

NO. 19-1842

---

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

---

B.L., a Minor by her Father, Lawrence Levy, and her Mother, Betty Lou Levy,  
PLAINTIFFS-APPELLEES,

v.

MAHANoy AREA SCHOOL DISTRICT,  
DEFENDANT-APPELLANT.

---

On Appeal from the United States District Court  
for the Middle District of Pennsylvania  
Case No. 3:17-cv-01734

The Honorable A. Richard Caputo, United States District Court Judge

---

**BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION,  
STUDENT PRESS LAW CENTER, PENNSYLVANIA CENTER FOR THE  
FIRST AMENDMENT, AND BRECHNER CENTER FOR FREEDOM OF  
INFORMATION IN SUPPORT OF PLAINTIFFS-APPELLEES  
AND AFFIRMANCE**

---

Sophia Cope  
Jamie Williams  
ELECTRONIC FRONTIER FOUNDATION  
815 Eddy Street  
San Francisco, CA 94109  
sophia@eff.org  
(415) 436-9333

*Counsel for Amici Curiae*

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Electronic Frontier Foundation, Student Press Law Center, Pennsylvania Center for the First Amendment, and Brechner Center for Freedom of Information each state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

Dated: August 28, 2019

By: /s/ Sophia Cope  
Sophia Cope

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST .....	1
INTRODUCTION.....	3
ARGUMENT .....	4
I. <i>Tinker</i> 's Substantial Disruption Test Should Not Apply To Off-Campus Speech.....	4
II.   Declaring <i>Tinker</i> Inapplicable To Off-Campus Speech Is Even More Important Today, Given That Off-Campus Social Media Speech Now Plays an Increasingly Important Role in Young People's Lives. ....	9
A.    Social Media Use Among Young People Is Ubiquitous. ....	11
B.    Young People Use Social Media as a Platform for Self-Expression, Connection with Others, and Advocacy. ....	12
C.    Young People Use Social Media To Criticize Aspects of Their Lives at School.....	19
CONCLUSION .....	22
CERTIFICATE OF COMPLIANCE .....	24
CERTIFICATE OF DIGITAL SUBMISSION.....	25
CERTIFICATE OF SERVICE.....	26

## TABLE OF AUTHORITIES

### Cases

<i>B.L. v. Mahanoy Area School District</i> , 376 F. Supp. 3d 429 (M.D. Pa. 2019) .....	3
<i>Bethel School District No. 403 v. Fraser</i> , 478 U.S. 675 (1986) .....	7
<i>Cohen v. California</i> , 403 U.S. 15 (1971) .....	7
<i>Dwyer v. Oceanport School District</i> , Case 3:03-cv-06005-SRC-TJB, Dkt. 14 (D.N.J. Mar. 31, 2005) .....	21
<i>Evans v. Bayer</i> , 684 F. Supp. 2d 1365 (S.D. Fla. 2010) .....	22
<i>Hazelwood School District v. Kuhlmeier</i> , 484 U.S. 260 (1988) .....	8
<i>Healy v. James</i> , 408 U.S. 169 (1972) .....	5
<i>J.S. ex rel. Snyder v. Blue Mountain School District</i> , 650 F.3d 915 (3d Cir. 2011) .....	3, 4, 9, 10
<i>Klein v. Smith</i> , 635 F. Supp. 1440 (D. Me. 1986) .....	6
<i>Layshock ex rel. Layshock v. Hermitage School District</i> , 650 F.3d 205 (3d Cir. 2011) .....	10, 23
<i>Morse v. Frederick</i> , 551 U.S. 393 (2007) .....	3, 7
<i>Nuxoll v. Indian Prairie School District</i> , 523 F.3d 668 (7th Cir. 2008) .....	7
<i>Porter v. Ascension Parish School Board</i> , 393 F.3d 608 (5th Cir. 2004) .....	6

*R.S. ex rel. S.S. v. Minnewaska Area School District No. 2149*,  
894 F. Supp. 2d 1128 (D. Minn. 2012) .....21

*Saxe v. State College Area School District*,  
240 F.3d 200 (3d Cir. 2001) .....6

*Shelton v. Tucker*,  
364 U.S. 479 (1960) .....5

*Sypniewski v. Warren Hills Regional Board of Education*,  
307 F.3d 243 (3d Cir. 2002) .....21

*Thomas v. Board of Education, Granville Central School District*,  
607 F.2d 1043 (2d Cir. 1979) .....5, 6

*Tinker v. Des Moines Independent Community School District*,  
393 U.S. 503 (1969) .....*passim*

***Other Authorities***

Alexis Manrodt, *The New Face of Teen Activism*, Teen Vogue (Apr. 8, 2014),  
<https://www.teenvogue.com/story/teen-online-activism>..... 15

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> ..... 15

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> ..... 19

Associated Press, *Students worldwide walk out of school to push for action on climate change*, Washington Post (Mar. 15, 2019),  
[https://www.washingtonpost.com/lifestyle/kidspost/students-worldwide-walk-out-of-school-to-push-for-action-on-climate-change/2019/03/15/310f363a-4781-11e9-90f0-0ccfeec87a61\\_story.html?utm\\_term=.77f3b1811e0a](https://www.washingtonpost.com/lifestyle/kidspost/students-worldwide-walk-out-of-school-to-push-for-action-on-climate-change/2019/03/15/310f363a-4781-11e9-90f0-0ccfeec87a61_story.html?utm_term=.77f3b1811e0a) ..... 17

Fight the Dress Code, Instagram,  
[https://www.instagram.com/fight\\_the\\_dress\\_code/](https://www.instagram.com/fight_the_dress_code/) ..... 19

Frank Leon Roberts, *How Black Lives Matter Changed the Way Americans Fight for Freedom*, ACLU Blog (July 13, 2018), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-black-lives-matter-changed-way-americans-fight> ..... 14

Greta Thunberg, Facebook, <https://www.facebook.com/gretathunbergsweden>..... 17

Greta Thunberg, Instagram, <https://www.instagram.com/gretathunberg/?hl=en> .... 17

Heather L. Whitley, *How The CEO Of DoSomething.org Uses FOMO To Inspire Social Change*, Forbes (Sep. 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> ..... 15

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>..... 16

Jessy McCabe, *Ensure the representation of women on the A-Level Music syllabus*, Change.org, <https://www.change.org/p/edexcel-ensure-the-representation-of-women-on-the-a-level-music-syllabus> ..... 20

Julie Zeilinger, *How the 12-Year-Old Activist Behind #1000BlackGirlBooks is Taking the World by Storm*, Forbes (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)..... 18

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/> ..... 16

Ki Mae Heussner, *Can You Trash Your Teacher on Facebook?*, ABC News (Feb. 22, 2010), <https://abcnews.go.com/Technology/trash-teacher-facebook/story?id=9903651> ..... 22

Lily Fletcher et al., *These teenage activists are shaping our future*, Huck Magazine (Jun. 1, 2018), <https://www.huckmag.com/perspectives/activism-2/teenage-activists-protest-worldwide-agents-of-change> ..... 17

Liz Elting, *A Hard Look At The Hard Numbers Of #MeToo*,  
Forbes (Oct. 15, 2018), <https://www.forbes.com/sites/lizelting/2018/10/15/a-hard-look-at-the-hard-numbers-of-metoo/#18b5355279f9> ..... 14

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>..... 15, 16

Lydia Coutre, *Minnesota school that demanded student’s Facebook password settles First Amendment lawsuit*, Student Press Law Center (Mar. 28, 2014), <https://splc.org/2014/03/minnesota-school-that-demanded-students-facebook-password-settles-first-amendment-lawsuit/> ..... 21

Maggie McGrath, *12-Year-Old Marley Dias Is Changing The Face Of Children’s Literature*, Forbes (Jun. 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/#760648bb4ce0>..... 18

Mark Tutton, *Greta Thunberg inspires global climate protests*, CNN (Mar. 15, 2019), <https://www.cnn.com/2019/03/15/world/greta-thunberg-climate-strike-intl/index.html> ..... 16

Monica Anderson and 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/>  
..... 11, 12

Monica Anderson and 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/> ..... 13

Monica Anderson and Skye Toor, *How social media users have discussed sexual harassment since #MeToo went viral*, Pew Research Center (Oct. 11, 2018), <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> ..... 14

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/> ..... 13, 14

Muhammad Najem, YouTube, <https://www.youtube.com/channel/UCw-EfChHemLJ4KX2p-HhuVA> ..... 17

Nadia Khomami, *A-level music to include female composers after student’s campaign*, The Guardian (Dec. 16, 2015), <https://www.theguardian.com/education/2015/dec/16/a-level-music-female-composers-students-campaign-jessy-mccabe-edexcel> ..... 20

Pippa Allen-Kinross, *Freedom of speech or damaging reputations? What schools should do about students on social media*, BBC Teach (Nov. 17, 2017), <https://schoolsweek.co.uk/freedom-of-speech-or-damaging-reputations-what-schools-should-do-about-students-on-social-media/> ..... 20

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> ..... 19

Snapchat Support, *My Story*, <https://support.snapchat.com/en-US/a/my-story> ..... 10

*Social Media, Social Life: Teens Reveal Their Experiences*, Common Sense Media (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) ..... 12

*The Common Sense Census: Media Use by Tweens and Teens*, Common Sense Media (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) ..... 11

Wikipedia, [https://en.wikipedia.org/wiki/Marley\\_Dias](https://en.wikipedia.org/wiki/Marley_Dias) (last updated June 16, 2019) ..... 17



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

*Amicus* Electronic Frontier Foundation (EFF) is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 31,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

*Amicus* Student Press Law Center (SPLC) is a non-profit, non-partisan organization that, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. SPLC publishes free legal information and educational materials for student journalists, and its legal staff jointly authors the widely used media-law text, *Law of the Student Press*. SPLC is especially concerned with upholding constitutional protection for off-campus student journalism; because of the heavy censorship of school publications, student journalists are increasingly taking their speech off campus in order to address issues important to their lives.

---

<sup>1</sup> 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. The parties have consented to the filing of this brief.

*Amicus* Pennsylvania Center for the First Amendment (PaCFA), one of the nation's preeminent First Amendment 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.

*Amicus* Brechner Center for Freedom of Information at the University of Florida College of Journalism and Communications is a research center dedicated to advancing understanding, appreciation, and support for freedom of information in the state of Florida, the nation, and the world. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the First Amendment and open records laws. Through education and promotion of freedom of information laws and policies, the Center seeks to foster open government and a participatory democracy. This brief is submitted on behalf of the Brechner Center faculty and does not represent the views of the University of Florida or the University of Florida Board of Trustees.

## INTRODUCTION

Statements made by students on social media when they are off-campus and outside of school hours are fully protected by the First Amendment. The district court in this case correctly held that under this Court’s clear precedent set out in *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915, 926 (3d Cir. 2011) (en banc), Mahanoy Area School District violated B.L.’s constitutional rights when it punished her for off-campus profanity, uttered via Snapchat on a Saturday. *B.L. v. Mahanoy Area School District*, 376 F. Supp. 3d 429, 445 (M.D. Pa. 2019). As this Court held in *J.S. ex rel. Snyder*, the United States Supreme Court has expressly recognized that its exception to *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), allowing schools to regulate on-campus profanity, does not extend “outside the school context[.]” *J.S. ex rel. Snyder*, 650 F.3d at 932 (citing *Morse v. Frederick*, 551 U.S. 393, 394 (2007)). And as the district court correctly concluded, just as in *J.S. ex rel. Snyder*, B.L.’s off-campus speech here cannot be punished under *Tinker*’s substantial disruption test, because the Snapchat post at issue did not cause a substantial disruption in her school and could not reasonably have led school officials to forecast any such substantial disruption. See *B.L.*, 376 F. Supp. 3d at 443–44.

*Amici* write today to encourage this Court to reach the question left open in *J.S. ex rel. Snyder*: whether *Tinker*'s substantial disruption test applies to off-campus speech in the first place. *Amici* urge the Court to hold that it does not.

The First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large. This is true regardless of whether the speech occurred offline or online, such as on social media, and regardless of whether that speech was later brought on campus by others. Reaching this question—and affirmatively ruling that *Tinker*'s substantial disruption test does not apply to off-campus speech—is even more important today than it was when this Court issued its decision in *J.S. ex rel. Snyder*. Social media is an increasingly important medium for off-campus student expression, and this Court should send a clear message to students and school administrators alike—to ensure that students' constitutionally protected off-campus social media speech is not chilled and to avoid cases like this one in the future.

## **ARGUMENT**

### **I. *TINKER*'S SUBSTANTIAL DISRUPTION TEST SHOULD NOT APPLY TO OFF-CAMPUS SPEECH.**

Fifty years ago, in *Tinker*, the Supreme Court held that the First Amendment protects the free speech rights of students and teachers. 393 U.S. at 506. 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)).

In *Tinker*, 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[.]” 393 U.S. at 511. The Court held that “to justify prohibition of a particular expression of opinion,” school officials must demonstrate that “the forbidden conduct would *materially and substantially interfere* with the requirements of appropriate discipline in the operation of the school,” or that they reasonably forecasted such substantial disruption. *Id.* at 509 (emphasis added; quotation marks omitted).

*Tinker* involved only *on-campus* speech: students wearing black armbands on school grounds, during school hours, to protest the Vietnam War. *See id.* at 504. Today, lower courts remain divided as to whether *Tinker*’s substantial disruption test governs students’ *off-campus* speech. Many courts have concluded that it does not.

For example, in *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043, 1050 (2d Cir. 1979), the Second Circuit distinguished *Tinker* in a case involving a satirical newspaper, *Hard Times*, created by five high school students and published and distributed off-campus. The court noted that “all but an insignificant amount of relevant activity in this case was deliberately

designed to take place beyond the schoolhouse gate” and that the students had “diligently labored to ensure that *Hard Times* was printed outside the school, and that no copies were sold on school grounds.” *Id.* According to the court, because in attempting to punish the students, “school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.” *Id.* at 1050.

Similarly, in *Porter v. Ascension Parish School Board*, 393 F.3d 608, 615, 620 (5th Cir. 2004), the Fifth Circuit held that *Tinker* did not apply to a student’s off-campus drawing. According to the court, “[b]ecause [the student’s] drawing was composed off-campus, displayed only to members of his own household, stored off-campus, and not purposefully taken by him to [the school] or publicized in a way certain to result in its appearance at [the school], we have found that the drawing is protected by the First Amendment.” *Id.* See also *Klein v. Smith*, 635 F. Supp. 1440, 1441–42 (D. Me. 1986) (enjoining suspension of student who made a vulgar gesture to a teacher while off-campus); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 216 n. 11 (3d Cir. 2001) (noting that if the school’s anti-harassment policy was interpreted to apply off-campus, it “would raise additional constitutional questions”); *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 674

(7th Cir. 2008) (school rule prohibiting derogatory comments “probably would not wash if it were extended to students when they [were] outside of the school”).

The Supreme Court’s own precedent suggests that these courts have it right—that *Tinker*’s substantial disruption test should be limited to *on-campus* speech.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), for example, Justice Brennan noted that a student who was penalized for making lewd comments during a school-sponsored debate could not have been punished 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).

The majority of the Court reiterated this very point twenty years later in *Morse v. Frederick*, 551 U.S. 393 (2007), stating, “[h]ad Fraser 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), which held—in a case not limited to student speech—that a state may not make a “single four-letter expletive a criminal offense”). *See also id.* at 422 (Alito, J., concurring) (noting that *Tinker* allows schools to regulate “in-school student speech . . . in a way that would not be constitutional in other settings”); *id.* at 434 (Stevens, J., dissenting) (agreeing 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).

And in *Hazelwood School District v. Kuhlmeier*, 484 US. 260 (1988), the Court held that although a school principal may censor a high school-sponsored student newspaper if the censorship is “reasonably related to legitimate pedagogical concerns,” it would not have been able to censor similar speech had it occurred outside of the school and not born the school’s imprimatur. *Id.* at 261, 266.

In *Tinker* itself, the Court stated unequivocally that students “may not be confined to the expression of those sentiments that are officially approved” and that “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students”—as ‘persons’ under the Constitution—“are entitled to freedom of expression of their views.” *Id.*

The Supreme Court’s message is clear: a school’s authority over student speech is dependent on whether the speech occurs on school premises, at school-sponsored events, or bears the imprimatur of the school. And when outside of school, students stand on equal footing as other members of the public.



**II. DECLARING *TINKER* INAPPLICABLE TO OFF-CAMPUS SPEECH IS EVEN MORE IMPORTANT TODAY, GIVEN THAT OFF-CAMPUS SOCIAL MEDIA SPEECH NOW PLAYS AN INCREASINGLY IMPORTANT ROLE IN YOUNG PEOPLE’S LIVES.**

In *J.S. ex rel. Snyder*, this Court specifically declined to address the question of whether *Tinker*’s substantial disruption test applies to off-campus student speech. See 650 F.3d at 926 (“[W]e will assume, without deciding, that *Tinker* applies to J.S.’s speech in this case.”). But five judges in a concurring opinion agreed that *Tinker* does not apply, and that off-campus student speech should be subject to the same First Amendment protections as “speech by citizens in the community at large.” *Id.* (Smith, J., concurring, joined by McKee, C.J., and Sloviter, Fuentes, and Hardiman, J.J.). As Justice Smith stated and rightly concluded: “Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student’s classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if *Tinker* were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law.” *Id.* at 939.

It is even more important today than it was when this Court issued its decision in *J.S. ex rel. Snyder* that the Court reach this open question—and

affirmatively rule that *Tinker*'s substantial disruption test does not apply to off-campus 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. This Court has already ruled that social media speech originating off-campus does not somehow transform into on-campus speech simply because it foreseeably makes its way onto campus. *See Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216–19 (3d Cir. 2011) (en banc) (discussing how the school district could not punish a student for the off-campus creation of a lewd and offensive fake Myspace profile of his principal simply because the speech “reached inside the school”). And indeed, as this case makes clear, because of the relative ease of taking screenshots—even of communications intended to be only accessible by recipients for a fleeting number of hours over a weekend<sup>2</sup>—it is easier than ever for off-campus student speech to be brought on-campus by someone other than the original speaker. The concern raised by Judge Smith in his *J.S. ex rel. Snyder* concurrence is thus all the more pressing today. Students should be free to express themselves online, from off-campus locations, outside of school hours, about even potentially controversial topics—like gay

---

<sup>2</sup> *See* Snapchat Support, *My Story*, <https://support.snapchat.com/en-US/a/my-story> (“My Story is a collection of your Snaps that play in the order you created them. Your friends can view your Story an unlimited number of times for 24 hours . . . . You can also see if a screenshot was taken.”).

marriage, the #MeToo movement, or gun control—without having to worry that school officials will claim that their speech somehow caused or may cause a disruption at school.

This Court should take this opportunity to hold that students’ off-campus speech is entitled to full First Amendment protection, to ensure that students’ off-campus social media speech is not chilled, and to avoid cases like this in the future.

**A. Social Media Use Among Young People Is Ubiquitous.**

Social media has become an inextricable part of young people’s lives. Today, 95 percent of U.S. teens, ages 13 to 17, report that they have access to a smartphone, and 45 percent say that they use the Internet “almost constantly.”<sup>3</sup> Almost 60 percent of teens use social media each day, spending an average of two hours online.<sup>4</sup> One recent study found that 32 percent of teens, ages 13 to 17, consider social media to be either “extremely” (9 percent) or “very” (23 percent) important in their lives.<sup>5</sup> YouTube, Instagram, and Snapchat are the most popular

---

<sup>3</sup> Monica Anderson and JingJing Jiang, *Teens, Social Media & Technology 2018*, Pew Research Center (May 31, 2018) (hereinafter “Pew, *Teens, Social Media & Technology*”), <https://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/>.

<sup>4</sup> *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](https://www.common Sense Media.org/sites/default/files/uploads/research/census_researchreport.pdf).

<sup>5</sup> *Social Media, Social Life: Teens Reveal Their Experiences*, Common Sense Media, at 21 (2018),

social media platforms for teens, with, respectively, 85 percent, 72 percent, and 69 percent of teens reporting use.<sup>6</sup> Meanwhile, 35 percent of teens say that Snapchat is the social media platform they use the most often, 32 percent say they use YouTube the most often, and 15 percent say they use Instagram the most often.<sup>7</sup>

**B. Young People Use Social Media as a Platform for Self-Expression, Connection with Others, and Advocacy.**

**1. Young People Use Social Media To Express Themselves and Connect with Others.**

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, teens responded that it helped them keep in touch with others (40 percent), access news and information (16 percent), connect with people with shared interests (15 percent), express themselves (7 percent), access support from others (5 percent), and learn new things (4 percent).<sup>8</sup> A majority of teens also said that social media helps them “interact with people from different

---

[https://www.common sensemedia.org/sites/default/files/uploads/research/2018\\_cs\\_socialmediasociallife\\_fullreport-final-release\\_2\\_lowres.pdf](https://www.common sensemedia.org/sites/default/files/uploads/research/2018_cs_socialmediasociallife_fullreport-final-release_2_lowres.pdf).

<sup>6</sup> Pew, *Teens, Social Media & Technology*.

<sup>7</sup> *Id.*

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

backgrounds and experiences” (69 percent), “find different points of view” (67 percent), and “show their support for causes/issues” (66 percent).<sup>9</sup>

## **2. Young People Use Social Media To Amplify Their Voices and Advocate For Causes They Believe In.**

Social media has increasingly become an important platform for advocacy and activism. According to a poll conducted in 2018, just over half of Americans 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>

Social media has been used to drive social movements, providing a medium to quickly disseminate information and garner supporters. The hashtags #MeToo and #TimesUp have called attention to sexual violence and harassment, and have encouraged both men and women to share their stories.<sup>12</sup> In the year after these

---

<sup>9</sup> Monica Anderson and 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/>.

<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.*

<sup>12</sup> Monica Anderson and Skye Toor, *How social media users have discussed sexual harassment since #MeToo went viral*, Pew Research Center (Oct. 11, 2018),

hashtags were first popularized in 2017, #MeToo was used more than 19 million times on Twitter, and more than half of Fortune 1000 companies reported an increase in employees coming forward with harassment claims.<sup>13</sup> Similarly, the hashtag #BlackLivesMatter has been used to fuel a national conversation around race relations and police brutality. Since its popularization five years ago, it has been used 30 million times on Twitter—an average of over 17,000 times per day.<sup>14</sup> In that same period, multiple Department of Justice reports on police corruption have been released, and criminal justice reform has been a subject of national political debate.<sup>15</sup>

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 young people to utilize traditional mediums, like broadcast television, as a means of participating in national debate, given the

---

<https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/>.

<sup>13</sup> *Id.*; Liz Elting, *A Hard Look At The Hard Numbers Of #MeToo*, *Forbes* (Oct. 15, 2018), <https://www.forbes.com/sites/lizelting/2018/10/15/a-hard-look-at-the-hard-numbers-of-metoo/#18b5355279f9>.

<sup>14</sup> Anderson et al., *supra*; Frank Leon Roberts, *How Black Lives Matter Changed the Way Americans Fight for Freedom*, *ACLU Blog* (July 13, 2018), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-black-lives-matter-changed-way-americans-fight>.

<sup>15</sup> *Id.*

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.<sup>16</sup>

DoSomething.org, for example, a nonprofit that engages young people in activism through Snapchat selfie challenges, Twitter debates, and text messaging campaigns, has 5.3 million members, a majority of which are between the ages of 13 and 25.<sup>17</sup>

Today, young people all over the world use social media as a tool to promote causes they believe in and advocate for change.

The survivors of the school shooting in Parkland, Florida, for example, 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 protestors nationwide.<sup>18</sup>

---

<sup>16</sup> Alexis Manrodt, *The New Face of Teen Activism*, Teen Vogue (Apr. 8, 2014), <https://www.teenvogue.com/story/teen-online-activism>.

<sup>17</sup> *Id.*; Heather L. Whitley, *How The CEO Of DoSomething.org Uses FOMO To Inspire Social Change*, Forbes (Sep. 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>18</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>; Lois Beckett, *Parkland one year on: what victories have gun control advocates seen?*, The Guardian (Feb. 14, 2019)

Seventeen Magazine, recognizing the demand amongst 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.<sup>19</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>20</sup>

Greta Thunberg, a 16-year-old Swedish activist, has used social media to inspire hundreds of thousands of students to walk out of classrooms around the world to protest inaction on climate change.<sup>21</sup> In August 2018, Thunberg began organizing weekly sit-ins outside Swedish parliament to call attention to climate issues.<sup>22</sup> Since then, Thunberg has used social media to help spread her message

---

(hereinafter “Beckett, *Parkland one year on*”), <https://www.theguardian.com/us-news/2019/feb/14/parkland-school-shooting-anniversasry-gun-control-victories>.

<sup>19</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>20</sup> Beckett, *Parkland one year on*.

<sup>21</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>22</sup> Mark Tutton, *Greta Thunberg inspires global climate protests*, CNN (Mar. 15, 2019), <https://www.cnn.com/2019/03/15/world/greta-thunberg-climate-strike-intl/index.html>.



and inspire similar protests worldwide.<sup>23</sup> Her Facebook and Instagram accounts have collectively amassed over 3 million followers.<sup>24</sup>

Muhammad Najem, a 15-year-old Syrian teen and citizen journalist, uses Twitter and YouTube to broadcast war atrocities committed by the Assad regime in Syria.<sup>25</sup> He has become one of Syria's most prominent opposition activist-correspondents.<sup>26</sup> In many of his videos, he interviews children about their experiences and hopes for the future.<sup>27</sup>

And Marley Dias, a 14-year-old activist and feminist from Philadelphia,<sup>28</sup> 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

---

<sup>23</sup> Associated Press, *Students worldwide walk out of school to push for action on climate change*, Washington Post (Mar. 15, 2019), [https://www.washingtonpost.com/lifestyle/kidspost/students-worldwide-walk-out-of-school-to-push-for-action-on-climate-change/2019/03/15/310f363a-4781-11e9-90f0-0ccfeec87a61\\_story.html?utm\\_term=.77f3b1811e0a](https://www.washingtonpost.com/lifestyle/kidspost/students-worldwide-walk-out-of-school-to-push-for-action-on-climate-change/2019/03/15/310f363a-4781-11e9-90f0-0ccfeec87a61_story.html?utm_term=.77f3b1811e0a).

<sup>24</sup> Greta Thunberg, Facebook, <https://www.facebook.com/gretathunbergsweden/>; Greta Thunberg, Instagram, <https://www.instagram.com/gretathunberg/?hl=en>.

<sup>25</sup> Lily Fletcher et al., *These teenage activists are shaping our future*, Huck Magazine (Jun. 1, 2018), <https://www.huckmag.com/perspectives/activism-2/teenage-activists-protest-worldwide-agents-of-change>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; Muhammad Najem, YouTube, <https://www.youtube.com/channel/UCw-EfChHemLJ4KX2p-HhuVA>.

<sup>28</sup> Wikipedia, [https://en.wikipedia.org/wiki/Marley\\_Dias](https://en.wikipedia.org/wiki/Marley_Dias) (last updated June 16, 2019).

children's literature.<sup>29</sup> Her goal was to collect and donate 1,000 books with a black girl as the main character.<sup>30</sup> Since then, she has collected more than 9,000 books,<sup>31</sup> and also written a book of her own about how young people can get involved in activism.<sup>32</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>33</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.

---

<sup>29</sup> Maggie McGrath, *12-Year-Old Marley Dias Is Changing The Face Of Children's Literature*, *Forbes* (Jun. 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/#760648bb4ce0>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Julie Zeilinger, *How the 12-Year-Old Activist Behind #1000BlackGirlBooks is Taking the World by Storm*, *Forbes* (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>33</sup> *Id.*

**C. Young People Use Social Media To Criticize Aspects of Their Lives at School.**

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, teens 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>34</sup> Her Instagram account frequently uses the hashtag #iamnotadistracted, which has been leveraged by young women and girls across the county to raise awareness to this issue.<sup>35</sup>

Teens have also used social media to criticize USDA regulations around nutrition championed by Michelle Obama, which put calories, fat, sugar, and sodium restrictions on food sold in schools nationwide.<sup>36</sup> To call attention to the

---

<sup>34</sup> Fight the Dress Code, Instagram, [https://www.instagram.com/fight\\_the\\_dress\\_code/](https://www.instagram.com/fight_the_dress_code/).

<sup>35</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>36</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>.

impact of the restrictions, students around the country have tagged photos online of unappetizing school lunches with the hashtag #thanksmichelleobama.

Across the Atlantic, students in the United Kingdom have used social media to protest the lack of gender diversity in course syllabi.<sup>37</sup> Seventeen-year-old Jessy McCabe, for example, created a Change.org petition protesting the fact that not a single piece in her music class syllabus was composed by a woman.<sup>38</sup> Her petition, which received 3,850 signatures, led to one of the United Kingdom's national exam boards adding five female composers to the syllabus.<sup>39</sup>

Students also commonly use social media, as in this case, to express dissatisfaction with their schools or school staff, speech that is fully protected by the First Amendment. For example, a middle school student at Maple Place Middle School in New Jersey created a website called “Anti-Maple Place”—from home, outside of school hours—where he posted messages criticizing the school

---

<sup>37</sup> Pippa Allen-Kinross, *Freedom of speech or damaging reputations? What schools should do about students on social media*, BBC Teach (Nov. 17, 2017), <https://schoolsweek.co.uk/freedom-of-speech-or-damaging-reputations-what-schools-should-do-about-students-on-social-media/>.

<sup>38</sup> Jessy McCabe, *Ensure the representation of women on the A-Level Music syllabus*, Change.org, <https://www.change.org/p/edexcel-ensure-the-representation-of-women-on-the-a-level-music-syllabus>.

<sup>39</sup> Nadia Khomami, *A-level music to include female composers after student's campaign*, The Guardian (Dec. 16, 2015), <https://www.theguardian.com/education/2015/dec/16/a-level-music-female-composers-students-campaign-jessy-mccabe-edexcel>.

and certain teachers and asking students to sign a guestbook saying why they, too, disliked the school.<sup>40</sup> The student was suspended and then sued the school district. School officials ultimately paid \$117,500 to settle his lawsuit<sup>41</sup> after a district court judge found that the school had violated the student's First Amendment rights. *Dwyer v. Oceanport Sch. Dist.*, Case 3:03-cv-06005-SRC-TJB, Dkt. 14 (D.N.J. Mar. 31, 2005) (noting that disruption on campus must consist of more than merely discomfort, hurt feelings, offense, or resentment) (citing *Sypniewski v. Warren Hills Regional Bd. of Ed.*, 307 F.3d 243, 265 (3d Cir. 2002)).

Similarly, a middle school student in Minnesota was suspended after posting on Facebook, from her home, outside of school hours, that she "hated" a school hall monitor because the monitor was "mean" to her.<sup>42</sup> She sued, alleging that the suspension violated her First Amendment rights. The District Court of Minnesota ruled that the First Amendment protected her out-of-school online statements, *R.S. ex rel. S.S. v. Minnewaska Area School District No. 2149*, 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012), and the school district ultimately settled her lawsuit.

---

<sup>40</sup> *New Jersey student receives \$117,500 in First Amendment claim settlement*, Student Press Law Center (Nov. 1, 2005), <https://splc.org/2005/11/new-jersey-student-receives-117500-in-first-amendment-claim-settlement/>.

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

<sup>42</sup> *Lydia Coutre, Minnesota school that demanded student's Facebook password settles First Amendment lawsuit*, Student Press Law Center (Mar. 28, 2014), <https://splc.org/2014/03/minnesota-school-that-demanded-students-facebook-password-settles-first-amendment-lawsuit/>.

And in Florida, a high school student was suspended for creating a Facebook page, from her home, outside of school hours, stating that her teacher was the “worst teacher [she’s] ever met.”<sup>43</sup> The Southern District of Florida ruled in the student’s favor, finding that her off-campus speech was constitutionally protected. *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010).

As these cases show, students use the Internet and social media 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. And just as adults have confidence that their constitutionally protected criticisms will not result in government sanctions, so too should student commentators when their speech takes place off-campus and outside of school hours—even if their speech is controversial and happens to be brought onto campus by others. *Tinker’s* substantial disruption standard does not offer sufficient protection for off-campus student speech, and this Court should find affirmatively that *Tinker* does not apply here.

## CONCLUSION

This Court should affirm the district court’s decision below, and it should further hold that *Tinker’s* substantial disruption test does not apply to off-campus

---

<sup>43</sup> Ki Mae Heussner, *Can You Trash Your Teacher on Facebook?*, ABC News (Feb. 22, 2010), <https://abcnews.go.com/Technology/trash-teacher-facebook/story?id=9903651>.

speech. As this Court has recognized, “It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.” *Layshock ex rel. Layshock*, 650 F.3d at 216. This Court should shore up its precedent and make clear that when students use social media when they are off campus and outside of school hours to engage in discourse on issues important to their self-expression and self-realization, even if that discourse is sharp or subjectively offensive, the First Amendment applies with full force—just as it would for other citizens.

Dated: August 28, 2019

Respectfully submitted,

/s/ Sophia Cope

Sophia Cope

Jamie Williams

Electronic Frontier Foundation

815 Eddy Street

San Francisco, California 94109

sophia@eff.org

(415) 436-9333

*Counsel for Amici Curiae*

*Electronic Frontier Foundation,*

*Student Press Law Center,*

*Pennsylvania Center for the First*

*Amendment, and Brechner Center for*

*Freedom of Information*

## CERTIFICATE OF COMPLIANCE

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

1. This Brief of *Amici Curiae* Electronic Frontier Foundation, Student Press Law Center, Pennsylvania Center for the First Amendment, and Brechner Center For Freedom of Information in Support of Plaintiffs-Appellees and Affirmance complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,764 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: August 28, 2019

By: /s/ Sophia Cope  
Sophia Cope

*Counsel for Amici Curiae  
Electronic Frontier Foundation,  
Student Press Law Center,  
Pennsylvania Center for the First  
Amendment, and Brechner Center  
for Freedom of Information*



## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 3rd Cir. R. 113.12
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus-scanning program, Bitdefender Virus Scanner Version 3.12 (3.12.10781), updated August 26, 2019, and according to the program are free of viruses.

Dated: August 28, 2019

By: /s/ Sophia Cope  
Sophia Cope

*Counsel for Amici Curiae  
Electronic Frontier Foundation,  
Student Press Law Center,  
Pennsylvania Center for the First  
Amendment, and Brechner Center  
for Freedom of Information*

### CERTIFICATE OF SERVICE

I certify that on this 28th day of August, 2019, I electronically filed the foregoing Brief of Amici Curiae Electronic Frontier Foundation, Student Press Law Center, Pennsylvania Center for the First Amendment, and Brechner Center For Freedom of Information in Support of Plaintiffs-Appellees and Affirmance, using the Court's CM/ECF system which will send notification of such filing to the following:

Michael I. Levin, Esq.  
David W. Brown, Esq.  
Levin Legal Group  
1800 Byberry Rd.  
1301 Masons Mill Business Park  
Huntingdon Valley, PA 19006  
Tel.: 215.938.6378  
Email: mlevin@levinlegalgroup.com; dbrown@levinlegalgroup.com

John G. Dean, Esq.  
Elliott Greenleaf & Dean  
201 Penn Avenue, Suite 202  
Scranton, PA 18503  
Tel.: 570.346.7569  
Email: jgd@elliottgreenleaf.com

Dated: August 28, 2019

By: /s/ Sophia Cope  
Sophia Cope

*Counsel for Amici Curiae  
Electronic Frontier Foundation,  
Student Press Law Center,  
Pennsylvania Center for the First  
Amendment, and Brechner Center  
for Freedom of Information*