people use social media to advocate for racial justice. Marley Dias, a teenage activist from Philadelphia, started the #1000BlackGirlBooks campaign on social media in 2015, when she was just 11 years old, to raise awareness about the racial representation gap in children's literature.²³ Her goal was to collect and donate 1,000 books with a Black girl as the main character.²⁴ Since then, she has collected more than 9,000 books,²⁵ and also written a book of her own about how young people can get involved in activism.²⁶ Dias says that social media is “the best place” for young people to get their start in activism, and that she uses social media to “get the message out” about her work.²⁷

Students also commonly use social media to engage in the Black Lives Matter movement, protest racism in their schools, and debate school administration

²² Lorenz, *supra* n.20.

²³ Maggie McGrath, *From Activist to Author: 12-Year-Old Marley Dias Is Changing the Face of Children's Literature*, Forbes (June 13, 2017), <https://www.forbes.com/sites/maggiemcgrath/2017/06/13/from-activist-to-author-how-12-year-old-marley-dias-is-changing-the-face-of-childrens-literature/?sh=1c05e2134ce0>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Julie Zeilinger, *How the 12-Year-Old- Activist Behind #1000BlackGirlBooks Is Taking the World by Storm*, MTV News (Sept. 20, 2017), http://www.mtv.com/news/3037121/how-the-12-year-old-activist-behind-1000blackgirlbooks-is-taking-the-world-by-storm/?xrs=_s.tw_main.

²⁷ *Id.*

and staff's handling of racist incidents in school. Zee Thomas, a high school student in Tennessee, organized a Black Lives Matter march through Nashville over Twitter and Instagram²⁸ that drew 10,000 participants.²⁹ Seventeen-year-old Simone Jacques similarly used Instagram to organize a Black Lives Matter protest of thousands in San Francisco.³⁰ And high school students in Maine organized recurring Black Lives Matter marches through the town of Gorham over the summer of 2020, largely over Facebook.³¹ Expressing an opposing view,

²⁸ Jessica Bennett, *These Teen Girls Are Fighting for a More Just Future*, N.Y. Times (July 3, 2020), <https://www.nytimes.com/2020/06/26/style/teen-girls-black-lives-matter-activism.html>. See also Vera Castaneda, *High School Students Organized Many of the Recent O.C. Protests and They're Drafting Action Plans*, L.A. Times (June 18, 2020), <https://www.latimes.com/socal/daily-pilot/entertainment/story/2020-06-18/high-school-students-organized-many-of-the-recent-o-c-protests-and-theyre-drafting-action-plans> (detailing, among others, the activism of a high school student who used Instagram to raise money for a fund to bail out activists arrested during demonstrations).

²⁹ Bennett, *supra* n.28.

³⁰ Amy Graff, *17-Year-Old Mission District Teen Leads Protest of Thousands in San Francisco*, SFGate (June 3, 2020), <https://www.sfgate.com/news/slideshow/Simone-Jacques-Mission-District-protest-203235.php>.

³¹ Robert Lowell, *BLM Protesters Stage Second Peaceful March in Gorham*, Portland Press Herald (June 16, 2020), <https://www.pressherald.com/2020/06/16/blm-protesters-stage-second-peaceful-march-in-gorham/>. See also Megan Gray, *Teenagers Lead the Way in Black Lives Matter Movement*, Portland Press Herald (July 12, 2020), https://www.pressherald.com/2020/07/12/teenagers-lead-the-way-in-black-lives-matter-movement/#goog_rewarded (collecting stories of high school activists in Maine).

University of Houston student Rohini Sethi wrote on Facebook, after five police officers were killed during a Black Lives Matter protest in Dallas, “Forget #BlackLivesMatter. More like AllLivesMatter.”³²

Survivors of the school shooting in Parkland, Florida have used social media to launch a national conversation about gun violence and push forward concrete reforms. Many of these student activists have used Twitter as a platform to refute conspiracy theorists and organize March for Our Lives anti-gun violence rallies, which have gathered more than a million protesters nationwide.³³ Seventeen Magazine, recognizing the demand among its young readership for information not only about the school shooting but also about the student activism that followed, featured in their extensive coverage of the incident stories from a Parkland survivor on Snapchat and a video on Instagram showing one of their editors calling

³² As student body vice president, her statement caused controversy on campus and led to her being sanctioned by the Student Government Association. Cleve R. Wootson, Jr., *Student Body Vice President Writes A “Forget Black Lives Matter” Post, and a University Erupts*, Wash. Post (Aug. 1, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/08/01/student-body-vice-president-writes-a-forget-black-lives-matter-post-and-a-university-erupts/>.

³³ Alyssa Newcomb, *How Parkland’s Social Media-Savvy Teens Took Back the Internet – and the Gun Control Debate*, NBC News (Feb. 22, 2018), <https://www.nbcnews.com/tech/tech-news/how-parkland-students-are-using-social-media-keep-gun-control-n850251>. See also Lois Beckett, *Parkland One Year On: What Victories Have Gun Control Advocates Seen?*, The Guardian (Feb. 14, 2019), <https://www.theguardian.com/us-news/2019/feb/14/parkland-school-shooting-anniversasry-gun-control-victories>.

a government representative.³⁴ Since the Parkland survivors started this movement, state legislatures have passed 67 bills aimed towards preventing gun violence, and gun control advocates have been elected to Congress.³⁵

Students are also using social media to organize around climate activism.³⁶ Greta Thunberg, a teenage Swedish activist, used social media to inspire hundreds of thousands of students around the world to protest inaction on climate change.³⁷ Her Facebook and Instagram accounts have collectively amassed over 3 million followers.³⁸ Before the COVID-19 pandemic, New York high school student Alexandria Villaseñor went on strike from school every Friday in order to

³⁴ Kayleigh Barber, *How Seventeen is Using Snapchat to Give Young Activists a Voice*, Folio (Mar. 5, 2018), <https://www.foliomag.com/how-seventeen-is-using-snapchat-to-give-young-activists-a-voice/>.

³⁵ Beckett, *supra* n.33.

³⁶ See, e.g., Miriam Wasser, *Meet the Leaders of Massachusetts' Youth Climate Strike*, WBUR News (Mar. 15, 2019), <https://www.wbur.org/news/2019/03/15/massachusetts-youth-climate-strike>; Lauren Wittenmeyer & Juliann Zhou, *Boston Students Strike for Climate*, The Heights (Sept. 23, 2019), <https://magazine.bcheights.com/index.php/2019/boston-students-strike-for-climate/>.

³⁷ Isabelle Gerretsen, *Global Climate Strike: Record Number of Students Walk Out*, CNN (May 24, 2019), <https://www.cnn.com/2019/05/24/world/global-climate-strike-school-students-protest-climate-change-intl/index.html>.

³⁸ Greta Thunberg, Facebook, <https://www.facebook.com/gretathunbergsweden/>; Greta Thunberg (@gretathunberg), Instagram, <https://www.instagram.com/gretathunberg/?hl=en>.

demonstrate outside of the United Nations building.³⁹ Now confined to her home,

Villaseñor has shifted her advocacy online, leading online strikes every Friday and posting pictures of herself on social media holding up signs inside her home.⁴⁰ Another teenage climate activist, Xiye Bastida, uses her social media to spread messages about climate change and climate catastrophes, and to advocate for organizations such as the Peoples Climate Movement, the Sunrise Movement, and Extinction Rebellion.⁴¹

These are just a few examples of how young people have used social media to advocate for causes they believe in. For this young generation, social media has become an indispensable tool to make their voices heard on a scale that was previously unimaginable.

Social media has shown itself to be a powerful tool not just for young activists, but also for students seeking to discuss and criticize aspects of their lives

³⁹ Carolyn Kormann, *New York's Original Teen-Age Climate Striker Welcomes a Global Movement*, *New Yorker* (Sept. 21, 2019), <https://www.newyorker.com/news/dispatch/new-yorks-original-teen-age-climate-striker-alexandria-villasenor-greta-thunberg>.

⁴⁰ Sarah Kennedy, *Social-media Savvy Youth Climate Movement Isn't Stopping for COVID-19*, *Yale Climate Connections* (June 2020), <https://yaleclimateconnections.org/2020/06/social-media-savvy-youth-climate-movement-isnt-stopping-for-covid-19/>.

⁴¹ Marlene Cimon, *Meet Xiye Bastida, America's Greta Thunberg*, *PBS* (Sept. 19, 2019), <https://www.pbs.org/wnet/peril-and-promise/2019/09/meet-xiye-bastida-americas-greta-thunberg/>.

at school. For example, students commonly use social media to express dissatisfaction with their schools regarding racially insensitive incidents or policies. Students have created accounts on Instagram, Twitter, TikTok, and Snapchat, referred to as “Black at” accounts, to convey stories of racist incidents and treatment by the educational institution, its administrators, and the student body.⁴² For example, several such posts detail teachers confusing Black students for other Black students. One student at Phillips Academy in Andover, Massachusetts wrote that she spent an entire term in a chemistry class in which the instructor “continually mixed up me and the other black girl,” noting that they “did not look alike.”⁴³

Students are also using social media to advocate for themselves during the COVID-19 pandemic. For example, Georgia high school student Hannah Watters posted a photo and a video to Twitter of her school’s crowded hallways after her school reopened during the COVID-19 pandemic (according to school policy, cell phone use was allowed in between classes and she waited until after regular school

⁴² See, e.g., Taylor Lorenz & Katherine Rosman, *High School Students and Alumni Are Using Social Media to Expose Racism*, N.Y. Times (June 16, 2020), <https://www.nytimes.com/2020/06/16/style/blm-accounts-social-media-high-school.html>; Bridget Read, *Black Teens Are Taking Their Fancy Private Schools to Task for Racism*, Cut (June 17, 2020), <https://www.thecut.com/2020/06/black-teens-are-calling-out-racism-at-their-fancy-schools.html>.

⁴³ Black at Andover (@blackatandover), Instagram (June 15, 2020), https://www.instagram.com/p/CBei9lajhVt/?utm_source=ig_web_copy_link..

hours to post to social media).⁴⁴ Along with the photo and video, Watters described the hallways as “jammed,” noting with disapproval the “10 percent mask rate” of the students.⁴⁵ In response, Watters received a five-day suspension from school, which she successfully appealed.

Examples abound of students at colleges and universities also using social media to critique school policies regarding COVID-19. For example, when 19-year-old Zoie Terry became one of the first students to be quarantined at the University of Alabama’s isolation facility, her posts and interviews about the experience on TikTok led to important changes in university policies, including medical monitoring of quarantined students.⁴⁶ Additionally, “at many campuses, students with confirmed or possible infections have flooded social media platforms to describe filthy rooms, meager food rations, lack of furniture, chaotic procedures and minimal monitoring from their universities.”⁴⁷

⁴⁴ Jon Brodtkin, *HS Suspends Teen Who Tweeted Photo of Hallway Packed with Maskless Students*, *Ars Technica* (Aug. 7, 2020), <https://arstechnica.com/tech-policy/2020/08/hs-suspends-teen-who-tweeted-photo-of-hallway-packed-with-maskless-students/>.

⁴⁵ *Id.*

⁴⁶ The Daily, *Quarantine on a College Campus*, *N.Y. Times* (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/podcasts/the-daily/college-coronavirus-outbreaks.html>.

⁴⁷ Natasha Singer, *College Quarantine Breakdowns Leave Some at Risk*, *N.Y. Times* (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/business/colleges-coronavirus-dormitories-quarantine.html>. *See also* Alisha Ebrahimji, *NYU Students Are Posting Their Lackluster Quarantine Meals on Social Media*, *CNN* (Aug. 21,

Students use social media to discuss and criticize other aspects of their lives at school. For example, teenagers have used social media to highlight the gendered implications of school dress codes. Claire, a high school student in Texas, created an Instagram account called “fight_the_dress_code,” which posts stories of girls’ experiences with dress codes.⁴⁸ The account frequently uses the hashtag #iamnotadistracted, which has been leveraged by young women and girls across the country to raise awareness about this issue.⁴⁹

Teenagers have also used social media to criticize USDA regulations around nutrition championed by then-First Lady Michelle Obama, which restricted calories, fat, sugar, and sodium in food sold in schools nationwide.⁵⁰ To call attention to the impact of the restrictions, students around the country tagged photos of unappetizing school lunches with the hashtag #thanksmichelleobama.⁵¹

2020), <https://www.cnn.com/2020/08/21/us/nyu-quarantine-student-meals-trnd/index.html>.

⁴⁸ Fight the Dress Code (@fight_the_dress_code), Instagram, https://www.instagram.com/fight_the_dress_code/.

⁴⁹ See, e.g., Associated Press, *6th-Grade Girl Launches Social Media Dress Code Protest*, Boston.com (Apr. 21, 2017), <https://www.boston.com/news/local-news/2017/04/21/6th-grade-girl-launches-social-media-dress-code-protest>.

⁵⁰ Rachel Zarrell, *Teens Are Sharing Gross Pictures of Their School Lunches With the Hashtag #ThanksMichelleObama*, BuzzFeed News (Nov. 21, 2014), <https://www.buzzfeednews.com/article/rachelzarrell/teens-are-sarcastically-tweeting-thanksmichelleobama-with-th>.

⁵¹ *Id.*

As these examples show, students use the internet and social media not only to express dissatisfaction with their educational institutions, just as adults use the internet and social media to vent their frustration with high property taxes or long lines at the DMV, but also to connect with others and engage with the world at large. Just as adults have confidence that their constitutionally protected speech will not result in government sanctions, so too should public school students when their speech takes place off campus—even if their speech is controversial and happens to be brought onto campus by others.

CONCLUSION

This Court must reject any suggestion that the inherent qualities of social media grant public schools greater control over students' off-campus speech. The Supreme Court advised caution in this area and drew a line at regulating “all the speech a student utters during the full 24-hour day.” *Mahanoy*, 141 S. Ct. at 2046. Expanding *Tinker* to allow school officials to punish off-campus social media speech like C.G.'s would cross that line and dramatically expand public schools' power to police students' private lives—indeed, the whole of their lives, given the pervasive use of social media by today's young people.

Dated: September 16, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Plaintiff-Appellant C1.G., on behalf of his minor son, C.G. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,268 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, the word processing system used to prepare the brief, in 14-point font in Times New Roman font.

Dated: September 16, 2021

/s/ Sophia Cope
Sophia Cope

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus-scanning program, Virus Total, updated September 16, 2021, and according to the program are free of viruses.

Dated: September 16, 2021

/s/ Sophia Cope
Sophia Cope

CERTIFICATE OF SERVICE

I certify that on this 16th day of September 2021, I electronically filed the foregoing Brief of Amicus Curiae using the Court's CM/ECF system which will send notification of such filing to all parties of record.

Dated: September 16, 2021

/s/ Sophia Cope
Sophia Cope