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

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Case No. 20-1950

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JOHN DOE, BY HIS MOTHER AND NEXT FRIEND, JANE DOE; BEN BLOGGS, BY  
HIS MOTHER AND NEXT FRIEND, JANE BLOGGS,

*Plaintiffs-Appellants,*

v.

HOPKINTON PUBLIC SCHOOLS,

*Defendant-Appellee.*

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ON APPEAL FROM A FINAL JUDGMENT ENTERED IN THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

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**BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION  
IN SUPPORT OF PLAINTIFFS-APPELLANTS  
AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

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

Dated: February 11, 2021

By: /s/ Sophia Cope

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## STATEMENT OF INTEREST<sup>1</sup>

*Amicus curiae* 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 broader policy debates regarding the application of law to the Internet and other technologies.

## INTRODUCTION

Statements made by students on social media when they are off-campus are fully protected by the First Amendment. The First Amendment protects the rights of students to speak in their communities at large to the same extent it protects speech by adults. This is 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 is also true regardless of whether that speech is later brought onto campus by others.

The Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), was a landmark victory for

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Plaintiffs have consented to the filing of this brief. Defendants have “no objection” to the filing of this brief.

student expression, acknowledging that students do not leave their free speech rights “at the schoolhouse gate.” *Id.* at 506. The Court’s admonition that school administrators could not punish student speech unless it actually and substantially disrupted the school day, facts reasonably led school officials to forecast a substantial disruption, or the student speech invaded the rights of other students, was a stark limitation on 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* distorts the Court’s free speech shield into a censorial sword. Making clear that *Tinker*’s narrow exception does not allow schools to punish students’ constitutionally protected, off-campus speech is especially important today, as social media is a vital medium for off-campus student expression. This Court should send a clear message to students and school administrators alike to ensure that students’ constitutionally protected off-campus speech is not chilled.

*Amicus* writes to encourage this Court to reach the question of whether the narrow exception established in *Tinker*—allowing schools to punish constitutionally protected student speech only in certain, narrowly delineated circumstances—applies to students’ off-campus speech at all. *Amicus* urges the Court to hold that it does not.

## ARGUMENT

### **I. SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS WAS IMPROPER BECAUSE THE DISTRICT COURT FAILED TO CONSIDER WHETHER PLAINTIFFS' SPEECH OCCURED ON CAMPUS**

#### **A. The *Tinker* Exception Does Not Allow Public Schools to Punish Students' Off-Campus Speech**

More than 50 years ago, the Supreme Court in *Tinker* made clear that the First Amendment protects the free speech rights of students and teachers. 393 U.S. 503, 506 (1969). The Court recognized that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution”—and that “[t]hey are possessed of fundamental rights which the State must respect.” *Id.* at 511. As the high 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 speech, and recognized only a narrow set of exceptional circumstances where school officials have some power to act: when school officials can demonstrate that (1) a student’s expression actually caused a substantial disruption on school premises; (2) facts reasonably led school officials to forecast a substantial disruption; or (3) the expression “invades the rights of others.” *See Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25 (1st Cir. 2020)

(citing *Tinker*, 393 U.S. at 513-14). The authority to punish speech in those circumstances is therefore a limited exception to the general free speech protections that public-school students, like all Americans, enjoy against government regulation of their speech. *See id.* at 23 (noting that “*Tinker* provides the framework for justifying the restriction of student speech that is otherwise protected”).

Nothing in *Tinker* or its progeny suggests that its exception may apply to students’ off-campus speech. *See infra* Part I.A.2-3.

*Amicus* urges 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 off. 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) (holding that *Tinker*’s exception does not apply to off-campus speech), *cert. granted*, 2021 WL 77251 (U.S. Jan. 8, 2021) (No. 20-255).

### 1. “Off-Campus” Speech Can Be Defined in the Internet Age

It is possible to define “off-campus” speech in the age of technology and the Internet. The district court in this case seemed to dismiss the importance, if not the very possibility, of crafting such a definition. *See Doe v. Hopkinton*, No. 19-11384,

2020 WL 5638019 at \*10 (D. Mass. Sept. 22, 2020) (questioning whether the off-campus analysis has “any meaning when analyzing messages sent from a mobile phone”).

With the pervasive use of technology blurring the boundaries between school and students’ private lives, it is more critical than ever for courts to draw a clear line defining off-campus social media speech. There is no doubt, however, that whether student speech is on or off campus is a question whose “difficulty has only increased after the digital revolution.” *Mahanoy*, 964 F.3d at 179. The proliferation of mobile devices and social media has allowed students’ off-campus speech to be easily transmitted to classmates and available on devices while at school. As a result, “when a student speaks in the ‘modern public square’ of the internet,” even when they do so from their own home, “it is highly possible that her speech will be viewed by fellow students and accessible from school.” *Id.* at 187 (citation omitted).

Consistent with Supreme Court precedent, *see infra* Part I.A.2, posting to social media while off school grounds or after school hours, and not at a school-sponsored event, should be considered off-campus speech. In *Mahanoy*, a case that involved off-campus social media speech on Snapchat, the Third Circuit similarly defined off-campus speech as “speech that is outside school-owned, -operated, or - supervised channels and that is not reasonably interpreted as bearing the school’s

imprimatur.” *Id.* at 189. Importantly, in the digital age just as in the analog era, “a student’s online speech is not 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. |

**2. Supreme Court Precedent Makes Clear That *Tinker*’s Exception for Regulating On-Campus Speech Does Not Extend to Students’ Off-Campus Speech<sup>2</sup>**

*Tinker* involved students’ expressive activity at school—wearing black armbands 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, the Supreme Court identified additional areas where schools may regulate students’ speech without showing that the speech caused a substantial disruption or interfered with the rights of others. Based on each of these three cases, it is clear that schools’ authority to punish students’ protected speech extends only to speech that occurs within the school setting.

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

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<sup>2</sup> The question is before the Supreme Court this term. *See Mahanoy Area Sch. Dist. v. B.L.*, 2021 WL 77251 (U.S. Jan. 8, 2021) (No. 20-255).

... 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.* (citing *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. 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,” and noted that schools may regulate certain speech “even though the government could not censor similar speech *outside the school.*” *Id.* at 266 (emphasis added). The Court held that school officials have the authority to regulate student speech in the context of “school-sponsored … expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Id.* at 271.

The Supreme Court’s message is 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.

**3. This Court Should Hold That *Tinker* Does Not Apply to Off-Campus Speech, and This Court’s Precedent Does Not Suggest Otherwise**

Looking to the foregoing Supreme Court precedent, this Court should hold that the limited exception established in *Tinker* does not allow public schools to regulate students’ speech outside of the school context. This Court would not be

alone in reaching this conclusion, particularly in the context of social media.

In *Mahanoy*, the Third Circuit held that *Tinker* categorically does not apply to off-campus speech. 964 F.3d at 189. The court considered 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 court recognized that “[f]rom the outset, [the] *Tinker* [exception] has been a narrow accommodation.” *Id.* at 189. As such, the court 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. 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.” *Id.*

It does not matter that the instant case involves bullying and Defendants' invocation of a school's right under *Tinker* to punish student speech that invades the rights of others. Whether a school invokes *Tinker*'s exception because that speech caused or may cause a substantial disruption, or invaded the rights of others, that only goes to the nature of the speech—and not whether that speech occurred from a *location* within the authority of the school. The district court heavily relied on this Court's decision in *Norris v. Cape Elizabeth School District*, 969 F.3d 12 (1st Cir. 2020), to uphold the school's punishment of Plaintiffs John Doe and Ben Bloggs for their comments about Robert Roe in a Snapchat group. See *Hopkinton*, 2020 WL 5638019 at \*6-7. In *Norris*, this Court held that bullying "implicates the governmental interest in protecting against the invasion of the rights of others, as described in *Tinker*." 969 F.3d at 29. However, nothing in *Norris* suggested that schools may punish off-campus speech considered bullying—in fact, that case involved a note left on a mirror in the girls' bathroom on school grounds. *Id.* at 14. Additionally, *amicus* is aware of no case in which the First Circuit has ever applied either prong of *Tinker*'s exception to off-campus student speech.

Moreover, while the Third Circuit in *Mahanoy* preserved for another day the specific question of what to do about off-campus student speech that harasses others, 964 F.3d at 186, the Court at the same time criticized cases involving online

harassment and the tests those circuits employed to regulate off-campus student speech under *Tinker*. *See id.* at 186-88; *see also infra* Part I.A.4. The Third Circuit also drew no distinction between *Tinker*'s prongs in reaching its holding, concluding that *Tinker* represents a “narrow exception” allowing schools authority to restrict students’ on-campus speech. *Id.* at 177.

Importantly, the *Mahanoy* court repeatedly emphasized that “[h]olding *Tinker* inapplicable to off-campus speech … offers the distinct advantage of offering up-front clarity to students and school officials.” *Id.* at 189. This Court should also strive for such clarity.

#### **4. This Court Should Reject Other Tests That Would Regulate Off-Campus Student Speech**

The district court in this case cited two alternative tests for punishing off-campus student speech, which this Court should reject. *See Hopkinton*, 2020 WL 5638019 at \*10. In *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), the Fourth Circuit upheld the punishment of a student who had created a MySpace page at home that harassed another student. The court concluded that the school acted properly under *Tinker* because the student’s off-campus speech bore a “sufficient nexus” to the school’s “pedagogical interests” as the speech was “published beyond her home and could reasonably be expected to reach the school or impact the school environment.” *Id.* at 573, 577. And in *Bell v. Itawamba County School Board*, 799 F.3d 379 (5th Cir. 2015) (en banc), the Fifth Circuit

upheld the punishment of a student who posted a rap video on Facebook and YouTube that harassed and threatened teachers, and also accused the teachers of inappropriate and illegal conduct. *See id.* at 384. Similarly, the court concluded that the school acted properly under *Tinker* because the student “intentionally direct[ed] at the school community” off-campus speech that was reasonably foreseeable to cause a substantial disruption at the school. *Id.* at 396.

As the Third Circuit recognized in *Mahanoy*, these “nexus” and “reasonable foreseeability” tests “sweep far too much speech into the realm of schools’ authority.” 964 F.3d at 187. They “distort *Tinker*’s narrow exception into a vast font of regulatory authority.” *Id.* at 188-89. “In the past, it was merely a possibility, and often a remote one, that the speech of a student who expressed herself in the public square would ‘reach’ the school.” *Id.* But the explosive rise in the use of the Internet and social media among young people today almost ensures that a student’s off-campus online speech will be viewed by other students and accessible from school. *See id.* These tests, therefore, provide no meaningful limit to the scope of school discipline—rather, they would allow schools far-reaching authority to regulate the private, off-campus lives of students. Expanding *Tinker*’s schoolhouse gate so far would “subvert[] the longstanding principle that heightened authority over student speech is the exception rather than the rule.” *Id.* at 187-88.

**B. Defendants Failed to Carry Their Burden of Justifying the Punishment of Plaintiffs’ Speech Under *Tinker***

This Court has recognized that a school seeking to punish student speech bears the burden of justifying that punishment under *Tinker*. *See Norris*, 969 F.3d at 25; *accord Hopkinton*, 2020 WL 5638019 at \*6. Thus, once a student seeking to challenge their school’s punishment of their speech establishes that their speech is constitutionally protected—that is, their speech does not fall into one of the categorical exceptions to the First Amendment’s scope, such as obscenity, incitement, or true threats—the burden shifts to the school to justify its restriction of the student’s speech. This burden includes, as a threshold matter, proving that the student was appropriately under the authority of the school—that is, they uttered the speech while “on campus,” as well as proving that the student’s speech substantially disrupted the school environment, or that it invaded the rights of others per *Tinker*’s exception. *See Norris*, 969 F.3d at 24-25 (first determining that student’s speech was protected, then “apply[ing] *Tinker* to determine if the school has demonstrated that it was justified in restricting her speech”).

Defendants were not entitled to summary judgment in this case because they did not meet their burden of justifying their punishment of Plaintiffs’ speech under *Tinker*. *See Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 69 (1st Cir. 2016) (summary judgment is properly granted only if the movant can demonstrate that the movant is entitled to summary judgment as a matter of law).

The court below identified three exchanges in which Bloggs discussed Roe in the Snapchat group, and one exchange in which Doe did. *Hopkinton*, 2020 WL 5638019 at \*3. Nowhere in the record did Defendants assert that Bloggs and Doe made those comments while on school property during school hours, or at a school-sponsored event—or, indeed, any place other than their own homes—despite the fact that the school has no jurisdiction to punish students for their constitutionally protected off-campus speech. *See supra* Part I.A.

The district court failed to recognize that Defendants had not met their burden of demonstrating that *Tinker*’s narrow exception allowed them to punish Plaintiffs’ protected speech. The district court erroneously concluded that “it does not matter whether any particular message was sent from an on- or off-campus location” and that “this fact pattern is very different from the one in [*Mahanoy*]” because “*much* of the actual conduct and speech occurred on campus.” *Id.* at \*10 (emphasis added). The district court, then, approved of Defendants’ punishing of Doe and Blogg’s speech solely because *other students* in the Snapchat group engaged in punishable speech while at school.

This novel formulation was legal error. Doe and Bloggs, like all young people enrolled in public school, are “persons” under the Constitution endowed with full First Amendment rights to engage in protected speech outside of school. *See Tinker*, 393 U.S. at 511. The school bears the burden of showing not only that

it had the authority under either prong of *Tinker*'s exception to punish their speech—but also of showing that Doe and Bloggs engaged in the prohibited speech while at school or otherwise under the school's authority. Schools cannot hold their students liable for off-campus speech even if that speech somehow relates to the school or reaches the school environment. *See Mahanoy*, 964 F.3d at 180 (citations omitted).

The district court's conclusion that *Mahanoy* and this case are materially distinguishable would have been appropriate only if the school had, in fact, shown that Plaintiffs' speech here—unlike in *Mahanoy*—occurred on campus. Having made no such showing, the school was not entitled to summary judgment.

## **II. LIMITING THE *TINKER* EXCEPTION TO ON-CAMPUS SPEECH IS PARTICULARLY IMPORTANT GIVEN THE INCREASINGLY IMPORTANT ROLE THAT SOCIAL MEDIA PLAYS IN YOUNG PEOPLES' LIVES**

It is essential that this Court make clear that the *Tinker* exception does not apply off campus in order to avoid chilling young peoples' constitutionally protected online speech. Social media is an increasingly important medium 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 only accessible by

recipients for a fleeting number of hours<sup>3</sup>—it is now far easier for off-campus student speech to be brought on-campus by someone other than the original speaker. But students should remain free to express themselves off-campus and online—about even potentially controversial topics, from the Black Lives Matter movement to the government’s COVID-19 response to gun control—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, report that they have access to a smartphone, and 45 percent say that they use the Internet “almost constantly.”<sup>4</sup> Almost 60 percent of teenagers use social media each day, spending an average of two hours online.<sup>5</sup> One recent study found that 32 percent of young people, ages 13

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<sup>3</sup> See Snapchat Support, *Group Chat*, <https://support.snapchat.com/en-US/a/group-chat> (“Messages in Group Chat are deleted by default after 24 hours.”); see also Appellants’ Br. 6 (two assistant principals found screen shots of the Snapchat group chat).

<sup>4</sup> 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/>.

<sup>5</sup> *The Common Sense Census: Media Use by Tweens and Teens*, Common Sense Media, at 39 (2015), [https://www.commonSenseMedia.org/sites/default/files/uploads/research/census\\_researchreport.pdf](https://www.commonSenseMedia.org/sites/default/files/uploads/research/census_researchreport.pdf).

to 17, consider social media to be either “extremely” or “very” important in their lives.<sup>6</sup> Instagram, Snapchat, and TikTok are the most popular social media platforms for teenagers, with, respectively, 84 percent, 80 percent, and 69 percent of teenagers reporting use.<sup>7</sup> Meanwhile, 34 percent of teenagers say that Snapchat is their favorite social media platform.<sup>8</sup>

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).<sup>9</sup>

Social media has increasingly become an important platform for activism. In

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<sup>6</sup> *Social Media, Social Life: Teens Reveal Their Experiences*, Common Sense Media, at 21 (2018), [https://www.commonSenseMedia.org/sites/default/files/uploads/research/2018\\_cs\\_socialmediasociallife\\_fullreport-final-release\\_2\\_lowres.pdf](https://www.commonSenseMedia.org/sites/default/files/uploads/research/2018_cs_socialmediasociallife_fullreport-final-release_2_lowres.pdf).

<sup>7</sup> *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](http://www.pipersandler.com/private/pdf/TSWTs_Fall_2020_Full_Report.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> 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/>.

2018, just over half of American adults had used social media to engage in a civic activity in the past year.<sup>10</sup> 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.<sup>11</sup> *See, e.g., 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

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<sup>10</sup> 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/>.

<sup>11</sup> *Id.*

debates, and text messaging campaigns, and has 5.5 million members,<sup>12</sup> a majority of whom are between the ages of 13 and 25.<sup>13</sup>

## **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 promote causes they believe in and advocate for change.<sup>14</sup>

For example, Marley Dias, a teenage activist from Philadelphia, started the #1000BlackGirlBooks campaign on social media in 2015, when she was just 11 years old, to raise awareness about the racial representation gap in children's literature.<sup>15</sup> Her goal was to collect and donate 1,000 books with a Black girl as the

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<sup>12</sup> 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>.

<sup>13</sup> Alexis Manrodt, *The New Face of Teen Activism*, Teen Vogue (Apr. 8, 2014), <https://www.teenvogue.com/story/teen-online-activism>.

<sup>14</sup> 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/>.

<sup>15</sup> 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>.

main character.<sup>16</sup> Since then, she has collected more than 9,000 books,<sup>17</sup> and also written a book of her own about how young people can get involved in activism.<sup>18</sup> 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.<sup>19</sup>

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 Instagram<sup>20</sup> that drew 10,000 participants.<sup>21</sup> Seventeen-year-old Simone Jacques similarly used Instagram to organize a Black Lives Matter protest

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 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](http://www.mtv.com/news/3037121/how-the-12-year-old-activist-behind-1000blackgirlbooks-is-taking-the-world-by-storm/?xrs=_s.tw_main).

<sup>19</sup> *Id.*

<sup>20</sup> 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, 2:46 PM), <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).

<sup>21</sup> Bennett, *supra* note 20.

of thousands in San Francisco.<sup>22</sup> 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.<sup>23</sup>

Similarly, 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.<sup>24</sup> Seventeen Magazine, recognizing the demand among its young readership for

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<sup>22</sup> 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>.

<sup>23</sup> 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\\_rew](https://www.pressherald.com/2020/07/12/teenagers-lead-the-way-in-black-lives-matter-movement/#goog_rew) (collecting stories of high school activists in Maine).

<sup>24</sup> 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-anniversary-gun-control-victories>.

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.<sup>25</sup> Since the Parkland survivors started this movement, state legislatures have passed 67 bills aimed towards preventing gun violence, and gun control advocates have been elected to Congress.<sup>26</sup>

Students are also using social media to organize around climate activism.<sup>27</sup> 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.<sup>28</sup> Her Facebook and Instagram accounts have collectively amassed over 3 million followers.<sup>29</sup> Before the COVID-19 pandemic, New York high school student

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<sup>25</sup> Kayleigh Barber, *How Seventeen is Using Snapchat to Give Young Activists a Voice*, Folio (Mar. 5, 2018), <https://www.foliomag.com/how-seventeen-is-using-snapchat-to-give-young-activists-a-voice/>.

<sup>26</sup> Beckett, *supra* note 24.

<sup>27</sup> 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*, Heights (Sept. 23, 2019), <https://magazine.bcheights.com/index.php/2019/boston-students-strike-for-climate/>.

<sup>28</sup> 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>.

<sup>29</sup> Greta Thunberg, Facebook, <https://www.facebook.com/gretathunbergsweden/>; Greta Thunberg, Instagram, <https://www.instagram.com/gretathunberg/?hl=en>.

Alexandria Villaseñor went on strike from school every Friday in order to demonstrate outside of the United Nations building.<sup>30</sup> Now confined to her home, Villaseñor has shifted her advocacy online, leading online strikes every Friday and posting pictures of herself on social media holding up signs inside her home.<sup>31</sup> 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.<sup>32</sup>

These are just a few examples of how young people have used social media to advocate for a better future. 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

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<sup>30</sup> Carolyn Kormann, *New York's Original Teen-Age Climate Striker Welcomes a Global Movement*, *New Yorker* (Sept. 21, 2019), <https://www.newyorker.com/news/dispatch/new-yorks-original-teen-age-climate-striker-alexandria-villasenor-greta-thunberg>.

<sup>31</sup> 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/>.

<sup>32</sup> Marlene Cimons, *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/>.

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 institution, its administrators, and the student body.<sup>33</sup> 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.”<sup>34</sup>

Students are also using social media to advocate for themselves during the COVID-19 pandemic. For example, Georgia high school student Hannah Watters

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<sup>33</sup> See 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>.

<sup>34</sup> Black at Andover, Instagram (June 15, 2020), [https://www.instagram.com/p/CBei9lajhVt/?utm\\_source=ig\\_web\\_copy\\_link](https://www.instagram.com/p/CBei9lajhVt/?utm_source=ig_web_copy_link); see also Black at Grace, Instagram (June 13, 2020), [https://www.instagram.com/p/CBZoo9kFNjT/?utm\\_source=ig\\_web\\_copy\\_link](https://www.instagram.com/p/CBZoo9kFNjT/?utm_source=ig_web_copy_link); Black at Grace, Instagram, (June 13, 2020), [https://www.instagram.com/p/CBZlc8XI0sz/?utm\\_source=ig\\_web\\_copy\\_link](https://www.instagram.com/p/CBZlc8XI0sz/?utm_source=ig_web_copy_link).

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).<sup>35</sup> Along with the photo and video, Watters described the hallways as “jammed,” noting with disapproval the “10 percent mask rate” of the students.<sup>36</sup> 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.<sup>37</sup>

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<sup>35</sup> Jon Brodkin, *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/>.

<sup>36</sup> *Id.*

<sup>37</sup> 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>; 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>; <https://www.nytimes.com/2020/09/09/business/colleges-coronavirus-dormitories-quarantine.html> (“[A]t many campuses, students with

Students use social media to discuss and criticize other aspects of their lives at school. For example, teenagers have used social media to highlight the gendered implications of school dress codes. Claire, a high school student in Texas, created an Instagram account called “*fight\_the\_dress\_code*,” which posts stories of girls’ experiences with dress codes.<sup>38</sup> The account frequently uses the hashtag *#iamnotadistraction*, which has been leveraged by young women and girls across the country to raise awareness about this issue.<sup>39</sup>

Teenagers have also used social media to criticize USDA regulations around nutrition championed by Michelle Obama, which restricted calories, fat, sugar, and sodium in food sold in schools nationwide.<sup>40</sup> To call attention to the impact of the restrictions, students around the country tagged photos of unappetizing school lunches with the hashtag *#thanksmichelleobama*.<sup>41</sup>

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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.”)

<sup>38</sup> *Fight the Dress Code*, Instagram, [https://www.instagram.com/fight\\_the\\_dress\\_code/](https://www.instagram.com/fight_the_dress_code/).

<sup>39</sup> 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>.

<sup>40</sup> 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>.

<sup>41</sup> *Id.*

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

## **CONCLUSION**

For the reasons described above, we respectfully ask that this Court vacate the district court’s decision below, 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.

Dated: February 11, 2021

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## **CERTIFICATE OF COMPLIANCE**

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

1. This Brief of Amicus Curiae Electronic Frontier Foundation in Support of Plaintiffs-Appellants and Reversal of the Opinion of September 22, 2020 complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 5,895 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, the word processing system used to prepare the brief, in 14-point Times New Roman font.

Dated: February 11, 2021

By: /s/ Sophia Cope

*Counsel for Amicus Curiae  
Electronic Frontier Foundation*

## **CERTIFICATE OF SERVICE**

I certify that on this 11th day of February, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: February 11, 2021

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