Case No. 20-1320

In the

United States Court of Appeals

for the

Tenth Circuit

C1.G, an individual,

Plaintiff-Appellant,

v.

SCOTT SIEGFRIED, in his individual and official capacities, CHRIS SMITH, in his individual and official capacities, RYAN SILVA, in his individual and official capacities, KEVIN UHILG, in his individual and official capacities, THOMAS BRYNN, in his individual and official capacities and CHERRY CREEK SCHOOL DISTRICT NO. 5,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Colorado - Denver
Case No. 1:19-cv-03346-RBJ · Honorable R. Brooke Jackson, U.S. District Judge

AMICI CURIAE BRIEF OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND CATO INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certifies that (1) neither *amicus* has any parent corporations and (2) no publicly held companies hold 10% or more of the stock or ownership interest in either *amicus*.

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The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has successfully defended the rights of thousands of students and faculty members across the United States. FIRE defends fundamental rights at both public and private institutions through public commentary and advocacy, litigation on behalf of students and faculty members, and participation as *amicus curiae* in cases that implicate student and faculty rights, like the one now before this Court. *See, e.g.*, *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 183 (3d Cir. 2020) (citing with approval FIRE's *amicus curiae* brief in holding student's online speech protected by the First Amendment), *aff'd,* 141 S. Ct. 2038 (2021).

The Cato Institute is a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets,

[1] Pursuant to Rule 29(a)(4) of the Federal Rules of Appellate Procedure, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than FIRE and the Cato Institute, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 29(a), all parties have consented to the filing of this brief.

and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual Cato *Supreme Court Review*. Cato also filed an *amicus* brief before the Supreme Court in the *Mahanoy* case.

Amici are interested in this case because the issue of school regulation of noncurricular, off-campus speech is only growing in importance in the digital age. Because tomorrow's college students attend today's grade schools, and because courts often misapply K–12 precedent to speech restrictions involving college students, the resolution of this case could resonate on campuses across the country for years to come.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "[T]here's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."
>
> "Suppose he never commits the crime?" said Alice.
>
> —Lewis Carroll, *Through the Looking Glass*

Cherry Creek School District's expulsion of C.G. for protected speech has turned Lewis Carroll's fictional absurdity into a reality. Much like the White Queen, Cheery Creek first punished C.G., suspending him for a total of 21 days without ever giving him a chance to be heard. Only after pursuing expulsion did Cherry Creek give C.G. any chance to tell his side of the story. And worst of all, Cherry Creek never even considered that C.G.'s Snapchat post was protected by the First Amendment, and not punishable at all.

After the Supreme Court's recent decision in *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021), it is beyond cavil that the First Amendment protected C.G.'s post. Like the student in *Mahanoy*, C.G. posted on social media after school hours, off-campus, and not as part of any school program or activity—all of which diminish any leeway under the First Amendment that grade schools may have to control speech of

their students. *Mahanoy* all but disarms K–12 officials from disciplining off-campus speech that is not directed at any student, teacher, or administrator and otherwise lacks any nexus to the school.

In fact, the Supreme Court made clear more than 50 years ago that school officials cannot punish speech simply because they anticipate unpleasantness or discomfort among a student body. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). *Tinker* requires a concrete threat of substantial disruption to the school before it can regulate speech at the K–12 level. There was no evidence of that here. *Tinker* and its progeny thus compel reversing the decision below, and *Mahanoy* only serves to reinforce that.

Allowing the decision below to stand will only aggravate the problem of censorship in both the K–12 and collegiate contexts by ratifying an impermissible heckler's veto. Lessons learned in grade school about the need to protect free speech carry on to college and beyond. Overreaction by those charged with educating youth—like *expelling* a student for an out-of-school social media joke—chills speech and teaches the wrong lesson about the importance of the First Amendment. *Amicus* FIRE's two decades of defending civil liberties in

higher education demonstrate that preventing the heckler's veto is vital, particularly as school officials often exaggerate claims of disruption to suppress disfavored speech.

This Court should clarify in this case that K–12 precedent cannot be used to support speech restrictions on public college students. Courts often misapply the K–12 precedent of *Tinker* and its progeny to higher education. But given the differences between grade school and higher education and their respective minor and adult student bodies, the Supreme Court cabined its *Mahanoy* decision from applying to higher education. This Court should similarly do so.

In addition to violating C.G.'s right to free expression, Cherry Creek infringed on his right to due process by failing to provide him sufficient notice of the charges he faced and a meaningful opportunity to contest them. Cherry Creek advised C.G. of only one policy violation at the time of his original suspension. After the hearing officer held that cited policy was inapplicable, Cherry Creek then expelled C.G. for allegedly violating *other* policies. The district court compounded this error by treating C.G.'s sitting in his Dean's office for hours after being suspended as sufficing for a "hearing" on the subsequent and more severe suspensions. And at

the eventual hearing on the most severe sanction—expulsion—Cherry Creek refused to consider C.G.'s First Amendment claims at all. Expelling C.G. for a single social media post, made off-campus, after school hours, is vastly disproportionate to the seriousness of any offense, transgressing fundamental notions of fairness and guidance from the Department of Education. Accordingly, this Court should reverse.

ARGUMENT

I. The Decision Below Contravenes *Tinker* and *Mahanoy*.

The ruling below cannot be squared with *Tinker*, which prohibits punishing student speech based on speculative, "undifferentiated fear" of harm or disruption, or with *Mahanoy*, which all but disarms K–12 schools from disciplining students for off-campus speech not specifically directed at any student, teacher, or administrator, and that otherwise lacks nexus with the school.

A. *Tinker* does not permit punishment of student speech based on "undifferentiated fear."

The Supreme Court has long recognized students possess "fundamental rights which the State must respect." *Tinker*, 393 U.S. at 511. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* Consequently, even if C.G.'s off-campus social media post constituted student speech regulable by school officials (which it does not, for the reasons in § II.B, *infra*), "undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression." *Id.* at 508 (emphasis added). In order to discipline student expression, school

officials must reasonably forecast substantial disruption to school activities. *Id*. at 514.

Cherry Creek violated C.G.'s First Amendment rights in expelling him for his social media post because the post did not even come close to causing substantial disruption. Hurt feelings, outrage, and unreasonable overreactions are not actionable under *Tinker*, which emphasized the importance of "hazardous freedom" and "risk" in a free society. 393 U.S. at 508–09. Rather, schools must justify punishment of student speech by more than "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* Schools are not "enclaves of totalitarianism" and "[s]chool officials do not possess absolute authority over their students." *Id.* at 511.

While *Tinker*'s substantial disruption standard does not require school officials to await a riot, merely avoiding controversy is far from sufficient. *Id*. at 509–10. As this Court has noted, any forecast must rest on a *concrete* threat of substantial disruption. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 37 (10th Cir. 2013). "[T]here must be a real or substantial threat of actual disorder, as opposed to the

mere possibility." *Holloman v. Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004).

The very first published court decision involving punishment of a student's social media speech captured the point well: "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*." *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998). "[T]he mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3rd Cir. 2000) (Alito, J., concurring). Indeed, the Supreme Court has identified protecting offensive and even repugnant speech as a "bedrock principle" of First Amendment law. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Ignoring this principle, the district court allowed the expulsion of a student for speech that merely caused offense—a concept anathema to First Amendment jurisprudence.[2] School officials claimed C.G.'s speech caused some isolated commotion in

[2] *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Hurley v. Irish–American Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995)) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.").

the community, but this does not equate to a substantial disruption of the school environment.[3]

Courts have recognized student jokes—even if vulgar, crude, offensive, and in poor taste—are also protected under *Tinker*. The Third Circuit held a crude profile of a middle school principal—though filled with profanity and other vulgar content—was a joke that could not have led authorities to reasonably forecast substantial disruption. *J.S. v. Blue Mountain School District*, 650 F.3d 915, 920, 931 (3rd Cir. 2011). Similarly, *Sagehorn v. Independent School District* held a high school student stated a First Amendment claim challenging his punishment for jokingly responding "yes" to a tweet asking if he had "made out" with a teacher, noting "there is no indication that any disruption was, in fact, caused." 122 F. Supp. 3d 842, 858–59 (D. Minn. 2015).

Courts must be able to distinguish protected (even if offensive) speech—like jokes, satire, or parody—from unprotected speech, like true

[3] *See J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010). Even expression related to Nazism or Hitler does not justify depriving a student of an education. *Depinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 646 (D.N.J. 2007) (finding no concrete evidence of a specific fear of substantial disruption under *Tinker* when primary school students wore buttons with pictures of Hitler to protest school uniforms).

threats or speech causing substantial disruption. That was a chief lesson of the seminal decision in *Watts v. United States*, 394 U.S. 705 (1969), where the Supreme Court recognized that an African-American protestor's comment on the draft's racially disproportionate impact—"If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."—was constitutionally protected "political hyperbole" that elicited laugher from listeners, not a "true threat" against the president. *Id.* at 706–07. The same principle should apply in the instant case. C.G.'s joke did not evince any real intent to hurt or kill others—there was no evidence that the speech was a threat, nor was it directed to anyone at Cherry Creek. Consequently, it remains protected by the First Amendment.

Unfortunately, "some school administrators forget the spirit of *Tinker* and censor student expression based on 'undifferentiated fear.'"[4] Such overreaction contravenes *Tinker*'s well-established guidance regarding freedom of expression in grade school: "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views

[4] David L. Hudson, Jr., *Fear of Violence in Our Schools: Is "Undifferentiated Fear" in the Age of Columbine Leading to a Suppression of Student Speech*, 42 WASHBURN L.J. 79, 79 (2002).

of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." *Tinker,* 393 U.S. at 508. As C.G.'s speech presented no demonstrable threat of substantial disruption to school activity, Cherry Creek had no authority to punish it.

B. *Mahanoy* tightly cabins schools' authority to punish students for off-campus speech.

The ruling below sharply conflicts with the Supreme Court's most recent decision on student speech, *Mahanoy Area School District v. B.L.*, which reinforces *Tinker's* strict limitations on public schools punishing off-campus speech. *Mahanoy* made clear that "[w]hen it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." 141 S. Ct. at 2046. Justice Alito's concurrence elaborated on this limitation, identifying as "a category of speech that is almost always beyond the regulatory authority of a public school" that which "is not expressly and specifically directed at the school, school administrators, teachers, or fellow students" and involves sensitive matters of public concern. *Id.* at 2055.

C.G.'s speech, like that in *Mahanoy*, happened outside school hours, away from school, and not part of any school program or activity. *C1.G.*

v. Siegfried, 477 F. Supp. 3d 1194, 1200–01 (D. Colo. 2020). The school had no supervisory authority over C.G. when he made the Snapchat post. Moreover, C.G.'s speech did not pertain to any of his school's administrators, teachers, students, or even—as in *Mahanoy*—its extracurricular programs. *Id.* Thus, every feature of C.G.'s speech sharply diminishes the "special First Amendment leeway" schools might otherwise have to regulate speech occurring under their supervision. *Mahanoy*, 141 S. Ct. at 2046.

That members of the community may have found C.G.'s joke deeply offensive provides *more*—not less—reason to protect it. As explained in *Mahanoy*, grade schools have an abiding "interest in protecting a student's unpopular expression, *especially when [it] takes place off-campus*." 141 S. Ct. at 2046 (emphasis added). The Court recognized that by immunizing merely unpopular expression from punitive consequences, schools both uphold the First Amendment and teach young citizens an important lesson about its core purpose and underlying principles.[5] To instead allow schools to clamp down on unpopular

[5] *Id.* Of course, school officials and the wider community may exercise their own rights to condemn a speaker's message, as happened here. That is the remedy for disfavored speech the First Amendment envisions.

speech—even jokes—wrongly conveys to students that their words are undeserving of constitutional protection.

Were C.G.'s suspension to stand, students would rationally but mistakenly conclude that they must self-censor *everywhere*, lest they cause offense to others. The First Amendment does not permit such a panopticon. As the Court cautioned, "courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." *Id.*

Allowing the ruling below to stand would also ignore *Mahanoy*'s warning that school officials should not punish students simply because it is foreseeable that offensive, off-campus speech might lead *others* to cause a disruption at school. *C1.G.*, 477 F. Supp. 3d at 1210–11. Allowing C.G.'s punishment to stand on this basis effectuated a "heckler's veto," a type of censorship the Supreme Court has unreservedly rejected, for good reason: It enables individuals who dislike a speaker's message to suppress it simply by creating a disturbance.[6] When government officials

[6] *See, e.g., Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (speech cannot "be punished or banned, simply because it might offend a hostile mob"); *Brown v. State of La.*, 383 U.S. 131, 133 n.1 (1966) (government has no authority to prosecute peaceful demonstrators

capitulate to the heckler's veto, any viewpoint opposed by disruptive listeners becomes vulnerable.

Adverse reactions—much less *anticipated* adverse reactions—of others to student speech on matters of public concern that occur off-campus, and not directed at the school, cannot be used to punish the speaker. As Justice Alito explained in *Mahanoy*:

> [E]ven if such speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the student who spoke out; "that would be a heckler's veto." *The school may suppress the disruption, but it may not punish the off-campus speech that prompted other students to engage in misconduct.* . . . This is true even if the student's off-premises speech on a matter of public concern is intemperate and crude.

Mahanoy, 141 S. Ct. at 2056 (Alito, J., concurring) (emphasis added) (citation omitted).

Mahanoy leaves no doubt that the speech-prohibitive heckler's veto is untenable, even in K–12 schools, particularly with respect to ordinarily

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merely because "their critics might react with disorder or violence"); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792, 795 (E.D. Va. 1991) ("One of the most persistent and insidious threats to first amendment rights has been . . . the 'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at the peril of suffering disruptions of public order.") (cleaned up).

protected off-campus speech unrelated to the school. Otherwise, officials could punish large swaths of potentially offensive speech—expressed anywhere, at any time—simply based on risks that students offended by it will react in ways that disrupt the school environment.

That is exactly what happened here. The district court singled out "anti-Semitic comments—even comments intended as a joke" as causing "far more insidious disruption" than other comments that might engender disagreement, but this plainly and impermissibly targets speech based on how deeply it may offend. *C1.G.*, 477 F. Supp. 3d at 1209. Such a standard is foreign to the First Amendment and forsakes the school's interest in protecting the "marketplace of ideas." *Mahanoy*, 141 S. Ct. at 2046.

II. Allowing the District Court's Ruling to Stand Would Worsen the Problem of Censorship That *Amicus* FIRE Confronts in Higher Education.

The district court's decision ratifies an impermissible heckler's veto, which, if allowed to stand, will only aggravate the problem of censorship in K–12 and higher education. From *Tinker* to *Mahanoy*, the Supreme Court has repeatedly recognized that public schools must instill respect

for constitutional liberties such as free expression.[7] Failing to do so normalizes censorship, which is already rampant in higher education.

A. Censorship at the K–12 level fosters illiberal values that persist in higher education.

Public schools are "nurseries of democracy," *Mahanoy,* 141 S. Ct. at 2046, responsible for protecting free expression, "the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker,* 393 U.S. at 508–09. Free-speech lessons gleaned by K–12 students carry forward to higher education.

Experiences with American public schools "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities." *Ambach v. Norwick*, 441 U.S. 68, 79 (1979). Because "[t]his influence is crucial to the continued good health of a democracy," student experiences with our public schools must not include overreaching government censorship and surveillance. *Id*. If public grade school administrators can punish off-campus student expression far beyond the schoolhouse gate, a generation of Americans will be taught a

[7] *See Tinker,* 393 U.S. 503; *Mahanoy* 141 S. Ct. 2038; *see also* Amanda H. Cooley, *Inculcating Suppression*, 107 GEO. L.J. 365, 389 (2019).

corrosive, illiberal lesson about the illusory value of their constitutional freedoms.

Despite the importance of inculcating respect for fundamental civil liberties, public schools "have increasingly failed to scrupulously protect students' constitutional freedoms," law professor and education scholar Amanda Harmon Cooley observes, concluding that "the natural reaction is for students to naturalize the cabining of their rights."[8] Unfortunately, this effect extends beyond secondary school. As Cooley explains, when public school administrators normalize rights suppression, it "result[s] in a modeling effect in terms of how young people deal with conflict and adverse ideas," resulting in "college and university students who stifle and suppress the speech of others solely because they disagree with their viewpoints."[9] This "speech suppression replication" undermines "the transcendent democratic values of academic freedom and robust dialogue."[10]

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[8] Cooley, *supra* note 7 at 395, 399.

[9] *Id.*

[10] *Id.* at 399.

In his *Mahanoy* concurrence, Justice Alito defended the precondition of "robust dialogue," declaring that "[s]peech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting." 141 S. Ct. at 2058. Virtually every day, students or faculty—whether by posting on social media, teaching or participating in classrooms, inviting speakers, tabling and leafleting, or myriad other means—express themselves in ways someone finds objectionable. If this Court upholds the decision below, it will teach a generation of students the illiberal lesson that the First Amendment may be ignored in favor of accommodating another's discomfort with, disfavor of, or disruption to unpopular or dissenting expression. This is not a hypothetical concern.

B. *Amicus* FIRE routinely combats the heckler's veto in higher education.

Campus administrators too often sacrifice free speech rights to placate those who disfavor the speech at issue, as *amicus* FIRE has observed over two decades of advocating for civil liberties on campus. For instance, vandalism and injuries led the University of California, Berkeley to cancel a speech by then-*Breitbart* editor Milo Yiannopoulos

in 2017.[11] That same year, Middlebury College in Vermont shut down a talk by academic and writer Charles Murray mid-speech due to violent protests.[12] In 2013, Brown University students shouted down former New York City police commissioner Ray Kelly, who was unable to finish his scheduled talk.[13]

Additionally, school officials often exaggerate the disruption that might follow unpopular speech to justify taking action against the speaker. For example, in June 2017, Essex County College terminated instructor Lisa Durden after she appeared on Tucker Carlson's Fox News program to discuss a controversial Black Lives Matter event.[14] Although

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[11] *Updated Statement on Violent Protest at University of California, Berkeley*, FIRE (Feb. 2, 2017), https://www.thefire.org/updated-statement-on-violent-protest-at-university-of-california-berkeley.

[12] Alex Morey, *Violent Middlebury protesters injure professor, force invited speaker to flee lecture hall*, FIRE (Mar. 3, 2017), https://www.thefire.org/violent-protesters-at-middlebury-force-invited-speaker-to-flee-lecture-hall-injure-professor.

[13] Will Creeley, *At Brown, Free Speech Loses as Hecklers Silence NYPD Commissioner*, FIRE (Oct. 30, 2013), https://www.thefire.org/at-brown-free-speech-loses-as-hecklers-silence-nypd-commissioner.

[14] Adam Steinbaugh, *After FIRE lawsuit, Essex County College finally turns over documents about firing of Black Lives Matter advocate*, FIRE (Jan. 23, 2018), https://www.thefire.org/after-fire-lawsuit-essex-county-college-finally-turns-over-documents-about-firing-of-black-lives-matter-advocate.

officials claimed the school "was immediately inundated with feedback . . . expressing frustration, concern and even fear," about Durden's views, public records revealed only *three* emails in the wake of Durden's appearance, all received *after* administrators had already decided to remove her.

When Babson College fired adjunct professor Asheen Phansey in January 2020,[15] over a satirical Facebook post calling for the Ayatollah Khomeini to bomb the Kardashians, the school claimed it was "cooperating with local, state and federal authorities" to conduct a "thorough investigation."[16] However, Massachusetts state police had no records of any reports, nor did Babson's own police—while local police

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[15] Teo Armus, *Adjunct professor who jokingly said Iran should list 52 U.S. cultural sites to bomb has been fired*, Wash. Post (Jan. 10, 2020), https://www.washingtonpost.com/nation/2020/01/10/babson-professor-iran. While Babson College is a private institution, it commits to the expressive freedom of its students and faculty. *See* Adam Steinbaugh, *Babson College abandons freedom of expression, fires professor over Facebook post criticizing Trump threat to bomb Iran cultural sites*, FIRE (Jan. 9, 2020), https://www.thefire.org/babson-college-abandons-freedom-of-expression-fires-professor-over-facebook-post-criticizing-trump-threat-to-bomb-iran-cultural-sites.

[16] Adam Steinbaugh, *Babson falsely claimed it was 'cooperating' with Massachusetts State Police over professor's 'threatening' Facebook post*, FIRE (Feb. 17, 2020), https://www.thefire.org/babson-falsely-claimed-it-was-cooperating-with-massachusetts-state-police-over-professors-threatening-facebook-post.

records showed the college was concerned only with the possibility of media presence on campus.

In August 2018, tenured professor James Livingston took to Facebook to satirically vent, "I now hate white people. I am white people, for God's sake, but can we keep them—us—[ ] out of my neighborhood?" Rutgers University investigated, asserting his posts were unprotected because "numerous complaints," negative publicity, and criticism in "mainstream media" had caused disruption on campus.[17] Though no student had complained, the university wrongly argued its action was justified because public criticism itself was "disruptive."[18]

C. This Court should clarify that K–12 precedent cannot support speech restrictions on public college students.

The Court in deciding this appeal should clarify, regardless of outcome, that the jurisprudential rationales for restricting grade school speech cannot apply to adult college students. Even if grade school students under supervision of school authorities may face restrictions on

[17] Memorandum From Carolyn Dellatore, Assoc. Dir., Off. of Emp. Equity, Rutgers Univ., 7 (July 31, 2018), https://www.thefire.org/rutgers-investigation-report (emphasis added).

[18] Letter from Marieke Tuthill Beck-Coon, Dir. of Litigation, FIRE, to Robert Barchi, President, Rutgers Univ. (Aug. 20, 2018), https://www.thefire.org/fire-letter-to-rutgers-university.

their speech, the Supreme Court has made clear its "precedents . . . leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972). This is because "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957).

Despite this longstanding recognition of the importance of academic freedom in higher education, some federal circuit courts have misapplied K–12 precedent to First Amendment claims involving college student speech.[19] But in *Mahanoy*, after discussing at length the qualitative differences between grade school and higher education, the Supreme Court cabined its decision from applying to higher education. 141 S. Ct. 2038, *see also id.* at 2049 n.2 (Alito, J., concurring).

This Court should follow suit, for the same reasons. First, while public grade schools are charged with "teaching students the boundaries

[19] *See, e.g.*, *Doe v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207, 1211–12 (11th Cir. 2016) (applying K–12 precedents to First Amendment claim involving college student speech); *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (same); *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (same).

of socially appropriate behavior," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), public universities serve as "vital centers for the Nation's intellectual life," which traditionally require "individual thought and expression." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 835, 836 (1995). Public universities cannot function without full freedom of expression.

Second, speech restrictions that may be necessary to keep order amongst grade schoolers make little sense in college given the disparity in age and maturity of the respective cohorts. *Widmar v. Vincent,* 454 U.S. 263, 274 n.14 (1981). Additionally, while K–12 students are a "captive audience" due to mandatory attendance, *Fraser*, 478 U.S. at 684, adult college students attend voluntarily. Justifications for K–12 speech restrictions are thus particularly inapplicable to a public college campus—which "at least for its students, possesses many of the characteristics of a public forum." *Widmar*, 454 U.S. at 267 n.5.

Third, in the grade school context, administrators stand *in loco parentis*. *Tinker*, 393 U.S. at 506 (*accord Mahanoy*, 141 S. Ct. at 2047). That consideration simply is not present with adult college students on public college campuses.

Fourth, as the Supreme Court recently cautioned in *Mahanoy*, when administrators assert omnipresent authority over "all the speech a student utters during the full 24-hour day," reviewing courts "must be more skeptical." 141 S. Ct. at 2046–48; *id.* at 2049–53 (Alito, J., concurring). Those concerns are only heightened for public college students, many of whom live on campus. *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 247 (3d Cir. 2010) ("[T]he idea that students may lose some aspects of their First Amendment right to freedom of speech while in school, does not translate well to an environment where the student is constantly within the confines of the schoolhouse." (citation omitted)).

For all these reasons, no matter the resolution of this appeal, the rule(s) of law that will apply are not germane to higher education, and the Court should state as much.

III. C.G.'s Punishment Violated His Due Process Rights.

The district court erred when it concluded, as a matter of law, that Cherry Creek did not violate C.G.'s due process in suspending or in expelling him. The complaint sufficiently alleges Cherry Creek deprived C.G. of his right to sufficient notice of how his Snapchat post violated

Cherry Creek's policies and that it denied C.G. a meaningful opportunity to respond to either the initial suspension or later extensions. Cherry Creek ultimately imposed a disproportionately severe punishment at odds with fundamental notions of fairness and good public policy.

A. Cherry Creek did not provide C.G. notice sufficient to allow him to prepare a proper defense.

Cherry Creek's notice to C.G. failed to satisfy due process because it did not allow him to defend against the various policies used to justify his expulsion. *See Goss v. Lopez*, 419 U.S. 565, 581, 584 (1975) (requiring student facing short-term suspension to "be given oral or written notice of the charges against him[,] . . . an explanation of the evidence the authorities have[,] and an opportunity to present his side of the story"). The due process right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane v. Cent. Hannover Trust Co.*, 339 U.S. 306, 314 (1950). While a student need not be given written notice of all specific charges, a school must allow the student "to prepare for the hearing and defend against the charges." *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1241 (10th Cir. 2001). Thus, the notice requirement exists to give the accused an opportunity to prepare a defense responsive "to the

precise issues which the decisionmaker regards as crucial." *Mathews v. Eldridge*, 424 U.S. 319, 346 (1976).

A student like C.G. does not have a "meaningful opportunity to present" a defense against accusations that he violated multiple polices when his accuser gives him notice of only one policy that does not even apply to the circumstances of his case. *Id.* at 349. When administrators initially summoned C.G. to Dean Thomas' office and told him his Snapchat post violated school policy, they cited only JICDA-13, Am. Compl. ¶ 52, ECF No. 30, which allows principals to suspend or recommend expulsion only if the student "while in school buildings, on school grounds, in school vehicles, or during a school-sponsored activity . . . [e]ngag[es] in verbal abuse, i.e. name calling, ethnic or racial slurs, or derogatory statements addressed publicly to others that precipitate disruption of the school program or incite violence." ECF No. 32-3 at 3–4. When Cherry Creek extended C.G.'s suspension by an additional five days, it again failed to cite any other policy. ECF No. 30 ¶¶ 64, 74. Likewise, nothing in the complaint indicates Cherry Creek cited any other policy before extending the suspension eleven more days. *Id.* ¶ 66. And the hearing officer at C.G.'s expulsion hearing found

JICDA-13—the one policy as to which C.G. received notice—inapplicable to his post because it was off-campus expression. *Id.* ¶ 74.

Nevertheless, the hearing officer recommended expulsion based on a determination—later adopted by Superintendent Siegfried—that C.G. violated several other policies, including prohibitions on "intimidation, harassment or hazing" and off-campus behavior "detrimental to the welfare or safety of other pupils or of school personnel." *Id.* ¶¶ 75, 77.

Here, C.G. would reasonably have believed that to defeat the charge against him, he needed only to demonstrate JICDA-13 did not apply because his expression occurred off-campus. He was unaware he needed to defend against charges that it constituted "intimidation, harassment or hazing," or was "detrimental to the welfare or safety" of those at school. Because the notice Cherry Creek provided did not allow him to prepare a defense to the shifting rationales for his expulsion, it violated his due process rights.

B. Cherry Creek failed to provide C.G. with a meaningful opportunity to respond to the allegations.

In addition to adequate notice, a school must give students facing a short-term suspension "an opportunity to present his side of the story." *Goss*, 419 U.S. at 581. For suspensions longer than ten days, this Court

determines whether the accused received adequate due process by using the *Mathews v. Eldridge* test, which considers: "(1) the private interest that will be affected by the official action, (2) the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the fiscal and administrative burden, that the additional or substitute procedural requirements would entail." *See Watson,* 242 F.3d at 1240 (citing *Mathews*, 424 U.S. at 334–35).

The district court erred by failing to consider whether Cherry Creek provided adequate due process at each step of the process leading up to C.G.'s expulsion. In rejecting C.G.'s argument that he did not receive adequate notice, the opportunity to be heard, or an avenue for appealing any of the suspensions, the district court cited Cherry Creek's argument that the suspensions should be subsumed by the ultimate expulsion. *C1.G.*, 477 F. Supp. 3d at 1212. Even though the district court conceded due process must be provided for each disciplinary decision, it held the negligible process given for the initial suspension could function as notice and an opportunity to be heard for longer suspensions not yet implemented. *Id*.

The district court erroneously concluded C.G.'s initial five-day suspension did not violate due process because the complaint alleges C.G. was detained in Dean Thomas' office "for hours" after he was told he had been suspended. *Id.* at 1212–13. Simply being in an administrator's office immediately *after* having been suspended provides scant opportunity to process the allegations, let alone marshal facts or arguments needed for defense. Indeed, it is not even clear from the complaint Dean Thomas was actually in his office to hear C.G.'s response to the charges.

Cherry Creek extended C.G.'s suspension another five days without an additional hearing, and the district court decided the initial time with Dean Thomas satisfied due process for that as well—despite the fact that C.G. had no prior notice he would be suspended a total of ten days. *Id.* The district court also held C.G. "had an opportunity to be heard when Dean Thomas informed him of the initial suspension decision" after Cherry Creek extended the suspension by 11 days, bringing the total suspension to 21 days. *Id.* at 1213.

This was error because severity of punishment informs the due process protections required. As the Supreme Court emphasized in *Goss*, longer suspensions constitute more substantial deprivations of a

student's liberty and property interests and may impact how he responds to the charges. 419 U.S. at 576, 584. Yet the district court incorrectly allowed C.G.'s presence in Dean Thomas' office immediately after being notified of a five-day suspension—where C.G. may or may not have had an opportunity to respond to the allegations—to serve as due process for that suspension *and* the later-imposed 10-day and 21-day suspensions.

Separately, C.G. also had no opportunity to assert his First Amendment rights and have them considered at *any point* in the process. The district court found Cherry Creek had no obligation to consider whether C.G.'s speech was constitutionally protected, even before imposing the extreme sanction of expulsion. A student's opportunity to respond to charges can hardly be meaningful if it lacks the opportunity to raise even flagrant First Amendment violations that, properly considered, should result in quick exoneration. Schools cannot be allowed to simply ignore this crucial issue in the disciplinary process and leave it for consideration only if a student makes the unlikely decision to commence costly, time-consuming litigation. If affirmed, the decision below will only increase the opportunities to punish students for clearly protected speech.

C. Expelling C.G. for his post violates fairness and good policy.

Expelling C.G. for a full year over one social media post made off-campus, outside school hours is vastly disproportionate to the seriousness of the alleged policy violations, flouts fundamental notions of fairness, and transgresses good public policy, including U.S. Department of Education guidance. While offensive to many, C.G.'s joke was made among friends, did not threaten, bully, or harass anyone, and could not reasonably be deemed a credible threat of violence. Further, C.G. already acknowledged how his post could affect other people and committed to making better choices in the future. *C1.G.*, 477 F. Supp. 3d at 1201. At that point Cherry Creek could have moved on, using the incident as a learning opportunity. Despite C.G.'s contrition, and that he never posed any risk of physical harm to the school community, *id.*, Cherry Creek pushed far beyond what a reasonable person would view as fair by imposing the most extreme sanction available: expulsion.

C.G.'s expulsion also breached accepted concepts of good public policy, as excessive punishments are detrimental to students' educational progress. "[R]esearch shows that attempting to maintain order by unnecessarily relying on suspensions or expulsions for minor

misbehaviors may undermine a school's ability to help students improve behavior, fail to improve the safety or productivity of the school's learning environment, and seriously and negatively impact individual and school-wide academic outcomes."[20] Accordingly, the Department of Education's guiding principles on discipline recommend that schools remove students from the classroom only as a "last resort," in response to the "most egregious disciplinary infractions that threaten school safety and when mandated by federal or state law," like bringing a firearm to school.[21] C.G.'s Snapchat joke falls far short of this mark.

CONCLUSION

Failure to reverse the decision below, which contradicts both *Tinker* and *Mahanoy*, will exacerbate the problem *amicus* FIRE routinely confronts in higher education and teach future college students to use the heckler's veto to suppress expressive rights of others instead of defending them. Moreover, the lack of due process afforded to C.G. compounds

[20] U.S. Dep't of Educ., *Guiding Principles: A Resource Guide for Improving School Climate and Discipline* 14 (2014) (*available at* https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf).

[21] *Id.* at 14, 15.

Cherry Creek's abdication of its role as a "nursery of democracy," which imbues them with the responsibility to protect the "marketplace of ideas." To protect students' rights, this Court should reverse.

Dated: September 16, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,399 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: September 16, 2021

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Counsel for *Amici Curiae* Foundation for Individual Rights in Education and Cato Institute in Support of Plaintiff-Appellant hereby certify that all required privacy redactions have been made, which complies with the requirements of Federal Rule of Appellate Procedure 25(a)(5).

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Dated: September 16, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on September 16, 2021, which will automatically send notification to the counsel of record for the parties.

Dated: September 16, 2021

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