No. 20-1320

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

C1.G,

PLAINTIFF-APPELLEE,

v.

SCOTT SIEGFRIED, et al.,

DEFENDANTS–APPELLANTS.

On Appeal from the United States District Court
for the District of Colorado
1:19-cv-03346-RBJ

Judge R. Brooke Jackson

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO IN SUPPORT OF PLAINTIFF–APPELLEE AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae American Civil Liberties Union and American Civil Liberties Union of Colorado state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: September 15, 2021

By: *Mark Silverstein* (signed as "/s/")
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STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has represented the students in all five of the Supreme Court's cases regarding student free speech, including *Mahanoy Area School District v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021), and *Tinker v. Des Moines*, 393 U.S. 503 (1969). The ACLU of Colorado is a state affiliate of the national ACLU.

As organizations committed to protecting the rights to freedom of speech and religious liberty, as well as students' rights to receive an education free from harassment, *amici* have a strong interest in the proper resolution of this case.

Unlike a party whose own speech is at issue, the ACLU has no particular interest in supporting or endorsing the ideas expressed. In fact, the ACLU and its membership often strongly disapprove of the speech at issue—as we do in this case. The ACLU's interest is in supporting the guarantees of the First Amendment so that the freedom of expression remains protected for all of us.

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(c), *amici* certify that no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

INTRODUCTION

This case is about the authority of public schools to discipline young people for their speech outside of school—at church, during weekend protests, at home, or, as in this case, in an online Snapchat post from a local thrift store on a Friday night. While a school has "special leeway . . . [to] regulate speech that occurs *under its supervision*," that leeway cannot swallow the general rules that protect young people's First Amendment rights outside of the school environment. *Mahanoy Area School District v. B. L. by & through Levy*, 141 S. Ct. 2038, 2045 (2021) (emphasis added). Outside of school-supervised settings, young people have the right to speak without being punished for their ideas, and other young people and adults have the right to hear what they have to say.

The court below erred in applying the diminished speech protections that apply *in* school to an *off-campus* Snapchat post. It reasoned that the Internet is so pervasive that anything posted online will inevitably reach, and may well disrupt, school. But as the Supreme Court recently made clear in *Mahanoy Area School District v. B. L. by & through Levy*—the Court's first case considering, and holding unconstitutional, a school's discipline of a student for off-campus, online speech—school officials cannot reflexively extend the authority they have inside the school environment to student speech outside of school, even where features of the speech "risk[] transmission to the school itself." 141 S. Ct. at 2047.

Holding otherwise, the Supreme Court explained, would unduly inhibit and silence young people. It could "mean that . . . student[s] cannot engage in [certain] kind[s] of speech at all," including, in particular, anything that might be controversial or critical of the status quo. *Id.* at 2046. It would risk interfering with parents' authority to direct their children's upbringing outside school. *Id.* And it would fail to serve schools' interests in educating our youth about, and preparing them for, a polity that values the free exchange of ideas.

To be clear, the content of the Snapchat post at issue in this case—a photograph of Appellant and three friends, including one wearing a foreign-World-War-II-style hat, with the caption "Me and the boys bout to exterminate the Jews"—is, at best, ignorant and asinine and, at worst, deeply disturbing and offensive. Especially in light of evidence that anti-Semitism is on the rise, school officials were right to condemn the post and to state that the school clearly and strongly opposes hate and supports acceptance, care, and respect for diversity. School officials were also right to devote class time to discussing the impact of hate on others. And they would have been equally right to devote additional class time to teaching their student body about the reality and horror of the Holocaust.

But, accepting the allegations of the amended complaint as true, as the Court must do in reviewing the district court's grant of the school's motion to dismiss—including allegations that the Snap was posted off campus and outside of school

hours, was not targeted at any particular individuals, was assessed by the police not to constitute a threat, and was promptly removed and apologized for—the school was wrong to suspend and expel Appellant. While many of these factors are not dispositive on their own, each is relevant to an overall assessment that, as alleged, the Snap did not constitute harassment or bullying. Indeed, defendants have not even *argued* that it did, instead seeking to punish Appellant under *Tinker*'s diminished "disruption" standard.

Of course, at a later stage, defendants will have the opportunity to introduce their own facts and evidence, which might demonstrate that the post in fact rose to the level of constitutionally proscribable harassment, bullying, or threats. And, while the school could not simply rely on *Tinker*'s disruption standard to justify the punishment even at that stage, the district court could then apply a more precisely tailored standard to assess whether the school's interest in preventing harassment and bullying justified punishment. But that question is simply not presented on the facts as alleged at the motion to dismiss stage. On the facts alleged, the district court plainly erred in dismissing this First Amendment complaint.

The Court should reverse the court below and hold that *Tinker* is not the appropriate standard to apply when schools seek to regulate speech outside of school-supervised settings.

ARGUMENT

I. YOUNG PEOPLE HAVE FIRST AMENDMENT RIGHTS.

"As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (cleaned up)). It is a bedrock principle that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989), nor may it enact a "heckler's veto," suppressing speech because others might react negatively to it, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992).

These bedrock First Amendment principles apply "[e]ven where the protection of children is the object." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 804–05 (2011) (invalidating regulation of violent video games for minors); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975) (invalidating restriction on drive-in movies designed to protect children); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) (invalidating statute prohibiting indecent communications available to minors online). And they apply not only to what children can hear, but also to what they can say. As the Supreme Court recently

affirmed, "minors are entitled to a significant measure of First Amendment protection." *Mahanoy*, 141 S. Ct. at 2044 (quoting *Brown* 564 U.S. at 794).

Indeed, the fact that a speaker is young is reason not for the diminution of their rights, but "for scrupulous protection of [their] Constitutional freedoms . . . if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Even when children are involved, "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." *Id.* at 637.

As *Mahanoy* reaffirmed, these principles apply with special force when it comes to schools—which, as "the nurseries of democracy," "have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" 141 S. Ct. at 2046.

First Amendment safeguards are "designed and intended to . . . put[ ] the decision as to what views shall be voiced largely into the hands of each of us," rather than the government. *Cohen v. California*, 403 U.S. 15, 24 (1971). And we all have a strong interest in hearing not only what adults have to say, but also the views of children. Young people are often at the forefront of movements, trends, and

technologies, including through off-campus speech: commentary they post online,[2] news and op-ed articles they publish,[3] and protests they attend in person.[4] *See also Brown*, 564 U.S. at 795, n.3 (discussing importance of protecting minors' right to attend rallies "in support of laws against corporal punishment of children, or laws in favor of greater rights for minors").

II. SCHOOLS DO NOT HAVE THE SAME AUTHORITY TO REGULATE STUDENT SPEECH ON AND OFF CAMPUS.

A. *Mahanoy* makes clear that schools cannot simply extend their in-school authority to off-campus speech.

The court below held that *Tinker v. Des Moines*—which allows schools to punish speech for its mere potential to disrupt, rather than requiring them to apply

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[2] *See, e.g.,* Kait Sanchez, *How a Teen Punk Led a Movement for Disabled People Online*, The Verge (July 27, 2021), https://www.theverge.com/22583848/disabled-teen-cripple-punk-media-representation; @jew.shua, Instagram (July 25, 2020), https://www.instagram.com/p/CDFLe7PHPfK/ (kid-created viral guide on trans-inclusive language).

[3] *See, e.g.,* Oliver Laughland, *How the Parkland Students Took Over Guardian US*, The Guardian (Mar. 31, 2018), https://www.theguardian.com/membership/2018/mar/31/parkland-students-gun-violence-change-guardian-us.

[4] *See, e.g.,* Perry Stein, *'Undocumented, Unafraid'.: DACA Recipients Storm the U.S. Capito*l, The Washington Post (Nov. 9,2017), https://www.washingtonpost .com/ local/undocumented-unafraid-daca-recipients-storm-the-us-capitol-for-their-cause/2017/11/09/4d9ae0bc-c558-11e7-aae0-cb18a8c29c65_story.html; Mihir Zaveri, *'I Need People to Hear My Voice': Teens Protest Racism*, The New York Times (June 23, 2020), https://www.nytimes.com/2020/06/23/us/teens-protest-black-lives-matter.html; Anna Turns, *Meet Generation Greta: Young Climate Activists Around the World*, The Guardian (June 28,2019), https://www.theguardia n.com/environment/2019/ jun/28/generation-greta-young-climate-activists-around-world.

traditional First Amendment standards, *in school*—applies with equal force "to off-campus speech," including everything posted online, because "the modern reality of social media is that off-campus electronic speech regularly finds its way into schools and can disrupt the learning environment." *C1.G. v. Siegfried*, 477 F. Supp. 3d 1194, 1206 (D. Colo. 2020). The district court did not have the benefit of the Supreme Court's teaching in *Mahanoy*, however, which post-dated the district court's decision and controls this appeal.

Mahanoy resoundingly rejected the district court's bright-line reasoning and rule. While recognizing that "courts must apply the First Amendment 'in light of the special characteristics of the school environment,'" *Mahanoy*, 141 S. Ct. at 2404 (quoting *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)), the Court held that "[t]hese special characteristics call for special leeway *when schools regulate speech that occurs under its supervision*." *Id.* at 2045 (emphasis added). In school or at school-supervised events, this special leeway includes the power *Tinker* granted to "regulat[e] speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others,'" *id.* (quoting *Tinker v. Des Moines*, 393 U.S. 503, 513 (1969)). Outside of school, however, the Court reasoned, "three features of off-campus speech . . . diminish the strength of the unique educational characteristics that might call for special First Amendment leeway" in the school-supervised setting. *Id.* at 2046.

First, "from the student speaker's perspective," if schools were able to regulate off-campus speech to the same extent as on-campus speech, school regulations would restrict "all the speech a student utters during the full 24-hour day." *Id.* This would deprive young people of the ability to ever speak freely—and, as discussed above, would deprive adults and other young people of the benefits of hearing their speech. *See Reno*, 521 U.S. at 874 (government cannot "suppress[ ] a large amount of speech that adults have a constitutional right to receive" in "order to deny minors access to potentially harmful speech").

Second, when "the expression takes place off campus," the school itself has a "strong interest" in "protecting a student's unpopular expression." *Mahanoy*, 141 S. Ct. at 2046. Far from concluding, as the district court erroneously did below, that "[a]pplying *Tinker* to off-campus speech properly protects both students' constitutional rights and the evolving nature of 'the school environment,'" *C1.G*, 477 F. Supp. 3d at 1206, the Supreme Court recognized that both the school's and the students' interests are better served by more fulsomely protecting the speech of young people off-campus. "America's public schools" bear the responsibility of teaching young people that "[o]ur representative democracy only works if we protect the . . . free exchange [of ideas]." *Mahanoy*, 141 S. Ct. at 2046. And "[t]hat protection must include the protection of unpopular ideas, for popular ideas have less need for protection." *Id.*

Finally, "[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility." *Id.* To give schools the same power to regulate young people's speech when they are outside the school environment as they have inside that environment risks intruding on the parents' prerogative. A parent who chooses to bring her daughter to a Black Lives Matter march should not have to worry that the principal might deem the child's participation or speech there potentially disruptive at school, and therefore punishable under *Tinker*.

Where these three features are present, *Mahanoy* directs, "the speaker's off-campus location [can] make the critical difference," and "the leeway the First Amendment grants to schools . . . is diminished." *Id.* In light of *Mahanoy*, the court below erred in applying *Tinker*'s disruption standard to Appellant's Snap merely because it appeared online.[5]

The particular application of these principles in *Mahanoy* only makes the district court's error more plain. *Mahanoy*, just like this case, involved Snapchat "posts [that] appeared outside of school hours from a location outside the school," "did not identify the school," did not "target any member of the school community

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[5] As discussed further in Section III, *infra*, the fact that schools may not regulate off-campus speech under the broad standard announced in *Tinker* does not mean that they are unable to address *any* off-campus speech, including harassing, bullying, or threatening speech; it merely requires that schools rely on a standard more precisely tailored to the government's interest in those circumstances.

with vulgar or abusive language," and were "transmitted . . . through [the student's] personal cellphone, to an audience consisting of [their] private circle of Snapchat friends." *Id.* at 2047. On those facts, the Supreme Court held that the speech was protected by the First Amendment and could not be the basis for punishment, even mere suspension from an extracurricular activity. *A fortiori*, on the facts alleged here, the school's suspension and expulsion of Appellant from school violated his First Amendment rights.

B. The Supreme Court's prior student speech cases—*Tinker, Morse, Fraser*, and *Hazelwood*—require the same result.

While *Mahanoy* was the first case to apply the on/off-campus distinction to online speech, the decision was in line with the full body of the Supreme Court's student speech cases. As the Court explained most recently in *Morse v. Frederick*, "schools may regulate some speech in the school '*even though the government could not censor similar speech outside the school*.'" 551 U.S. 393, 406 (2007) (quoting *Hazelwood*, 484 U.S. 260, 266 (1988)) (emphasis added). In *Morse,* the Court upheld a school's discipline of a student for displaying a "Bong Hits 4 Jesus" banner, but only because he displayed it at "an approved social event or class trip" supervised by teachers "during normal school hours."

The Court drew this same line when upholding a school's authority to suspend a student for delivering a lewd speech at a "required" student assembly that is "part of a school-sponsored educational program." *Bethel Sch. Dist. No. 403 v. Fraser*,

478 U.S. 675, 677 (1986). As the Court later noted, "had [the student] delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 405.

And, even as it upheld a school's authority to regulate the content of a school newspaper produced as part of a "regular classroom activity" and "supervised learning experience" "during regular class hours" for which "[s]tudents received grades and academic credit," the Court also recognized that "*the government could not censor similar speech outside the school*." *Hazelwood*, 484 U.S. at 268, 270 (emphasis added). It expressly distinguished government efforts to control young people's speech in "streets, parks, and other traditional public forums." *Id.* at 266, 267. Outside of the school environment, schools cannot rely on in-school rules.

And *Tinker* itself applied the "material disruption" standard only to speech within the schoolhouse gates, because of the "special characteristics of the school environment." 393 U.S. at 506. A thrift shop on a Friday night is not a "school environment," any more than the convenience store on a weekend where B.L. posted her Snap in *Mahanoy*.

III. EVEN IF A SIGNIFICANT INTEREST IN REGULATING OFF-CAMPUS SPEECH WERE IMPLICATED HERE, *TINKER* WOULD BE THE WRONG STANDARD TO APPLY.

Mahanoy recognizes that a school's interests in regulating speech that is uttered off campus "remain significant" in certain circumstances, including when it

amounts to "serious or severe bullying or harassment." 141 S. Ct. at 2045. Indeed, when responding to bullying or harassing speech that is not constitutionally protected, not only *can* schools address off-campus speech without violating the First Amendment, but they sometimes *must*, pursuant to their affirmative obligations under Title VI, Title IX, the Rehabilitation Act of 1973, and the Fourteenth Amendment. *See, e.g.,* U.S. Dep't of Ed., OCR, *First Amendment: Dear Colleague* (July 28, 2003), https://www2.ed.gov/about/offices/list/ocr/first amend.html ("2003 DCL"); U.S. Dep't of Ed., OCR, *Dear Colleague* (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html ("2010 DCL"); U.S. Dep't of Ed., OCR, Notice of Investigative Guidance, Racial Incidents and Harassment, 59 Fed. Reg. 11448, (Mar. 10, 1994), https://www2.ed.gov/about/offices/list/ocr/docs/race394.pdf ("OCR Guidance").

Here, however, the defendants have not even *argued* that the speech at issue constituted harassment or bullying, and have instead sought to justify their actions under the far more relaxed *Tinker* "disruption" standard that applies within school. Accordingly, this Court need not reach the issue of how to define harassment or bullying consistent with the First Amendment. It need only hold that the district court erred in applying the blunt instrument of *Tinker*'s disruption standard outside of the school environment. *See C1.G*, 477 F. Supp. 3d at 1209–10.

A. *Tinker* cannot be used outside of school to address harassment or bullying.

While *Mahanoy* refused to "deny the off-campus applicability of *Tinker*'s highly general statement *about the nature of a school's special interests*," *Mahanoy*, 141 S. Ct. at 2045 (emphasis added), it did not hold that *Tinker*'s standard governs whenever those special interests are implicated. Indeed, the Court refused to "set forth a broad, highly general First Amendment rule" for addressing school interests that extend off campus, *id*., rejecting the idea, advanced by the school district in *Mahanoy,* that whenever a school's special interest in student speech is triggered off-campus, *Tinker* is the appropriate standard. Outside the "special characteristics of the school environment," the First Amendment requires more precise tailoring.

This is for good reason. Extending *Tinker*'s broad—and, in practice, content- and viewpoint-based—rule would fail both to serve the school's interests and to protect young people's First Amendment rights. The danger of extending *Tinker* out, rather than applying a rule that is tailored to the government's specific interest in preventing bullying and harassment, is not hypothetical.

For example, in recent years, and prior to *Mahanoy*, schools relied on *Tinker* to discipline students for posting the following online, including, in some instances, when the students were off-campus:

- A photo and video showing how crowded school hallways were in the middle of the COVID-19 pandemic;[6]

- A photo of the dirty water in the school's bathroom;[7]

- Criticism of another student for sending racist messages;[8] and

- Photos depicting a weekend trip to a gun range, with guns that were legally purchased and properly permitted.[9]

Courts have also approved of schools' disciplining of students for displaying the Confederate flag in school,[10] including a shirt that stated "Our School Supports

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[6] Elliot Hannon, *Georgia High School Students Suspended for Social Media Posts Showing Packed Hallways*, SLATE (Aug. 7, 2020), https://slate.com/news-and-politics/2020/08/georgia-north-paulding-high-school-students-suspended-social-media-posts-packed-hallways.html.

[7] Rolando Zenteno, *Student Suspended After She Takes Photo of School's Dirty Water*, CNN (Sept. 26, 2016), https://www.cnn.com/2016/09/26/health/school-dirty-water-post-teen-trnd/.

[8] *ACLU Urges Shaker Heights High School to Reverse Decision to Punish Students for Free Speech*, ACLU (Nov. 14, 2016), https://www.acluohio.org/archives/press-releases/aclu-urges-shaker-heights-high-school-to-reverse-decision-to-punish-students-for-free-speech?c=174534.

[9] Robby Soave, *High School Suspends 2 Students for Posting Gun Range Photos on Snapchat, ACLU Files Suit*, REASON (Apr. 11, 2019), https://reason.com/2019/04/11/high-school-gun-snapchat-suspension-aclu/.

[10] *See, e.g., Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246, 1247–49 (11th Cir. 2003); *West v. Derby Unified Sch. Dist*. No. 260, 206 F.3d 1358, 1361, 1366–67 (10th Cir. 2000); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 329, 333–36 (6th Cir. 2010).

Freedom of Speech for All (Except Southerners)",[11] and wearing a University of San Diego sweatshirt and Los Angeles Lakers and Dodgers shirts to school.[12]

While schools understandably have special leeway within the school environment, and some of this discipline may have been warranted to address speech that occurs within the school context, expanding *Tinker* to the outside world—even in those instances when a school claims its interest in preventing harassment or bullying has been triggered—would use a sledgehammer when a scalpel is required, and would unduly silence young people. And while we may hope that school officials will teach students the error of some of these views by doing their work as educators, as government actors they cannot teach through censorship.

Rather, where a school's "significant" interest with regard to "serious or severe bullying or harassment" or threats is implicated, a school can discipline students pursuant to a more tailored standard. As the Ninth Circuit has explained in the context of workplace harassment, "[h]arassment law generally targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment." *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389–90 (1992)).

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[11] *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 432 (4th Cir. 2013).

[12] *Jeglin ex rel. Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1461–62 (C.D. Cal. 1993).

For example, even outside of the school environment, schools can proscribe true threats without running afoul of the First Amendment, *see Virginia v. Black*, 538 U.S. 343, 359 (2003). And importantly, what constitutes a true threat can take account of "contextual factors," *id*. at 367 (plurality), including "adjust[ing] the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children." *Brown*, 564 U.S. at 794; *see also Ginsberg v. New York*, 390 U.S. 629, 638–39 (1968). What is a true threat to a seven-year-old is not the same as what is a true threat to a twenty-five-year-old.

And while "[we] must tolerate insulting, and even outrageous, speech [in public debate] in order to provide adequate breathing space to the freedoms protected by the First Amendment," *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (cleaned up), there are circumstances in which "racial insults or sexual advances . . . may be prohibited on the basis of their non-expressive qualities, as they do not 'seek to disseminate a message to the general public, but to intrude upon the targeted [listener], and to do so in an especially offensive way.'" *Rodriguez*, 605 F.3d at 710 (quoting *Frisby v. Schultz*, 487 U.S. 474, 486 (1988).

Tinker, however, is not limited to such speech. Its broad "disruption" standard is not sufficiently tailored to the government's interest in preventing or addressing bullying, harassment, or threats.

B. While schools have an obligation to address harassment and bullying, that obligation is not triggered by the facts alleged in the complaint.

On the allegations of the amended complaint, Appellant's post, while offensive and deplorable, did not constitute constitutionally proscribable harassment or bullying, and his First Amendment claim should not be dismissed. Indeed, the school did not even argue that the post constituted bullying or harassment. *See* Am. Compl. ¶ 58 (alleging that, at the time of C.G.'s initial suspension, the school was still "determin[ing] the impact on the school environment"); *id.* ¶ 44 (alleging that "[o]fficers . . . determined there was no threat against anyone" and "determined no crime had been committed"); *see also id.* ¶ 39 (alleging that post was "removed within hours of it being posted"); *id.* ¶ 45 (alleging that "[u]pon learning people had a negative reaction to his post, C.G. posted an apology to his Snapchat story" explaining that it was meant to be a joke). At this stage, those allegations must be accepted as true and, on that basis, the court below erred in dismissing the case. The Snap at issue here was hateful, stupid, and deeply offensive—but without more, it was presumptively protected by the First Amendment.

With factual development in discovery—including relevant but not necessarily dispositive facts about, for example, the student's intent, whether the post was targeted at particular individuals, the impact on the school's ability to provide educational opportunities to other students, and whether the Snap "limited

or denied a student's ability to participate in or benefit from an educational program," *see, e.g.,* 2003 DCL; 2010 DCL; OCR Guidance; Colo. Rev. Stat. § 22-33- 106(1)(c) (2021)—the analysis might change. At this stage, however, the only question is whether a complaint that alleges that a school punished a student for a general statement that Appellees did not even argue harassed or bullied others survives a motion to dismiss. Under *Mahanoy*, the answer is yes.

When faced with some speech—certainly including the Snapchat post at issue here—"[i]t might be tempting to dismiss [the] words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect [even the despicable] in order to preserve the necessary." *Mahanoy*, 141 S. Ct. at 2048. The abhorrent nature of the speech here cannot justify diminishing the First Amendment's protection for all young people.

CONCLUSION

For these reasons, this Court should reverse the court below, hold that *Tinker* does not apply to off-campus speech, and allow Petitioner's case to proceed.

Dated: September 15, 2021 Respectfully submitted,

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**Application for Admission Pending*

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief of Amici Curiae in Support of Plaintiff–Appellant and Reversal complies with the type-volume limitation, typeface requirements, and type style requirements of Fed. R. App. P. 32(a) because it contains 4,412 words and has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using the word-processing system Microsoft Word 2016.

Dated: September 15, 2021

By: */s/Mark Silverstein*
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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

Dated: September 15, 2021

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