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.

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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 asso duc.9 (t)-gagatt4.4s th.9 (t)0gaga .5 9 (t4.4r( ) 71.1 ga)3.s1 gatt4.4c (.5gaga

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

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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.

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 (2018); 28 C.F.R. § 35.130(n)-4.594
[5] 20 U.S.C. § 1400, *et seq*.
[6] *Plyler*, 457 U.S. at 221

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

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

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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

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-

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

'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, doo

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 (9thWs

Columbine, Chillingly, Denver Post, November 22, 2000, found at

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'

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

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

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

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. Mah*

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

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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.

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.

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

/S/

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