

No. 20-255

IN THE
Supreme Court of the United States

MAHANoy AREA SCHOOL DISTRICT,

Petitioner,

v.

B.L., A MINOR, BY AND THROUGH HER
FATHER, LAWRENCE LEVY, AND HER MOTHER,
BETTY LOU LEVY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF OF *AMICI CURIAE* ELECTRONIC
FRONTIER FOUNDATION, BRENNAN
CENTER FOR JUSTICE AT NYU SCHOOL
OF LAW AND PENNSYLVANIA CENTER
FOR THE FIRST AMENDMENT IN
SUPPORT OF RESPONDENTS**

NAOMI GILENS

Counsel of Record

SOPHIA COPE

ELECTRONIC FRONTIER FOUNDATION

815 Eddy Street

San Francisco, CA 94109

(415) 436-9333

naomi@eff.org

Attorneys for Amici Curiae

301386



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICI CURIAE*¹

The Electronic Frontier Foundation (“EFF”) is a San Francisco-based, member-supported, nonprofit civil liberties organization that has worked for 30 years to protect free speech, privacy, security, and innovation in the digital world. With over 35,000 members, EFF represents the interests of technology users in court cases and policy debates regarding the application of law to the internet and other technologies.

The Brennan Center for Justice at NYU School of Law (“Brennan Center”) is a nonprofit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice.² The Center’s Liberty and National Security (“LNS”) Program uses innovative policy recommendations, litigation, and public advocacy to advance effective national security and law enforcement policies that respect the rule of law and constitutional values. The LNS Program’s interest in this case stems from its research and advocacy on monitoring the social media of vulnerable populations, including K-12 students.

The Pennsylvania Center for the First Amendment (“PaCFA”), one of the nation’s preeminent First Amendment

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

2. The Brennan Center for Justice is affiliated with New York University School of Law, but no part of this brief purports to represent the school’s institutional views.

research centers, was established by Pennsylvania State University in 1992 to promote awareness and understanding of the importance of freedom of expression. Today, PaCFA is a leader in education, research, and outreach concerning free expression and the free press in the United States. PaCFA provides educational programs, sponsors speakers, publishes books and articles, and serves as a media resource on a wide array of First Amendment topics.

SUMMARY OF ARGUMENT

Statements made by students on social media when they are off campus should be fully protected by the First Amendment. The First Amendment should protect the rights of students to speak in their communities at large to the same extent it protects speech by adults. This should be true regardless of whether a student's speech occurs at a protest, in an op-ed, in a private conversation, or online, including on social media. This should also be true regardless of whether that speech is later brought onto campus by others.

This 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. This Court admonished that school administrators could not punish student speech unless it materially and substantially disrupted the school day, school officials reasonably forecast such a disruption, or the student speech invaded the rights of other students. In so doing, the Court sharply limited the censorial power of school officials. *See id.* at

513-14. To now read *Tinker* as creating a path for school administrators to punish student speech *outside* the schoolhouse gate would distort this Court’s long-standing free speech shield into a censorial sword.

Making clear that *Tinker*’s narrow exception—allowing public schools to punish constitutionally protected on-campus student speech only in specific, enumerated circumstances—does not also allow schools to punish students’ protected, off-campus speech is especially important today. As social media has become central to young people’s lives, schools have also increasingly sought to monitor and punish off-campus student speech via these new communications channels. Expanding *Tinker*’s exception to allow schools to police off-campus student speech would chill students from engaging in valuable, constitutionally protected expression, both online and offline.

Amici write to respectfully encourage this Court to hold that the narrow exception established in *Tinker* does not apply to students’ off-campus speech, thereby limiting the ability of public schools to reach into and regulate the private lives of students.

ARGUMENT

I. THE *TINKER* EXCEPTION SHOULD NOT ALLOW PUBLIC SCHOOLS TO PUNISH STUDENTS’ OFF-CAMPUS SPEECH

More than 50 years ago, this Court in *Tinker* made clear that the First Amendment protects the free speech rights of students and teachers. 393 U.S. 503, 506 (1969).

This 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 this 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 school officials cannot punish students for their constitutionally protected on-campus speech, except in a narrow set of exceptional circumstances: when school officials can demonstrate that (1) a student’s expression actually caused a material and substantial disruption on school premises, or school officials reasonably forecast such a disruption; or (2) the expression invaded the rights of others. *Tinker*, 393 U.S. at 513-14. *Tinker* made clear that the authority to punish speech in those circumstances is a limited exception to the general free speech protections that public-school students, like all Americans, enjoy against government policing of their speech, arising out of the particular government interest in being able to “prescribe and control conduct *in the schools*.” *Id.* at 506-07 (emphasis added).

Nothing in *Tinker* or its progeny suggests that its exception may apply to speech that students utter in their private lives outside of school. *Amici* urge this Court to adopt a bright-line rule that *Tinker*’s exception does *not* apply to off-campus speech, irrespective of whether that speech occurs online or offline. It is essential that courts “pursue *ex ante* clarity,” both “to avoid chilling potential speech and to give government officials notice of the

constitutional boundaries they may not cross.” *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 188 (3d Cir. 2020).

A. Since *Tinker*, This Court Has Recognized Public Schools’ Authority to Punish Student Speech Exclusively in the Context of On-Campus Speech

Tinker involved students’ expressive activity at school—wearing black armbands to school to protest the Vietnam War—and its exception must be considered in light of these facts. *See* 393 U.S. at 504. In each of three post-*Tinker* cases, this Court identified additional, discrete areas where schools may regulate students’ speech at school or during school activities, without showing that the speech caused a substantial disruption or interfered with the rights of others. None of these cases presented the precise question now at issue—that is, whether schools’ authority to punish students’ protected speech extends only to speech that occurs within the school setting.

But the Court in each case clearly assumed that this is so.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court upheld the punishment of a student who made lewd comments during an on-campus assembly. Justice Brennan emphasized that the student could not have been penalized 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).

The Court reiterated this point two decades later in *Morse v. Frederick*, 551 U.S. 393 (2007), where the Court upheld a student’s punishment for speech promoting illegal drug use, delivered physically off campus but at a school-sponsored event. The Court noted that “[h]ad [the student] delivered the same speech in a public forum outside the school context, it would have been protected.” *Id.* at 405 (citing *Cohen v. California*, 403 U.S. 15 (1971)). By contrast, the student’s “First Amendment rights were circumscribed” only “in light of the special characteristics of the school environment.” *Id.* (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).

Finally, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court upheld the censorship of two articles that were to be published in the high school newspaper that was produced by students in a journalism class, holding that such speech may be regulated because it “might reasonably [be] perceive[d] to bear the imprimatur of the school.” *Id.* at 271. The 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).

This Court’s message has been clear: a school’s authority to restrict student speech is dependent on whether the speech occurs on school premises, at school-sponsored events, or otherwise bears the imprimatur of the school. But when outside of school, students stand on equal footing with other members of the public.

B. This Court Should Hold That *Tinker* Does Not Apply to Off-Campus Speech, Whether Online or Offline

Consistent with the foregoing precedent, this Court should hold that the limited exception established in *Tinker* does not allow public schools to punish students’ speech outside of the school context, regardless of whether off-campus speech occurs online or offline. Otherwise, particularly in the age of mobile technology and the internet, there would be no meaningful limitation to schools’ ability to reach into and regulate the private lives of students.

The Third Circuit correctly held below that *Tinker* categorically does not apply to off-campus speech.³

3. In holding that *Tinker* does not extend to off-campus speech, the Third Circuit did not suggest that schools are forbidden from regulating off-campus speech under any standard. *See Mahanoy*, 964 F.3d at 190-91 (noting that “our opinion takes no position on schools’ bottom-line power to discipline speech” that threatens violence or harasses others, and any regulation of student speech must “satisfy the appropriate level of scrutiny”).

Mahanoy, 964 F.3d at 189. This case involves a high school student who had posted a Snapchat story from a local store on the weekend using her personal cell phone—thus physically off campus and after school hours. In the Snapchat post, she shared a photo of herself and a friend with their middle fingers raised, accompanied by the caption, “Fuck school fuck softball fuck cheer fuck everything.” *Id.* at 175. The Third Circuit recognized that “[f]rom the outset, [the] *Tinker* [exception] has been a narrow accommodation.” *Id.* at 189. As such, the court correctly concluded that the school did not have the authority to punish the student for her weekend Snapchat post, even though the post had upset several students and violated school and cheerleading team rules. *Id.* at 176.

The Third Circuit acknowledged the challenges schools face in the digital age, but nevertheless underscored that “[r]ecent technological changes reinforce, not weaken, [the] conclusion” that schools may not punish off-campus speech via *Tinker*’s exception. *Id.* at 189. *See infra* Part II. The court rightly noted that “new communicative technologies open new territories where regulators might seek to suppress speech they consider inappropriate, uncouth, or provocative,” and stated that “we cannot permit such efforts, no matter how well intentioned, without sacrificing precious freedoms that the First Amendment protects.” *Mahanoy*, 964 F.3d at 189.

Thus, with the pervasive use of technology blurring the boundaries between students’ school and private lives, it is more critical than ever for courts to draw a clear line protecting off-campus speech. There is no doubt that the proliferation of mobile devices and social media has allowed students’ off-campus speech to be easily transmitted to classmates and available on classmates’

devices while at school. As a result, “when a student speaks in the ‘modern public square’ of the internet,” even when she does so from her own home, “it is highly possible that her speech will be viewed by fellow students and accessible from school.” *Id.* at 187 (citation omitted).

But a 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 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. *See id.* at 189 (defining off-campus speech as “speech that is outside schoolowned, operated, or -supervised channels and that is not reasonably interpreted as bearing the school’s imprimatur”). To be sure, a student who engages in unpopular or controversial online speech on a Saturday may draw opprobrium from his classmates come Monday—perhaps even causing a substantial disruption. But to allow the school to punish the student *for* the online speech the student engaged in outside of the school context would represent a seismic expansion of the school’s authority under *Tinker* to regulate student speech. Thus, in the digital age just as in the analog era, “a student’s online speech [should] not [be] rendered ‘on campus’ simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment.” *Id.* at 180.

Petitioner urges this Court to expand schools’ powers to punish student speech specifically because students can now use “social media platforms to instantaneously speak to hundreds of classmates.” Pet’r Br. at 38. In other words, Petitioner argues that because new technology allows

students to speak *more effectively*, students' online yet off-campus speech must be subject to regulation.

But the First Amendment applies even where new technologies amplify speech, along with all of its accompanying consequences. In 1997, this 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 this 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.

This approach has not changed in the nearly 25 years since. Indeed, this Court has repeatedly struck down laws intended to protect children from sexual predators online on First Amendment grounds. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). And as recently as 2017, this Court reiterated that “extreme caution” is necessary to avoid suggesting that “the First Amendment provides scant protection” online. *Packingham*, 137 S. Ct. at 1736.

Social media platforms, in particular, now “provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard, . . . allow[ing] a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’” *Id.* at 1737 (quoting *Reno*, 521 U.S.

at 870). But the reality of today’s internet does not justify expanding the government’s reach to control the content of speech online—including the reach of public schools to punish students for off-campus speech just because it was uttered online. The lesson from *Reno*, *Ashcroft*, and *Packingham* is clear: the First Amendment’s protections apply with full force to these powerful new channels for speech—and should continue to apply when public school students use them to speak while off campus.

II. LIMITING THE *TINKER* EXCEPTION TO ON-CAMPUS SPEECH IS CRITICAL GIVEN THE CENTRAL ROLE THAT SOCIAL MEDIA PLAYS IN YOUNG PEOPLE’S LIVES

It is essential that this Court make clear that the *Tinker* exception does not apply off campus in order to avoid chilling young people’s constitutionally protected online speech.

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 hours⁴—it is now far easier for off-campus student speech to be brought on-campus by someone other than the original speaker. But

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

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.

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.”⁵ 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.⁶ 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.⁷ Instagram, Snapchat, and TikTok are the most popular social media platforms for teenagers, with, respectively, 84 percent,

5. 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/>.

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

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

80 percent, and 69 percent of teenagers reporting use.⁸ Meanwhile, 34 percent of teenagers say that Snapchat is their favorite social media platform.⁹

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).¹⁰

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.¹¹ 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.¹² Indeed, this Court has

8. *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.

9. *Id.*

10. 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/>.

11. 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/>.

12. *Id.*

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 “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,¹³ a majority of whom are between the ages of 13 and 25.¹⁴

13. 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>.

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

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.¹⁵

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.¹⁶ The social media network can be a powerful platform for expression: a Republican hype house account, for example, has amassed over one million followers.¹⁷ A 17-year-old TikTok user who backed Sen. Sanders said, “I feel like I am making an impact on the election even though I can’t vote.”¹⁸

Other young people use social media to advocate for racial justice. Marley Dias, a teenage activist from Philadelphia, started the #1000BlackGirlBooks campaign

15. 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/>.

16. 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>.

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

18. Lorenz, *supra* n.16.

on social media in 2015, when she was just 11 years old, to raise awareness about the racial representation gap in children’s literature.¹⁹ Her goal was to collect and donate 1,000 books with a Black girl as the main character.²⁰ Since then, she has collected more than 9,000 books,²¹ and also written a book of her own about how young people can get involved in activism.²² 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.²³

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

19. 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>.

20. *Id.*

21. *Id.*

22. 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.

23. *Id.*

Instagram²⁴ that drew 10,000 participants.²⁵ Seventeen-year-old Simone Jacques similarly used Instagram to organize a Black Lives Matter protest of thousands in San Francisco.²⁶ 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.²⁷ Expressing an opposing view, University of Houston student Rohini Sethi wrote on Facebook, after five police officers were killed during a Black Lives Matter

24. 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).

25. Bennett, *supra* n.24.

26. 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>.

27. 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).

protest in Dallas, “Forget #BlackLivesMatter. More like AllLivesMatter.”²⁸

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.²⁹ 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 a government representative.³⁰ Since the Parkland

28. 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/>.

29. 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>.

30. Kayleigh Barber, *How Seventeen is Using Snapchat to Give Young Activists a Voice*, Folio (Mar. 5, 2018), <https://www.folio.com/2018/03/05/how-seventeen-is-using-snapchat-to-give-young-activists-a-voice>.

survivors started this movement, state legislatures have passed 67 bills aimed towards preventing gun violence, and gun control advocates have been elected to Congress.³¹

Students are also using social media to organize around climate activism.³² 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.³³ Her Facebook and Instagram accounts have collectively amassed over 3 million followers.³⁴ Before the COVID-19 pandemic, New York high school student Alexandria Villaseñor went on strike from school every Friday in order to demonstrate outside of the United Nations building.³⁵ Now confined

foliomag.com/how-seventeen-is-using-snapchat-to-give-young-activists-a-voice/.

31. Beckett, *supra* n.29.

32. 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/>.

33. 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>.

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

35. Carolyn Kormann, *New York's Original Teen-Age Climate Striker Welcomes a Global Movement*, New Yorker (Sept.

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.³⁶ 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.³⁷

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 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

21, 2019), <https://www.newyorker.com/news/dispatch/new-yorks-original-teen-age-climate-striker-alexandria-villasenor-greta-thunberg>.

36. 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/>.

37. 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/>.

institution, its administrators, and the student body.³⁸ 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.”³⁹

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 hours to post to social media).⁴⁰ Along with

38. 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>.

39. Black at Andover (@blackatandover), Instagram (June 15, 2020), https://www.instagram.com/p/CBei9lajhVt/?utm_source=ig_web_copy_link; see also Black at Grace (@blackatgrace), Instagram (June 13, 2020), https://www.instagram.com/p/CBZoo9kFNjT/?utm_source=ig_web_copy_link; Black at Grace (@blackatgrace), Instagram, (June 13, 2020), https://www.instagram.com/p/CBZlc8XlOsz/?utm_source=ig_web_copy_link.

40. 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/>.

the photo and video, Watters described the hallways as “jammed,” noting with disapproval the “10 percent mask rate” of the students.⁴¹ 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.⁴² 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.”⁴³

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

41. *Id.*

42. 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>.

43. 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, 2020), <https://www.cnn.com/2020/08/21/us/nyu-quarantine-student-meals-trnd/index.html>.

student in Texas, created an Instagram account called “fight_the_dress_code,” which posts stories of girls’ experiences with dress codes.⁴⁴ 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.⁴⁵

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.⁴⁶ To call attention to the impact of the restrictions, students around the country tagged photos of unappetizing school lunches with the hashtag #thanksmichelleobama.⁴⁷

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

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

45. 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>.

46. 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>.

47. *Id.*

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

Expanding *Tinker* to allow public schools to punish students for speech expressed off-campus and not as a participant in a school event would dramatically expand schools' power to police students' private lives and chill valuable student speech. As such, and in light of the foregoing, *amici* respectfully urge this Court to affirm the Third Circuit's judgment, hold that *Tinker*'s exception does not extend to off-campus speech, and make clear that when students use social media when they are off campus, the First Amendment applies with full force—just as it does for adults.

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NAOMI GILENS
Counsel of Record
SOPHIA COPE
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
naomi@eff.org

Attorneys for Amici Curiae