Case No. 20-1320

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

C1.G., on behalf of his minor son, C.G., Appellant,

v.

SCOTT SIEGFRIED, Superintendent of Cherry Creek School District, et al., Appellees.

Appeal from the United States District Court
for the District of Colorado
Honorable R. Brooke Jackson
Civil Action No. 19-CV-03346-RPM

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, COLORADO ASSOCIATION OF SCHOOL BOARDS, KANSAS ASSOCIATION OF SCHOOL BOARDS, NEW MEXICO SCHOOL BOARDS ASSOCIATION, OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION, AND UTAH SCHOOL BOARDS ASSOCIATION IN SUPPORT OF SCOTT SIEGFRIED, ET AL. AND AFFIRMATION OF THE DISTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money to fund preparing or submitting this brief; and (iii) no person other than Amici, their members, or their counsel contributed money to fund preparing or submitting this brief.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT

TABLE OF AUTHORITIES ii

STATEMENT OF IDENTITIES AND INTEREST OF *AMICI CURIAE*.....1

FRAP 29(a)(2) STATEMENT.....3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. After *Mahanoy*, *Tinker* Remains the Framework for Analysis of Public School Authority With Respect to Student Speech.....5

A. *Tinker* Provided a Practical, Workable Standard Used by Courts and School Officials Throughout the Nation 8

B. Courts Regularly Applied *Tinker* in Off-Campus Online Speech Cases Prior to *Mahanoy*.....13

II. In *Mahanoy*, The Supreme Court Explained How Courts Can Assess School Authority to Regulate Off-campus Online speech under *Tinker*; It Did Not Abrogate Existing Caselaw 22

CONCLUSION.....27

TABLE OF AUTHORITIES

CASES: **PAGE**

A.F. v. Ambridge Area Sch. Dist.,
2021 WL 3855900 (W.D. Pa. Aug. 27, 2021) 25

A.N. v. Upper Perkiomen Sch. Dist.,
228 F. Supp. 3d 391 (E.D. Penn. 2017) 10, 16, 19

A.S. v. Lincoln County R-III School District,
429 F. Supp. 3d 659 (E.D. Mo. 2019) 20

Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls,
536 U.S. 822 (2002) 7

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2006 WL 2189733 (N.D. Ga. 2006) 16, 19

Castaldo v. Stone,
192 F. Supp. 2d 1124 (D. Colo. 2001) 15

C.R. v. Eugene Sch. Dist. 4J,
835 F.3d 1142 (9th Cir. 2016) 19

Cuff v. Valley Central Sch. Dist.,
677 F. 3d 109 (9th Cir. 2012) 18

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647 F.3d 754 (8th Cir. 2011) 16, 18

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490 F. Supp. 3d 448 (D. Mass 2020)
No. 1950 (1st Cir. Filed Oct. 14, 2020) 8, 19

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482 U.S. 578 (1987) 6

Epperson v. Arkansas,
393 U.S. 97 (1968).....8

Evans v. Bayer,
684 F. Supp. 2d 1365 (S.D. Fla. 2010).....21

J.C. v. Beverly Hills Unified Sch. Dist.,
711 F. Supp. 2d 1094 (C.D. Cal. 2010).....21

J.S. v. Blue Mountain Sch. Dist.,
650 F.3d 915 (3d Cir. 2011).....21

Lau v. Nichols,
414 U.S. 563 (1974).....6

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257 F.3d 981 (9th Cir. 2001).....16

Layshock v. Hermitage Sch. Dist.,
650 F.3d 205 (3d Cir. 2011).....21

Mahanoy Area School District v. B.L.,
141 S. Ct. 2038 (2021)..... 1, 4, 5, 8, 9, 13, 19, 22, 23, 24, 25, 26, 28

McKinney v. Huntsville Sch. Dist.,
350 F. Supp. 3d 757 (W.D. Ark. 2018).....17, 19

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918 F.3d 700 (9th Cir. 2019).....15, 18

Meyer v. Nebraska,
262 U.S. 390 (1923).....5

Morse v. Frederick,
551 U.S. 393 (2007).....7, 17
Plyler v. Doe,
457 U.S. 202 (1982).....5, 6

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508 F.3d 765 (5th Cir. 2007).....16, 17, 18

Pulaski County Spec. Sch. Dist.,
306 F.3d 616 (8th Cir. 2002) 18

Reihm v. Engelking,
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R.L. v. Cent. York Sch. Dist.,
183 F. Supp. 3d 625 (M.D. Pa. 2016).....19

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894 F. Supp. 2d 1128 (D. Minn. 2012).....21

S.J.W. v. Lee's Summit R-7 Sch. Dist.,
696 F.3d 771 (8th Cir. 2012) 19

Spero v. Vestal Cent. Sch. Dist.,
427 F. Supp. 3d 294 (N.D.N.Y. 2019).....16, 17, 18

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307 F.3d 243 (3d Cir. 2002).....22

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713 F.3d 25 (10th Cir. 2013).....22

Tinker v. Des Moines Indep. Comm. Sch. Dist.,
393 U.S. 503 (1969)..... 3, 4, 5, 8, 10, 11, 12, 13, 17, 19, 20, 22, 23, 24, 25, 28

T.V. v. Smith-Green Comm. Sch. Corp.,
807 F. Supp. 2d 767 (N.D. Ind.) 21

Watts v. United States,
394 U.S. 705, 708 (1969).....14

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406 U.S. 205 (1972).....7

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494 F.3d 34 (2nd Cir. 2007).....16, 18

Wynar v. Douglas Cnty. Sch. Dist.,
728 F.3d 1062 (9th Cir. 2013) 16, 18, 20

STATUTES AND REGULATIONS:

Federal Statutes

20 U.S.C. §§ 1400 et seq (2021).....6

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STATEMENT OF IDENTITIES AND INTEREST OF *AMICI CURIAE*

Amicus Curiae National School Boards Association (NSBA), founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations that represent locally elected school board officials serving approximately 51 million public school students regardless of their disability, ethnicity, socio-economic status or citizenship, NSBA advocates for equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before federal and state courts, and has participated as *amicus curiae* in numerous cases addressing the First Amendment, including *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021).

Joining as *amici* are state school boards associations in this Circuit. *Amici* seek to inform the court about the interest of their members in preserving pre-*Mahanoy* case law recognizing their authority to address student speech that implies impending harm to a group of people.

The Colorado Association of School Boards (CASB) was established in 1940 to provide a structure through which school board members could unite in their efforts to promote the interests and welfare of Colorado's school districts. Its membership includes nearly all of Colorado's 178 public school districts, including the Cherry Creek School District.

The Kansas Association of School Boards (KASB) is a nonprofit organization dedicated to providing education services to 325 educational entities, including locally elected school boards.

The New Mexico School Boards Association (NMSBA) is the member organization for all of New Mexico's school boards to support their efforts in providing a quality education for all students of New Mexico. Its members comprise one hundred percent of the state's eighty-nine school boards.

The Oklahoma State School Boards Association (OSSBA) is a non-profit association that works to promote quality public education for the children of Oklahoma through training and information services to the state's approximately 2,700 locally elected school board members. Its membership consists of all of the boards of education of local public school districts in the State of Oklahoma.

The Utah School Boards Association (USBA), as set forth in Utah Code 53G-4-502, "is recognized as an organization and agency of the school boards of Utah and is representative of those boards." USBA builds highly qualified leaders by empowering locally elected school boards with the knowledge, skill, and quality services to advocate for public education and govern with excellence.

The Wyoming School Boards Association's (WSBA) is dedicated to improving educational opportunities for all of Wyoming's public school students through the improvement of local school board governance. Its members are the 48

school districts across Wyoming, consisting of 338 board members and representing all public schools in Wyoming.

FRAP 29(a)(2) STATEMENT

All parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

Before social media, cell phones, or the Internet, at the height of the War in Vietnam, the Supreme Court ruled that the First Amendment's free speech guarantee shielded public school students from discipline for silent, non-disruptive on-campus expression that did not interfere with the rights of others. "But," the Court held, "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker v. Des Moines Indep. Comm. Sch. Dist*. 393 U.S. 503, 513 (1969)(citation omitted). *Tinker* remains a pillar of free speech jurisprudence in the public school context. It has been cited in 2,493 decisions, including a handful of subsequent rulings by the High Court.[1] Its standard has been incorporated into student conduct codes and state anti-bullying laws, and applied daily by school administrators in innumerable factual scenarios – from political statements to verbal attacks to obscene rants to offensive jokes – both online

[1] Westlaw.com, last searched November 4, 2021.

and in-person.

For over fifty years, courts have applied *Tinker* in multiple student speech contexts, and it has stood because its two-pronged inquiry makes sense in the school environment. Courts regularly apply *Tinker* in off-campus online student speech cases, generally requiring school officials to show substantial disruption to the school environment or reasonable forecast thereof, or interference with the rights of other students or staff to justify discipline. Just months ago, in *Mahanoy Area School District v. B.L.*, 141 S.Ct. 2038 (2021), the High Court articulated the contours of *Tinker*'s application to off-campus online speech. Far from overruling *Tinker* or finding that it had no bearing in the analysis of school officials' actions with respect to B.L.'s off-campus online post, the Court ruled that the "special characteristics" of concern to school officials are *diminished* when students are not in school activities. *Id.* at 2045 (emphasis added). Those interests do not disappear, however: "The school's regulatory interests remain significant in some off-campus circumstances." *Id*. In this way, *Mahanoy* preserved the *Tinker* framework, but also articulated its limits in the off-campus online speech context. It directed schools to consider three features of off-campus speech: (1) the extent a school stands in loco parentis; (2) effect on students' ability to engage in political or religious speech that occurs outside a school program or activity; and (3) the school's interest in protecting a student's unpopular expression. *Id*. at 2046.

Here, the District Court applied *Tinker* consistently with existing caselaw and reached a decision consistent with *Mahanoy*. B.L.'s speech, adolescent venting alluding to a school activity, and the disruption it caused, mostly within the cheer squad, is categorically different from C.G.'s speech in this case. C.G.'s self-described "joke" suggested imminent violence against a historically-persecuted people. Courts have regularly given schools leeway to address imperiling speech such as this, especially in communities with histories of tension or violence. *Mahanoy* did not directly address this precise type of speech but suggested that school officials retain an interest in regulating threats and harassment.

As this court applies the *Tinker/Mahanoy* framework, *amici* urge it to consider the long line of cases interpreting *Tinker* in the off-campus speech context, the extent to which *Mahanoy* offers clues about schools' reach in cases like this, and the effect of this ruling in schools throughout the circuit.

ARGUMENT

I. After *Mahanoy*, *Tinker* Remains the Framework for Analysis of Public School Authority With Respect to Student Speech.

The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler v. Doe*, 457 U.S. 202,

221 (1982).

Public schools have simple criteria for admission: age and residence. In Colorado, public schools are open to resident children between the ages of six and twenty-one who have not received a high school diploma. Colo. Rev. Stat. § 22-1-102(1) (2020). Public schools are open to children from any and all racial, ethnic, religious, cultural, social, and socio-economic backgrounds, regardless of immigration status,[2] language barriers,[3] physical challenges,[4] and educational challenges.[5] 20 U.S.C. §§ 1400, *et seq*. (2021).

Public schools, however, must be more than open. They must be *welcoming* to *all* students. And it is not enough that staff members be welcoming; students must be, too. Staff must create an environment in which students understand that they must treat each other with respect and understanding regardless of the divisions that may exist in the larger society or immediate community.

"Families entrust public schools with the education of their children,"[6] but that trust is conditional:

> School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children

[2] *Plyler*, 457 U.S. at 230.
[3] *Lau v. Nichols*, 414 U.S. 563 (1974).
[4] 42 U.S.C. § 12132 (2021); 29 U.S.C. § 794 (2021).
[5] 20 U.S.C. §§ 1400 *et seq*. (2021).
[6] *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

> associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted.

Morse v. Frederick, 551 U.S. 393, 424 (2007) (Alito, J., concurring). The "public expects its schools not simply to teach," but also to maintain "a school environment that is safe and encourages learning. *Bd. of Educ., v. Earls*, 536 U.S. 822, 840 (2002) (Breyer, J., concurring).

Public schools are "vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system." *Bd. of Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982). Students enter school as children with the fallibilities and vulnerabilities of youth filtered through their individual and family experience. The challenge for educators is to create and maintain an environment in which all children can prepare to "participate effectively and intelligently in our open political system." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). The learning environment, just as the open political system in which students will live, must tolerate the expression of unpopular ideas to encourage thorough debate. But there is a crucial difference between tolerance of unpopular ideas and intolerance of unpopular peoples.

Creating a welcoming environment, and maintaining parental trust in that environment, requires school officials to make difficult judgment calls based upon

their educational experience and an understanding of the local educational community. "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

This case presents a question of vital importance to *amici*: to what extent does the First Amendment permit federal courts to second-guess the judgment calls made by educators to maintain the safety and integrity of the educational environment?

Briefing in this case was abated pending the Supreme Court's decision in *Mahanoy School District v. B.L.*, 141 S.Ct. 2038 (2021), issued on June 23, 2021. This court may be the first appellate court to apply the principles articulated in *Mahanoy*.[7]

A. *Tinker* Provided a Practical, Workable Standard Used by Courts and School Officials Throughout the Nation.

The question presented in *Mahanoy* was straightforward: "Whether *Tinker v. Des Moines Independent Community School District* . . . applies to student speech that occurs off campus." *Mahanoy*, 141 S. Ct. at 2044, *quoting* Pet. For Writ of

[7] The First Circuit currently is considering off-campus online speech in a different scenario. *Doe v. Hopkinton Sch. Dist.*, No. 1950 (1st Cir. Filed Oct. 14, 2020).

Cert., p. I (citation omitted). Thus, any understanding of *Mahanoy* must begin with *Tinker*.

In *Tinker*, two students were suspended for wearing black armbands to school to express their disapproval of the war in Vietnam, a topic of intense societal controversy. 393 U.S. at 504. The Court overturned the students' suspension, holding that First Amendment rights are available to teachers and students, but recognized that First Amendment rights must be "applied in light of the special characteristics of the school environment." *Id.* at 506. The Court articulated two circumstances when school officials may regulate student speech. First, school officials may regulate student speech that causes, or can be reasonably forecast to cause, a material and substantial disruption of the school environment. *Id.* at 514. Second, school officials may regulate student speech that "impinge[s] upon the rights of other students." *Id*. at 509. The Court repeatedly described these two circumstances as independent grounds. *Id*. at 508 (no evidence that students' speech caused an "interference, actual or nascent, with the schools' work ***or*** of collision with the rights of other students to be secure") (emphasis added); *id*. ("this case does not concern speech or action that intrudes upon the work of the schools ***or*** the rights of other students") (emphases added); *see also id*. at 509 ("record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school ***or*** impinge upon

the rights of other students.") (emphasis added); *id.* at 513 (student "may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school ***and*** without colliding with the rights of others.") (emphasis added); *id.* at 514 (plaintiffs "neither interrupted school activities nor sought to intrude in the school affairs ***or*** the lives of others.") (emphasis added).

The first scenario, substantial disruption, is fact-intensive. *A.N. v. Upper Perkiomen Sch. Dist.*, 228 F. Supp.3d 391, 398 (E.D. Penn. 2017). The *Tinker* Court examined the manner of the students' expression (silent), the nature of the speech (political), and the effect on the school environment (negligible). The second scenario, interfering with the rights of others, is straightforward. A student may be sent to the principal's office, and then home, for calling a classmate "fatso," "four-eyes," or an ethnic slur even if the remark did not disrupt the larger school environment. Thus, while the First Amendment permitted John and Mary Beth Tinker to wear black armbands to school, it did not empower them to whisper in the ear of a classmate whose older sibling was wounded in Vietnam, "Your brother's a baby killer."

Tinker has held up well over the years largely because its standards are phrased in terms that educators can apply in their everyday experience. Educators

can distinguish between a minor disruption and a substantial disruption. They recognize when one student is interfering with another.

Nonetheless, the special characteristics of the school environment have grown more complex. *Tinker* was decided when the provisions, protections, and enforcement mechanisms of Title VI of the Civil Rights Act prohibiting discrimination based on race, color, and national origin were in their infancy. 42 U.S.C. § 2000d *et seq.* (2021), Pub. L. 88-352 Title VI, § 601, July 2, 1964, 78 Stat. 252. It was decided before Title IX of the Education Amendments of 1972 prohibited discrimination based on sex, a prohibition now extending to more complex issues of sexual orientation and identity. 20 U.S.C. § 1681(2021), Pub. L. 92-318, Title IX, § 901, June 23 1972, 86 Stat. 373. It was decided before cell phones, the internet, and social media enhanced the reach of student speech through a ubiquitous, 24/7 virtual environment. It also was decided before school shootings became a recurring nightmare in our educational consciousness.[8]

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[8] Colorado has experienced its share of such nightmares, most notably, the attack on Columbine High School, twelve miles west of Cherry Creek High School. There have been five school shootings that resulted in casualties in Colorado since Columbine. In 2006, a gunman entered Platte Canyon High School, took six hostages, and killed one student. Associated Press, *Bailey Shooting Investigators Release Timeline*, ABC 7 News (Oct. 11, 2006), https://web.archive.org/web/20061023002516/https:/www.thedenverchannel.com/news/10050373/detail.html. In 2010, a shooter opened fire on students outside Deer Creek Middle School, seriously wounding two students. Howard Pankratz, Kevin Vaughan and Joey Bunch, *2 students shot, 1 man arrested at Deer Creek*

Tinker's aphorism that students do not "shed their constitutional rights . . . at the schoolhouse gate,"[9] does not create a geographic boundary for constitutional principles or the jurisdiction of school officials. Historically, schools "consistently followed" the principle that "any act of a pupil detrimental to the orderly discipline or well-being of the school, regardless of where committed, is of legitimate concern to the school." M. R. Sumption, *The Control of Pupil Conduct by the School*, 20 L. & Contemp. Probs. 80, 85 (1955), Available at: https://scholarship.law.duke.edu/lcp/vol20/iss1/7/. Consistent with that understanding, Colorado law provides that school officials may discipline students for "behavior on ***or off*** school property that is detrimental to the welfare or safety of

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Middle School, The Denver Post (Published: Feb. 23, 2010 Updated: May 6, 2016), https://www.denverpost.com/2010/02/23/2-students-shot-1-man-arrested-at-deer-creek-middle-school/. Later that year, a student at Aurora Central High was paralyzed when she was caught in gang-related gun fire. https://www.denverpost.com/2010/12/06/female-student-17-shot-outside-aurora-central-high-school/. In 2013, an Arapahoe High School student, upset with the school's forensics team, shot and killed a classmate. Sadie Gurman, Kirk Mitchell and Jeremy P. Meyer, *Arapahoe High School shooting: Gunman intended to harm many at school*, The Denver Post (Published: Dec. 14, 2013 Updated: Jun. 3, 2016), https://www.denverpost.com/2013/12/14/arapahoe-high-school-shooting-gunman-intended-to-harm-many-at-school/.
In 2019, two students opened fire in a charter school classroom, injuring eight students and killing one. Claire Cleveland, *STEM School Shooter Sentenced To Life Without Parole*, CPR News (Sept. 17, 2021), https://www.cpr.org/2021/09/17/stem-school-shooter-sentenced-life-without-parole/.

[9] *Tinker*, 393 U.S. at 506.

other pupils or of school personnel." Colo. Rev. Stat § 22-33-106(1)(c) (2020) (emphasis added). Educators focusing on the effect on the school environment, not the location of the speakers, is no more controversial than antitrust regulators focusing on the effect of an agreement on the relevant geographical market rather than on where the agreement was reached.

As a result, prior to *Mahanoy*, lower courts analyzed off-campus online speech cases using *Tinker*'s standard focusing on the effect of the posting on the educational environment, not on the location of the student when he or she created the post.

B. Courts Regularly Applied *Tinker* in Off-Campus Online Speech Cases Prior to *Mahanoy.*

Educators have no desire to police the after-hours speech or conduct of students. Outside school and school-related activities, educators tend to their own families, rather than monitor other people's children. Thus, off-campus online speech cases originate not with staff members policing the internet, but with a member of the community contacting school officials with a concern that may affect the school environment. If the concern does not affect the school environment, the community member is told that he or she is free to call the offending child's parents on their own, advice that does not give rise to a constitutional cause of action. If, however, the posting may affect the school environment, the school has the responsibility to investigate and address the issue often before the start of the next

school day. The investigation may require coordinating with law enforcement, public agencies, or community partners. Educators must consider how the post intersects with the recent events and history of the school community. If the school knows about the post, the larger community almost certainly knows about it as well. Educators must consider what message, if any, should be sent to the community.

Once the school knows about the offending speech, investigates, considers its effects and community context, it determines what, if any, discipline should result based on factors including the applicable code of conduct. Common characteristics are shared by the many student speech cases considered by courts in recent years. Cases involving student off-campus online speech fall into three general categories: (1) speech that is perceived as imperiling school safety; (2) speech that targets students, or groups of students, for harassment; and (3) speech that reflects the impulses of adolescence. The level of deference that courts afford to educators varies depending on the context of the cases.

1. Imperiling Speech

While true threats always have been beyond the protection of the First Amendment,[10] educators are expected to prospectively identify and address speech that may signal an unsettled mind drifting toward violence: "[T]he specter of school violence places a weighty social responsibility on school districts to insure that

[10] *Watts v. United States*, 394 U.S. 705, 708 (1969).

'warning signs' do not turn to tragedy." *McNeil v. Sherwood Sch. Dist.*, 918 F.3d 700, 708 (9th Cir. 2019). Colorado statutes impose a duty upon educators to protect students from third-party harm that is reasonably foreseeable. Colo. Rev. Stat. § 24-10-106.3(3) (2021). The question for educators is whether a student's particular expression makes future violence reasonably foreseeable. *See Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1146-1147 (D. Colo. 2001) (discussing claims against Columbine educators based on an alleged failure to predict and prevent future harm based on student speech). Criminologists refer to such expressions as "leakage."

> "Leakage" occurs when a student intentionally or unintentionally reveals clues to feelings, thoughts, fantasies, attitudes, or intentions that may signal an impending violent act. These clues can take the form of subtle threats, boasts, innuendos, predictions, or ultimatums. They may be spoken or conveyed in stories, diary entries, essays, poems, letters, songs, drawings, doodles, tattoos, or videos.

Mary Ellen O'Toole, *The School Shooter: A Threat Assessment Perspective*, National Center for the Assessment of Violent Crime, Federal Bureau of Investigation (1999), available at: https://files.eric.ed.gov/fulltext/ED446352.pdf. The determination as to whether a particular student expression represents leakage, which must be made in real time, is particularly perilous because the correctness of the decision will be measured in hindsight. People are more likely to believe that an event was foreseeable if they are aware of the outcome. B. Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 Journ. of Experimental Psych. 288 (1975),

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1743746/pdf/v012p00304.pdf. The more severe the negative outcome of an event, the more likely people will believe that the event was foreseeable. Erin M. Harley, *Hindsight Bias in Legal Decision Making*, 25 Social Cognition 43 (2007), https://doi.org/10.1521/soco.2007.25.1.48.

The true threat doctrine, therefore, is ill-suited to assessing the potential meaning of stories, essays, poems, song lyrics, or drawings. As a result, prior to *Mahanoy*, courts routinely measured educators' responses to ominous student expression against *Tinker*'s considerations, not the true threat doctrine. *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1068-70 (9th Cir. 2013) (discussing cases); *D.J.M. v. Hannibal Publ. Sch. Dist.*, 647 F.3d 754, 765-66 (8th Cir. 2011); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770-71 (5th Cir. 2007); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2nd Cir. 2007); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *Spero v. Vestal Cent. Sch. Dist.*, 427 F. Supp. 3d 294, 305 (N.D.N.Y. 2019); *A.N. v. Upper Perkiomen Sch. Dist.*, 228 F. Supp. 391 (E.D. Penn. 2017); *R.L. v. Cent. York Sch. Dist.*, 183 F. Supp. 3d 625, 640 (M.D. Pa. 2016); *Boim v. Doe v. Fulton Cnty Sch. Dist.*, 2006 WL 2189733, *3-4 (N.D. Ga. 2006).

It is easy for a student to deflect the impact of his words by maintaining that "it's just a joke," but school officials accept such deflections at face value at peril to their students and themselves. *See* Trent Siebert, *Klebold Essay Foretold*

Columbine, Chillingly, Denver Post, November 22, 2000, found at https://extras.denverpost.com/news/col1122e.htm (when teacher confronted Columbine shooter Dylan Klebold about story describing a gunman in a trench coat shooting young people, he responded, "It's just a story."). Therefore, courts addressing off-campus online speech agree that "the focus of the inquiry is not on the speaker's intent in making the communication." *McKinney v. Huntsville Sch. Dist.*, 350 F. Supp. 3d 757, 767-68 (W.D. Ark. 2018). The "prevailing norm" is that "*Tinker*'s focus is on the result of the speech rather than its content." *Ponce*, 508 F.3d at 770. *See also Morse*, 551 U.S. at 425 (Alito, J., concurring) ("due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence" than governments have in other settings). As the Fifth Circuit held: "We, therefore, find it untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of [a student's diary depicting a Columbine-style attack on school] would not have taken some action based on its violent and disturbing nature," notwithstanding the student's protest that his writing was a "work of fiction." *Ponce*, 508 F.3d at 771, n. 3.

"A threat of violence, even if remote, satisfies the *Tinker* substantial disruption standard." *Spero*, 427 F. Supp. 3d at 305. "Courts have allowed wide leeway to school administrators disciplining students for writings or other conduct

threatening violence." *Cuff v. Valley Central Sch. Dist.*, 677 F. 3d 109, 114 (9th Cir. 2012) (affirming order granting summary judgment to school district that suspended ten-year-old student for crayon drawing of astronaut expressing desire to blow up the school, noting that a "failure to respond forcefully to the 'wish' might have led to a decline of parental confidence in school safety"). *See also McNeil*, 918 F.3d at 708 (affirming order granting summary judgment that expelled student who wrote a hit list in his private journal); *Wynar*, 728 F.3d 1062 (affirming order granting summary judgment to school district that suspended student for sending instant message that hinted at school shooting); *D.J.M.*, 647 F.3d 754 (affirming order granting summary judgment to school district that disciplined student who instant-messaged a friend his desire to kill classmates); *Reihm v. Engelking*, 538 F.3d 952 (8th Cir. 2008) (affirming order granting summary judgment to county requiring student who submitted essay echoing Columbine to undergo mental health evaluation, finding true threat); *Ponce*, 508 F.3d 765 (vacating injunction entered in favor of student who depicted a Columbine-style attack in journal that he shared with a friend); *Wisniewski*, 494 F.3d 34 (2nd Cir. 2007) (affirming order granting school district's motion to dismiss suit brought by student who created instant messaging icon stating "Kill Mr. Vandermolen."); *Pulaski County Spec. Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (en banc) (reversing order voiding expulsion of student who wrote violent letter to ex-girlfriend); *Spero*, 427 F. Supp. 3d at 305 (granting

summary judgment to school district that suspended a student who, following a disciplinary sanction, posted an image of a woman holding a gun); *McKinney v. Huntsville Sch. Dist.*, 350 F. Supp. 3d 757 (W.D. Ark. 2018) (denying preliminary injunction to student who posted photo of himself wearing trench coat and holding a weapon); *A.N.*, 228 F. Supp. 391) (denying preliminary injunction to student expelled for posting ominous video); *R.L.*, 183 F. Supp. 3d at 629-30 (granting summary judgment to school district that suspended student who, following unrealized bomb threat, posted as a joke, "Plot twist, bomb isn't found, goes off tomorrow."); *Boim v. Doe v. Fulton Cnty Sch. Dist.*, 2006 WL 2189733 (N.D. Ga. 2006) (granting summary judgment to school district that suspended student for story in notebook about shooting teachers).

2. Harassing Speech

Prior to *Mahanoy*, Courts routinely applied *Tinker* in cases involving off-campus online speech that harassed a student or group of students. *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142 (9th Cir. 2016) (affirming district court order granting summary judgment to school district's suspension of student for sexually harassing student off campus based on *Tinker*'s "rights of others" consideration); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012) (reversing grant of preliminary injunction to students suspended after creating a website with racially offensive and sexually related posts); *Doe v. Hopkinton Sch. Dist.*, 490 F. Supp. 3d

448 (D. Mass 2020) (granting summary judgment to school district that suspended students for online harassment under *Tinker*'s invasion of rights standard); *A.S. v. Lincoln County R-III School District*, 429 F. Supp. 3d 659 (E.D. Mo. 2019) (granting Rule 12(c) motion to school district that suspended student for posting image of classmate who suffered from depression in a casket).

Many of the same considerations that apply in ominous speech classes apply in these cases. Educators can incur liability for failing to act in the face of student harassment. *A.S.*, 429 F. Supp. at 671. The same analytical considerations apply: "The test is an objective one, focusing on the reasonableness of the school administration's response, not the intent of the student," making a student's after-the-fact characterization of the posting as a joke "irrelevant." *Id.* at 670; *see also Doe*, 490 F. Supp. 3d at 459.

In cases involving student off-campus online speech that harassed or bullied an individual student or group of students, courts gave wide deference to school officials' disciplinary decisions. *See, e.g., Wynar*, 728 F.3d at 1069-70 (schools must be "allow[ed] to protect their students" from off-campus threats of violence, and students should be encouraged to report such speech to school authorities); *Kowalski*, 652 F.3d at 572, 574 ("[j]ust as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use . . .

schools have a duty to protect their students from harassment and bullying," which requires them to be able to address off-campus incidents).

3. Adolescent Speech

In contrast to the foregoing categories of cases, school districts are afforded less leeway when they discipline students for off-campus online speech that reflects the immaturity of youth -- whether it is students are posting snarky things about a classmate,[11] fabricating an insulting MySpace profile of a school principal,[12] posting photos from a slumber party,[13] criticizing a teacher,[14] or complaining about a hall monitor. *R.S. v. Minnewska Area Sch. Dist.*, 894 F. Supp. 2d 1128 (D. Minn. 2012). The bottom line of these cases is that an angry parent or staff member demanding retribution for an insult is not a material and substantial disruption of the school environment.

The District Court here aptly applied pre-*Mahanoy* case law to determine that a direct threat is not necessarily required to find "substantial disruption" resulting from a student's online off-campus speech. It declined to so narrow *Tinker* in the off-campus speech context because it would "be contrary to the Tenth Circuit's analysis of substantial disruption, which requires not a threat of physical harm but

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[11] *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010).
[12] *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011).
[13] *T.V. v. Smith-Green Comm. Sch. Corp.*, 807 F. Supp. 2d 767 (N.D. Ind.).
[14] *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

merely 'a "concrete threat" of substantial disruption.'" (citing *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 37 (10th Cir. 2013) (quoting *Sypniewski v. Warren Hills Regional Bd. of Educ*., 307 F.3d 243, 262 (3d Cir. 2002)).

Unlike cases in which courts overturned school discipline for speech that constituted a mild distraction or petty disagreement, or caused temporary embarrassment or discomfort, this case involves anti-Semitic comments suggesting violence. Even if they were intended as a joke, the district Court determined, such comments "cause a far more insidious disruption…. It was foreseeable that an anti-Semitic attempt at humor might cause substantial disruption to the learning environment." 477 F.Supp.3d 1194, 1209 (D. Colo. 2020).

II. In *Mahanoy*, The Supreme Court Explained How Courts Can Assess School Authority to Regulate Off-campus Online speech under *Tinker*; It Did Not Abrogate Existing Caselaw.

Mahanoy was a straightforward adolescent speech case. The plaintiff, B.L., was not selected for the varsity cheerleading team. *Mahanoy*, 141 U.S. at 2043. Angry and disappointed, she posted a photograph of herself and a friend with raised middle fingers and the caption "Fuck school fuck softball fuck cheer fuck everything." *Id.* The school administration, prompted by the team coaches, suspended B.L. from the cheerleading squad. *Id.* B.L. sued the school district. *Id.* The district court, consistent with prevailing practice described above, applied *Tinker*, ruling in favor of B.L., finding that her post did not cause a material and

substantial disruption of the educational environment. *Id.* at 2044. The school district appealed.

Rather than affirm the district court's decision as a proper application of *Tinker*, two judges announced that they would "forge our own path." *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 188-89 (3d Cir. 2020), *aff'd in part*, 141 U.S. 2038 (2021). The majority chose to draw a bright line: "*Tinker* does not apply to off-campus speech and thus cannot justify the decision to punish B.L." *Id.* at 191. The third judge concurred, declining to join the new "path" removing off-campus student speech from *Tinker*'s reach: "*Tinker* and its progeny . . . dictate that the School District violated B.L.'s First Amendment rights. That is all we had to say." 964 F.3d at 196 (Ambro, J., concurring).

The School District asked the Supreme Court to decide whether *Tinker* applies to student speech that occurs off campus. The Court agreed to do so. *Mahanoy*, 141 S. Ct. at 2044.

B.L. and supporting *amici* urged the Court to hold that student speech that occurs off-campus should be measured not by *Tinker*, but by First Amendment doctrines such as true threats, obscenity, defamation, and fraud. *Mahanoy Area Sch. Dist. v. B.L.*, case no. 20-255, Brief of Respondent, pp. 25-28; Brief of Pacific Legal Foundation, p. 12; Brief of Foundation for Individual Rights in Education, p. 31. The Court rejected their invitation, holding: "Unlike the Third Circuit, we 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. The school's regulatory interests remain significant in some off-campus circumstances." *Mahanoy*, 141 S. Ct. at 2045. The first two circumstances identified by the Court were threats and harassment. *Id.*

The Court applied *Tinker,* referencing its two existing standards; "substantial disruption of learning-related activities ***or*** the protection of those who make up a school community." *Id.* (emphasis added). The court identified three features of off-campus speech to consider: (1) the extent to which school officials have stepped into the role of parents; (2) the extent to which the off-campus speech is subject to 24/7 regulation, especially if it is political or religious; and (3) the educational system's interest, as a "nursery of democracy," in protecting unpopular speech. *Id.* at 2046.

Applying *Tinker* and these considerations to the case before it, the Court found no evidence that school officials were standing in the shoes of parents. *Id.* at 2047. There was "no evidence of any effort to prevent students from using vulgarity outside the classroom." *Id*. In addition, there was no evidence of a substantial disruption and little evidence of a decline in morale on the cheer team.[15] *Id.* at 2048.

[15] The Court did not discuss whether B.L.'s post was political or religious in nature.

In the end, *Mahanoy* gave courts three features to consider in assessing off-campus online speech under *Tinker*, but clearly did not abrogate the *Tinker*-based case law that existed prior to the Court's decision. *A.F. v. Ambridge Area Sch. Dist.*, 2021 WL 3855900 (W.D. Pa. Aug. 27, 2021).

Mahanoy validates the district court's decision to apply *Tinker*. Thus, the only question is whether the lower court applied *Tinker* correctly.

C.G.'s primary argument is that his posting is indistinguishable from B.L.'s.[16] This case is different -- much different.

Nobody understood B.L.'s "fuck cheer" post as a reference, joking or otherwise, to sexual violence against cheerleaders. "Me and the boys bout to exterminate the Jews," on the other hand, explicitly refers to violence against a long-persecuted people who were, within living memory, targeted for extermination. In 2017, the Jewish people saw a torch-carrying crowd marching through the streets of an American city chanting, "The Jews will not replace us!" and in 2018 they lost eleven members who were gunned down in a synagogue.[17]

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[16] His secondary argument is that the district court failed to apply the Rule 12(b)(6) standard correctly, an issue that is beyond the scope of this amicus brief.

[17] Campbell Robertson, Christopher Mele and Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, The New York Times (Oct. 27, 2018), https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html.

B.L.'s post did not cause anyone to be fearful, to notify the police, or make any child afraid to go to school. The principal of B.L.'s high school did not have to send a letter to the school community reassuring the community about the safety of the school, or to devise a plan to escort B.L. into the building. B.L.'s post did not engender press coverage about school safety. B.L.'s school did not have to devote an hour of class time across the entire school population in response to her post. A hearing officer did not recommend B.L.'s expulsion.

Here, C.G.'s post went out on Friday night. By the time school officials were aware of the post, they learned that the post had been widely circulated throughout the Jewish community, that four families had contacted the police, that prominent cultural organizations had been alerted, and reminded that less than a year earlier, students from the same school had threatened to use assault weapons to shoot Jews.

Unlike Mahanoy Area School District, which made no effort to teach children to refrain from using profanity outside of school – the first *Mahanoy* consideration – Cherry Creek School District does teach that persecution of unpopular people is bad. As to the second *Mahanoy* consideration – was the speech political or religious – C.G. did not post a critique of Jewish influence in world politics or question Jewish religious teachings, and no one perceived it as such. Finally, as to the third *Mahanoy* consideration – the school's interest, as a nursery of democracy, in protecting unpopular speech – there is a difference between tolerance of unpopular ideas and

intolerance of unpopular peoples. Public education cannot teach the former if it does not respond to the latter. Indeed, the Chery Creek school board passed a policy on student expression recognizing students' rights to speak, but noting the board's obligation "to maintain proper discipline among students and create an effective learning environment." Student Expression Rights, Board Policy Code JICED Littleton Public Schools (Adopted Oct. 12, 2000, Revised Oct. 25, 2019) available at:

https://go.boarddocs.com/co/lpsco/Board.nsf/goto?open&id=8MAQ6667BB43#.

The policy prohibits students from presenting or publishing expression that "… creates a clear and present danger of the commission of unlawful acts, the violation of lawful school regulations, or the material and substantial disruption of the orderly operation of the school; …threatens violence to property or persons; attacks any person because of race, color, sex, age, religion, national background, disability, or handicap; tends to create hostility or otherwise disrupt the orderly operation of the educational process; advocates illegal acts of any kind, which create a sense of threat to the orderly operation of the educational environment." *Id*.

CONCLUSION

Before the Supreme Court provided guidance on the limits of public school officials' authority to address student online speech that occurs off-campus, the District Court in this case issued a sound decision consistent with reams of case law

interpreting *Tinker* in this context. That case law remains almost entirely intact after *Mahanoy*, especially in instances like this, where a student's online off-campus post suggested, perhaps "joked," that he and his classmates were going to kill people. *Amici* urge this court to consider the ramifications of preventing school officials from addressing student online speech that suggests, encourages, even jokes about violence toward a persecuted racial, ethnic, or religious group. Such was not the factual scenario in *Mahanoy*, but it is similar to those school officials face daily. *Amici* ask the court to uphold the District Court's ruling.

Respectfully submitted,

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Dated: November 18, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2021, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to counsel of all parties of record.

Date: November 18, 2021

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