No. 20-1320

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

C1.G on behalf of his minor son, C.G., the aggrieved party,

Appellant,

v.

SCOTT SIEGFRIED, Superintendent of Cherry Creek School District, et al.,

Appellees.

Appeal from the United States District Court
For the District of Colorado
Civil Action No. 1:19-cv-03346-RBJ

Honorable R. Brooke Jackson, District Judge

ANSWER BRIEF OF APPELLEES

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Oral Argument Requested

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NOTICE OF PRIOR OR RELATED APPEALS

There are no prior or related appeals to this case.

STATEMENT OF THE CASE

This case is about a public school district's discipline of a high school student for posting hate speech on social media while off campus, which targeted the historically oppressed Jewish community. Appellant C.G. was disciplined after he posted a very alarming and inflammatory Snapchat message that he and his friends were going "to exterminate the Jews." Social media does not respect schoolhouse doors, and the post quickly spread in the Cherry Creek High School ("CCHS" or the "School") community, generating fear, anger, and sadness. Concerned parents contacted the police and school administration. Given the growing disruption to the School's operation and the violation of other students' rights to be free from harassment and receive an effective education, C.G. was suspended and ultimately expelled.

STATEMENT OF THE ISSUES

C.G., through his parent Cl.G., filed suit against Cherry Creek School District No. 5 ("CCSD" or the "District"), its governing Board of Education (the "Board"), its Superintendent, and several other administrators. Relevant to this appeal, C.G. asserted five claims under 42 U.S.C. § 1983: (1) violation of his free speech rights by all defendants except the District; (2) adoption of disciplinary policies by the District and the Board that encroach upon free speech; (3) violation of his procedural

due process rights by all defendants; (4) adoption of overbroad disciplinary policies by the District and the Board that fail to afford due process; and (5) commission of a conspiracy by all defendants to violate his constitutional rights under the First and Fourteenth Amendments. App. 58–70, ¶¶ 79–150 (Pl.'s Am. Compl.).[1] On C.G.'s appeal of the district court's dismissal of all these claims, Appellees' address the following issues:

1. Whether C.G. was lawfully disciplined for his off-campus hate speech targeting the Jewish community where it was reasonably forecast to materially and substantially disrupt CCHS's operations and infringe the rights of other students to receive an education free from harassment;

2. Whether the District's disciplinary policies are constitutional because they have no realistic danger of compromising established First Amendment rights of other students;

3. Whether C.G. was afforded procedural due process in having multiple opportunities to tell his side of the story, being allowed to argue his off-campus

[1] Citations to the record follow Appellant's convention and refer to his Appendix in the following format: App. [page number], (document title). Like Appellant, Appellees cite to the page numbers printed in blue font at the bottom right of each page in the Appendix.

speech was protected by the First Amendment, and receiving discipline under policies that incorporate the constitutional bounds of school authority; and

4. Whether C.G. cannot state a civil conspiracy claim because he was not deprived of his rights to free speech or due process under the First and Fourteenth Amendments?

STATEMENT OF THE FACTS

Because this case was decided on Appellees' Motion to Dismiss, the following recitation is based on the allegations in C.G.'s Complaint and documents referenced within it. In the fall of 2019, C.G. was a student at CCHS. *Id.* at 45, ¶ 32. On the evening of Friday, September 13, 2019, C.G. and three friends from CCHS went to a thrift shop. *Id*. at ¶¶ 34–35. C.G. took a photograph of his three friends wearing hats, one of which resembled a foreign military hat from the World War II era. *Id*. at 45–46, ¶¶ 35–36. C.G. posted the photograph on the social media platform Snapchat with the caption, "**Me and the boys bout to exterminate the Jews**." *Id*. at 46, ¶ 36 (emphasis added). People who were "friends" with C.G. on Snapchat were able to view the post, and it spread within the local Jewish community. *Id*. at 40, 47, ¶¶ 4, 43. One "friend" showed the post to her father, who called the police. *Id*. at 47, ¶ 43.

School officials also were contacted about the post. *Id*. at 40, ¶ 6. The

Complaint excerpted an email chain between Ryan Silva, CCHS's Principal, and community members just over a day after the post on Sunday, September 15, 2019. *Id*. at 47–48, ¶ 46.[2] The chain started when a CCHS student's mother emailed Mr. Silva, the Superintendent Scott Siegfried, Chief of Staff Chris Smith, Rabbi Richard Rheins, Anti-Defamation League Regional Director Scott Levin, and others. App. 90–91 (Ex. 1 to Defs.' Mot. to Dismiss). The student's mother stated C.G.'s social media post "ha[d] been **widely circulated** throughout the Jewish community this weekend" and was "**generat[ing] fear, anger, and sadness** for [herself and husband] and most importantly [her son] … who has a class with at least one of the students" in the picture. *Id.* at 90 (emphasis added).) She stated her family and three others had filed an incident report with the Arapahoe County Sheriff's Office. *Id.* The mother also referenced anti-Semitic activity at CCHS the year before and asked the District "to live your stated values of making the safety and security of our students a priority." *Id.* at 91. She noted her son "has expressed concern about returning to school and classes with students pictured in the anti-Semitic, hate speech Snapchat" and wants him to know that "teachers and administrators . . . are taking these threats seriously." *Id*.

[2] Appellees attached the email chain to their Motion to Dismiss, consistent with *GFF v. Assoc. Wholesale Grocers*, 130 F.3d 1381, 1384 (10th Cir. 1997).

The student's father then requested an explanation of the plan for when students returned to school the next day. *Id*. at 89. Mr. Silva replied that the plan was to "escort the students [involved in the post] from period 1 as they arrive." *Id*. at 88. Mr. Silva also explained that when "an incident happens off campus, we have to make sure there is a nexus to school. This is the case because our primary function is not to police the community. If we can make a case that there is a nexus to school, we can address a situation that happened away from school. **In this case, I feel the learning environment has been impacted**." *Id*. (emphasis added).

The next morning Monday, September 16, 2019, C.G. was escorted from his first period class and taken to Dean of Students Brynn Thomas's office and subsequently suspended for five days. App. 48, ¶¶ 50–51 (Pl.'s Am. Compl.). Mr. Silva then sent a communication to CCHS students, parents, and staff addressing "an anti-Semitic social media post" that happened outside of school. *Id*. at 50, ¶ 58; App. 92 (Ex. 2 to Defs.' Mot. to Dismiss).[3] Mr. Silva stated that CCHS was "investigating to determine the impact on the school environment and will take appropriate action" and that CCHS was "in communication with the Anti-Defamation League about how best to support students in the wake of this incident." *Id.* Mr. Silva further

[3] Appellees attached the message Mr. Silva sent to the CCHS community as an exhibit to their Motion to Dismiss—again, consistent with *GFF*, 130 F.3d at 1384.

emphasized, "Cherry Creek High School does not tolerate hateful speech or actions. Our responsibility is to keep students safe and to provide a place where students of every race, ethnicity, religion, gender and sexual orientation feel safe, valued and supported." *Id*. Over the next few days, multiple news outlets ran stories covering C.G.'s post, and several more parents contacted the School. App. 50–51, ¶¶ 59–60 (Pl.'s Am. Compl.).

On September 18, 2019, C.G.'s suspension was first extended for five days and then through the fall break holiday to enable an expulsion review process. *Id*. at 52–53, ¶¶ 64, 66. A few days later on September 23, 2019, CCHS dedicated a full advisory period schoolwide to discuss C.G.'s post and "encourage a real conversation between students and faculty about offensive and insensitive speech." *Id.* at 52, ¶ 63. CCHS holds an advisory period twice a week for 30 minutes. *Id.* at 51, ¶ 62. The advisory periods are intended to manage the administrative and counseling tasks that have historically interrupted educational time. *Id.* at 51–52, ¶ 62.

Meanwhile, C.G. and his parents tried to engage School and District staff about the Snapchat post. *Id.* at 53, ¶ 67. On September 23, 2019, C.G.'s parents sent a packet to the Superintendent, Mr. Smith, Director of High School Education Carla Stearns, Mr. Silva, CCHS Assistant Principal Kevin Uhlig, Ms. Thomas, and other

District staff that included: a letter from C.G. accepting full responsibility for the post, apologizing for his behavior, explaining it was an impulsive lapse of judgment not intended to hurt anyone, and stating he had recently spent time educating himself about Jewish history and talking with Jewish community members and advocacy groups; a letter from C.G.'s parents reiterating C.G.'s journey of education and reticence; and letters from community members who know C.G. and his family requesting that CCHS treat the post as "a learning opportunity." *Id.* at 53–54, ¶ 68. The next day, C.G.'s mother followed up on this information and requested a meeting with District staff. *Id.* at 54, ¶ 69. Ms. Stearns spoke with her and explained there was "no need" for more additional discussion because C.G. was set for an expulsion hearing. *Id*. at 54–55, ¶ 69.

That hearing was held on October 7, 2019. *Id.* at 55, ¶ 70. C.G. asserted his speech was protected by the First Amendment. *Id.* at ¶ 73. Mr. Uhlig testified CCHS was entitled to regulate off-campus speech if it had a "nexus" with the school environment. *Id.* at ¶ 70. He explained the School looks beyond the language of the disciplinary policies "at the nexus on how it impacts students." *Id.* In addition, Mr. Uhlig testified C.G.'s post caused "extreme outcry of concerned community members and students . . . over fear to come to school" and "fear to access education." *Id.* at ¶ 72.

The hearing officer found: C.G. was not on campus or at a school-sanctioned activity when he posted the picture; C.G. did not use a device or website related to CCHS or the District to post the picture; C.G. did not tag CCHS or the District or any employee thereof in his post; no evidence indicated that C.G.'s actions were directed towards CCHS, any CCHS activity, or the District community; and C.G. did not make a specific threat to any individual in his post. *Id*. at 55–56, ¶ 73. The hearing officer declined to determine the legal issue of whether C.G.'s speech was protected by the First Amendment. *Id*. at 56, ¶ 73. Nonetheless, the hearing officer found C.G. had violated District disciplinary policies and recommended expulsion. *Id*. at 56, ¶ 75.

Dr. Siegfried largely adopted the recommendation and expelled C.G. for one year, finding violations of Board Policies JKD-1-E (Grounds for Suspension, Expulsion, or Denial of Admission), JICDA (Conduct and Discipline Code), and ACC-R (Intimidation, Harassment, and Hazing).[4] *Id*. at 57, ¶ 77. C.G. appealed to the Board, which held a hearing and voted to affirm the expulsion. *Id.* ¶ 78.

As noted above, C.G. filed suit and asserted five claims under 42 U.S.C.

[4] Appellees attached these and other District policies as an exhibit to their Motion to Dismiss because they were referenced in the Complaint and are subject to judicial notice. *GFF*, 130 F.3d at 1384; *Gardner v. Miami-Yoder Sch. Dist. JT-60*, No. 10–cv–00530–ZLW–KLM, 2010 WL 4537951, *1 (D. Colo. Nov. 3, 2010).

§ 1983 against the District, the Board, Dr. Siegfried, Mr. Smith, Mr. Silva, Mr. Uhlig, Ms. Thomas, and Ms. Stearns. C.G. claimed he was disciplined in violation of the First Amendment, deprived due process of law, and damaged through a civil conspiracy to violate his constitutional rights. *Id.* at 58–70, ¶¶ 79–150. Appellees moved to dismiss C.G.'s Complaint in its entirety, arguing his claims failed as a matter of law and the individual Appellees were entitled to qualified immunity. *See generally* App. 73–87 (Defs.' Mot. to Dismiss). More specifically, Appellees emphasized schools may regulate off-campus speech, C.G. was afforded ample process, and the District's disciplinary policies are constitutional. *Id.*

The district court granted Appellees' Motion to Dismiss and dismissed C.G.'s Complaint in a written order on August 10, 2020. *See generally* App. 168–97 (Order). Following the majority of Circuits, the district court agreed *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), allows school districts to regulate off-campus speech. App. 176–78 (Order) (citing cases). The district court rejected C.G.'s attempt to diminish the pervasiveness of social media or argue that off-campus speech cannot be regulated without evidence of an intent to disrupt the educational environment:

> "It is laughable to compare Myspace access in 2007 to social media access in 2019. In 2007 the fact that a school blocked Myspace may have indeed meant that students

> would not be able to access the website during the school day. Yet in 2019 onwards there is little a school can do to prevent students from accessing and discussing social media on campus throughout the day. It must be expected that most social media use will reach campus."

Id. at 182 (citing *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011)). The district court also discounted C.G.'s argument that off-campus speech cannot be regulated absent a direct threat: "[b]ut it does not logically follow that no substantial disruption occurs in the absence of a direct threat. I will not narrow *Tinker* as applied to off-campus speech as such." App. 183 (Order).

Turning to C.G.'s allegations, the district court held the District reasonably forecasted a substantial disruption at CCHS. *Id.* at 183. Contrary to C.G.'s characterization of a "mild distraction," the district court explained:

> "[A]nti-Semitic comments—even comments intended as a joke—cause a far more insidious disruption. Although media coverage is not necessarily indicative of disruption in the school environment itself, it is telling that so many news stories ran on C.G.'s post. It was foreseeable that an anti-Semitic attempt at humor might cause substantial disruption to the learning environment. The post "was materially and substantially disruptive in that it 'interfer[ed] . . . with the schools' work [and] colli[ded] with the rights of other students to be secure and to be let alone.'"

Id. at 184 (quoting *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573–74 (4th Cir. 2011); *Tinker,* 393 U.S. at 508, 513).

As for the due process claims, the district court held the District's policies facially fell within the *Tinker* standard and were not overbroad or vague on either First or Fourteenth Amendment grounds. *Id.* at 186–87 (Order). It also rejected C.G.'s as applied due process arguments "because each decision was made in relation to the same conduct, the procedure afforded at one stage of the disciplinary process may be sufficient at a subsequent stage," and in any event, "more formal procedures for the second suspension decision would have added little." *Id.* at 189, 191. In particular, the district court concluded C.G. had ample opportunity to be heard, even when initially suspended, and requiring a legal determination on C.G.'s free speech argument was unwarranted in the school disciplinary process. *Id.* at 190, 193–95.

Finally, the district court dismissed C.G.'s conspiracy claim because there was no underlying constitutional violation. *Id.* at 197. As a result of its resolution of C.G.'s claims on their merits, the district court did not address Appellees' assertions of qualified immunity.

This appeal followed. Before briefs were filed, the appeal was abated pending the United States Supreme Court's determination of *Mahanoy Area School District v. B.L.*, Case No. 20-255. That case was decided on June 23, 2021, ___ U.S. ___, 141 S.Ct. 2038 (2021). This Court then lifted the abatement on July 1, 2021, and

briefing has proceeded.

SUMMARY OF THE ARGUMENT

C.G. was lawfully disciplined for his off-campus hate speech. His alarming and inflammatory Snapchat post that he and his friends were going "to exterminate the Jews" did not stay away from School. It quickly spread in a CCHS community that had suffered anti-Semitism before, generating fear, anger, and sadness. Given the growing disruption to the School's operation and the violation of other students' rights to be free from harassment and receive an education, the District suspended and ultimately expelled C.G. within its authority. Students now have the ability to communicate instantaneously from any location via the Internet, and their use of social media does not respect physical school boundaries. The Supreme Court recently affirmed that the *Tinker* standard may apply to off-campus speech. A school's regulatory interests can be significant off campus to prevent a substantial disruption of learning-related activities or to protect those who make up a school community.

The District's disciplinary policies are not facially overbroad. There is no realistic danger that the challenged policies will compromise established First Amendment rights of other students. Another student could not be disciplined for off-campus speech unless there is a reasonable forecast that it will materially and

substantially interfere with the operation of the school or impinge upon the rights of other students, such as to receive an education free of harassment.

C.G.'s allegations establish he was provided ample process. He had repeated opportunities to tell his side of the story, including his assertion that his speech was protected by the First Amendment. He also was granted an expulsion hearing, at which he was allowed to offer evidence and be represented by counsel. Written findings were issued, and C.G. had an appeal where he was again able to have counsel. In addition, there is no question District staff considered the scope of the District's authority to regulate C.G.'s off-campus speech, and regardless, the contours of the First Amendment and the *Tinker* standard are incorporated in the District's disciplinary policies. Requiring express consideration of constitutional questions at disciplinary hearings exceeds their scope and risks overwhelming school resources. It also necessarily follows that C.G. was not prejudiced by a lack of due process. Any additional process during the suspensions or legal determinations at the expulsion hearing would have added no benefit to his defense.

C.G. cannot state a § 1983 conspiracy claim because he was lawfully disciplined and was not deprived of his constitutional rights to free speech and due process.

ARGUMENT

I. C.G. Was Lawfully Disciplined for His Off-Campus Hate Speech.

C.G.'s first and second claims invoked the First Amendment and asserted he could not be disciplined for his Snapchat post because it was made off campus. App. 58–60, 61, ¶¶ 82–87, 97, 107 (Pl.'s Am. Compl.).

It is well established that a public school may "restrict private student expression" when "the school reasonably forecasts it 'would materially and substantially interfere with the requirements of appropriate discipline in operation of the school,' or 'impinge upon the rights of other students.'" *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 36 (10th Cir. 2013) (quoting *Tinker*, 393 U.S. at 505–06). In *Mahanoy*, the Supreme Court recently made clear this authority may extend to student speech made off campus. 141 S.Ct. at 2045. Many of C.G. and his amici's contentions are defeated by this unequivocal holding. Indeed, they seem to completely disregard the unique authority of schools to regulate student speech.

C.G. argues for a bright line at the schoolhouse doors, where speech made outside almost always would be protected by the First Amendment. But the Supreme Court in *Mahanoy* rejected the notion of an absolute boundary, explaining it "do[es] not believe the **special characteristics** that give schools additional license to regulate student speech always disappear when a school regulates speech that takes

place off campus." *Id.* (emphasis added). The Supreme Court held a school's regulatory interests can be "significant" off campus to prevent, for example, "substantial disruption of learning-related activities or the protection of those who make up a school community." *Id. Tinker*'s standard, therefore, is still good law and may allow regulation of off-campus speech.

The reasoning reflects reality now more than ever in the social media age. As the Fifth Circuit has explained, "[t]he pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction . . . mak[ing] any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools." *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 395–96 (5th Cir. 2015) (quotation omitted); *see also Doninger v. Niehoff*, 527 F.3d 41, 48–49 (2d Cir. 2008) (agreeing that in era of "blog postings, instant messaging, and other forms of electronic communication" "territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority") (quotation omitted). "Students now have the ability to disseminate instantaneously and communicate widely from any location via the Internet." *Bell*, 799 F.3d at 392. "These communications, which may reference events occurring, or to occur, at school, or be about members of the school community, can likewise be accessed anywhere, by anyone, at any time." *Id.*

Consequently, the district court correctly looked beyond the location where C.G's speech originated and examined other features to determine whether he was lawfully disciplined. While C.G. posted his hate speech off campus, it certainly was foreseeable the post would rapidly reach the CCHS community. Moreover, it was reasonably foreseeable that the incredibly hateful and inflammatory content of the post—that C.G. and his friends were going to "exterminate the Jews"—would cause a substantial disruption to the School's operation.

As alleged in the Complaint, the social media platform Snapchat is viewable by any CCHS student who was "friends" with C.G., and before the weekend was over, Principal Silva was responding to multiple emails expressing serious concern about what would happen when school resumed. App. 40, 47, ¶¶ 4, 6, 43, 46 (Pls.' Am. Compl.); App. 88–91 (Ex. 1 to Def.'s Mot. to Dismiss). Already recognizing an "impact" on "the learning environment," Silva responded swiftly, issuing a statement about the post to the entire CCSD community after C.G. had been suspended. App. 50, ¶ 58 (Pl.'s Am. Compl.); App. 92 (Ex. 2 to Def.'s Mot. to Dismiss). Over the next few days, news outlets reported the post, and more parents contacted the School. App. 51, ¶¶ 59–60 (Pl.'s Am. Compl.). Even more than a week after C.G. made the post, it was still such an issue in the School that a full advisory period was dedicated to discussing offensive and insensitive speech. *Id.* at 52, ¶ 63.

These allegations demonstrate on the face of the Complaint that C.G.'s post both reached the CCHS community and not only could have but did cause a substantial disruption at the School. *See, e.g.*, *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365–66 (10th Cir. 2000) (explaining and applying *Tinker's* substantial disruption standard). C.G. criticizes how the district court construed a couple of his allegations, but there was no failure to accept any well-pled allegations as true. Moreover, there can be no real dispute that the emails between Mr. Silva and parents of CCHS students establish C.G.'s post quickly spread amongst the school community and was deemed by many to be serious anti-Semitic hate speech. *See* App. 88–92; *see also GFF*, 130 F.3d at 1385 ("[F]actual allegations that contradict such a properly considered document are not well-pleaded facts that the court must accept as true."). C.G. does not squarely address the content of those emails, and regardless, he does not challenge their consideration by the district court.

Instead, C.G. shifts to what he deems the district court's foreseeable disruption standard. The district court, however, did not create any new standard or test. It simply applied *Tinker*, just as this Court applied it *West*, 206 F.3d at 1365–67, and *Taylor*, 713 F.3d at 36, to encompass a forecast of "disruption that the school may have headed off by taking immediate and decisive action." App. 185 (Order). As explained in *West*, even the lack of "an actual disruption . . . does not mean that

the school ha[s] no authority to act." 206 F.3d at 1366–67. A "reasonable basis for forecasting disruption" is enough. *Id.* at 1366; *accord Taylor*, 713 F.3d at 36–37 ("A disruption need not actually materialize. School officials may act to prevent problems . . . . "). Nothing in *Mahanoy* changes this longstanding rule.

To the extent C.G. challenges the District's forecast here, he ignores prior anti-Semitic activity at CCHS, App. 91 (Ex. 1 to Mot. to Dismiss), news coverage of the post, App. 50–51, ¶ 59 (Pl.'s Am. Compl.), and the unique position District officials were in to make their determination, *see Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877–78 (7th Cir. 2011) ("School authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission, because they have the relevant knowledge of and responsibility for the consequences."); *see also Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996) ("If the schools are to perform their traditional function of 'inculcat[ing] the habits and manners of civility,' they must be allowed the space and discretion to deal with the nuances."). *Cf. West*, 206 F.3d at 1366 ("The history of racial tension in the district made administrators' and parents' concerns about future substantial disruptions from possession of Confederate flag symbols at school reasonable. The fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that

the district was required to sit and wait for one . . . ."). Whether allowing forecasts might invite content-based discrimination is a policy question, already answered by the Supreme Court and this Court's requirement that a forecast of disruption be reasonable.

C.G. further hints the disruption was improperly caused by the District. As already discussed, however, the record establishes otherwise. And as the district court recognized, "cases do not distinguish between 'substantial disruption' caused by the speaker and 'substantial disruption' caused by the reactions of onlookers or a combination of circumstances." *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 778 (9th Cir. 2014). C.G. and his amici maintain this principle implicates a heckler's veto. It does not. This Court expressly rejected the same concern in *Taylor*, stating, "This argument might be effective outside the school context, but it ignores the 'special characteristics of the school environment.'" 713 F.3d at 38 (quoting *Tinker*, 393 U.S. at 506). As the Ninth Circuit has explained, "the *Tinker* rule is guided by a school's need to protect its learning environment and its students, and courts generally inquire only whether the potential for substantial disruption is genuine." *Dariano*, 767 F.3d at 778 (citing cases); *see also Doe v. Hopkinton Pub. Schs.*, 490 F. Supp. 3d 448, 469 (D. Mass. 2020) ("[T]he 'heckler's veto' doctrine is a poor fit in the context of school speech because it is inconsistent with the

'substantial disruption' test from *Tinker*," which "looks to the likely objective result of the speech rather than the speaker's intent.") (emphasis omitted)).

Ultimately, C.G. emphasizes that the speech at issue in *Mahanoy* could not be regulated, but the fallout there was, at most, five to ten minutes of discussion in a single math class for a few days. 141 S.Ct. at 2047–48. One of the coaches even testified there would be no disruption of class or other school activities. *Id.* at 2048. That should not surprise. The student's speech in *Mahanoy* did not invade the rights of other students to be secure and receive an education. It was merely vulgar criticism of a coaching decision—"Fuck school fuck softball fuck cheer fuck everything." *Id.* at 2043, 2046; *see also Snyder*, 650 F.3d at 929 (emphasizing Myspace post was "so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did."). Indeed, nothing about the speech in *Mahanoy* placed it outside the First Amendment's ordinary protection. 141 S.Ct. at 2046. C.G.'s post, in contrast, was hate speech targeting the Jewish community. It was not just a crude attempt at a joke about the Holocaust, as C.G. argues, and the negative impact at CCHS went well beyond discomfort and unpleasantness.

In *Mahanoy*, the Supreme Court indicated "serious or severe [off-campus] bullying or harassment targeting particular individuals" may call for school

regulation. *Id.* at 2045. The justification is well recognized. Schools have a special interest when they stand *in loco parentis*. *Id.* at 2046. Parents necessarily expect school administrators to stand in their place to "protect" their children. *Id.* When, as here, there is concern about "'protecting the well-being and educational rights'" of students, a "school has greater latitude in taking disciplinary steps." *Sagehorn v. Indep. Sch. Dist. No. 728*, 122 F. Supp. 3d 842, 860 (D. Minn. 2015) (quoting *Kowalski*, 652 F.3d at 571); *see also Zamecnik*, 636 F.3d at 877 ("A particular form of harassment or intimidation can be regulated . . . ."). Justice Alito stated it even more forcefully in his concurrence in *Mahanoy*: "[d]uring the entire school day, a school must have the authority to protect everyone on its premises, and therefore schools must be able to prohibit threatening and harassing speech." 141 S.Ct. at 2052.

The District did exactly that. While it must consider C.G.'s right to free speech, it also must consider the rights of other students to be free from harassment and receive an effective education. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 397 (2007) ("[T]he rights of students 'must be applied in light of the special characteristics of the school environment.'") (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)); *see also Shen v. Albany Unified Sch. Dist.*, No. 3:17-CV-02478-JD, 2017 WL 5890089, at *10 (N.D. Cal. Nov. 29, 2017)

("[S]tudents have the right to be free of online posts that denigrate their race, ethnicity or physical appearance, or threaten violence."). "A school need not tolerate student speech that is inconsistent with its basic educational mission . . . ." *West*, 206 F.3d at 1366 (citing cases). The parents of other CCHS students necessarily expect administrators to stand in their place to "protect" their children from learning loss occasioned by harassing hate speech.

For all these reasons, disciplining C.G. did not violate the First Amendment, and the dismissal of his first and second claims should be affirmed. Even if this Court reaches a different conclusion, it should affirm the dismissal of the first claim against the individual District employees because they are entitled to qualified immunity. *See, e.g.*, *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1233 (10th Cir. 2000) ("[T]his court can affirm the district court for any reason that finds support in the record.").

Qualified immunity shields government officials from liability for civil damages if their actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Once raised, a "heavy two-part burden" shifts to a plaintiff. *E.g., Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996). "In order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit

decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011) (quotation omitted). "A clearly established right is generally defined as a right so thoroughly developed and consistently recognized under the law of the jurisdiction as to be 'indisputable' and 'unquestioned.'" *Lobozzo v. Colo. Dep't of Corrs*., 429 F. App'x 707, 710 (10th Cir. 2011).

When C.G. made his post in 2019, there was no clearly established law from the Supreme Court or in this Circuit that would have put any of the individual defendant District employees on notice that C.G. could not be disciplined for his off-campus social media post. Six other Circuits then had considered whether *Tinker* extended to such speech, and all but one had concluded it does. *See Bell*, 799 F.3d at 393 ("[O]f the six circuits to have addressed whether [a school can regulate] . . . off-campus speech, five, including our own, have held [they can]. (For the other of the six circuits (the third circuit), there is an intra-circuit split)."). Only this year—almost two years after C.G. made his post—did the Supreme Court address the issue in *Mahanoy*, and even then, it disclaimed any "broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the

protection of those who make up a school community." 141 S.Ct. at 2045.

Accordingly, Dr. Siegfried, Mr. Smith, Mr. Silva, Mr. Uhlig, Ms. Thomas, and Ms. Stearns are entitled to qualified immunity. The same reasoning prevailed in an analogous, unpublished case decided shortly after C.G. made his post. In *Hunt v. Board of Regents of University of New Mexico*, this Court highlighted "unmistakable gaps in the case law, including whether: (1) *Tinker* applies off campus; [and] (2) the on-campus/off-campus distinction applies to online speech." 792 F. App'x 595, 606 (10th Cir. 2019). Another decision that arose from higher education similarly afforded an employee qualified immunity because "[a]t the intersection of university speech and social media, First Amendment doctrine is unsettled," and the plaintiff could not "establish [the employee] violated clearly established law when she expelled him, in part, for his online, off-campus tweets." *Yeasin v. Durham*, 719 F. App'x 844, 852 (10th Cir. 2018). Other Circuits have reached the same conclusion as to K–12 public school employees who were named in suits involving off-campus speech. *See, e.g.*, *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 265–69 (5th Cir. 2019).

Additionally, Ms. Stearns, the District's former Executive Director of High School Education, and Mr. Smith, who was Chief of Staff at the time, are entitled to qualified immunity because there are no plausible allegations that they personally

participated in disciplining C.G. *Cf.* App. 49, 53–55, ¶¶ 54, 66, 68–69 (Pl.'s Am. Compl.). *See, e.g.*, *Dodds v. Richardson*, 614 F.3d 1185, 1194 (10th Cir. 2010) (emphasizing that in qualified immunity analysis, "courts must consider as well whether each defendant's alleged conduct violated the plaintiff's clearly established rights"). The only specific alleged acts of Ms. Stearns are that she would not meet with C.G. or his family during the expulsion review and refused to explain why. App. 54–55, ¶ 69 (Pl.'s Am. Compl.). The only specific alleged act of Mr. Smith was that he notified C.G. that his suspension was being extended. *Id*. at 53, ¶ 66. Such minimal allegations are insufficient to require them to mount a defense.

II. The District's Disciplinary Policies Are Not Facially Overbroad.

In his second and fourth claims, C.G. asserted the District policies he was found to have violated are facially overbroad by allowing students to be suspended or expelled for off-campus speech, unconnected to a school-sponsored event or activity. *Id.* at 60–61, 66–67, ¶¶ 99–102, 135–36. Such a claim is highly disfavored "strong medicine" to be employed "only as a last resort." *West*, 206 F.3d at 1367 (citing *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999)). "A court should address an overbreadth challenge to a law only when the law may have a chilling effect on the free speech rights of parties not before the court. *West*, 206 F.3d at 1367 (citing *United Reporting Publ'g*, 528 U.S. at 38–39).

And contrary to C.G.'s complaint of burden shifting, "[t]he overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (internal quotation omitted). Here, the district court correctly concluded there is no realistic danger that the challenged District policies will compromise established First Amendment rights of other students. App. 186 (Order) (citing *West*, 206 F.3d at 1367).

Policy JKD-1-E allows suspensions or expulsions for "[b]ehavior on or off school property," but consistent with state law, the behavior must be "detrimental to the welfare or safety of other pupils or of school personnel." App. 93 (Ex. 3 to Def.'s Mot. to Dismiss); *see* § 22-33-106(1)(c), C.R.S. While Policy JICDA prohibits "verbal abuse," it must "precipitate disruption of the school program or incite violence." App. 95–96 (Ex. 3 to Def.'s Mot. to Dismiss). Policy JICDA also allows discipline for "[b]ehavior on or off school property that is detrimental to the welfare, safety, or morals of other students or school personnel." *Id.* at 96. Policy ACC-R similarly allows suspension or expulsion for "intimidation, harassment or hazing" when such conduct "seriously disrupt[s] the learning environment, undermine[s] a sense of civility, or present[s] a danger to the safety and welfare of students and staff." *Id.* at 98. Moreover, Policy JICED, which C.G. does not acknowledge,

explicitly recognizes "student expression rights." *Id.* at 112. Discipline is limited to expression that "[c]reates a clear and present danger of . . . the material and substantial disruption of the orderly operation of the school," *id.*, consistent with state law, § 22-1-120, C.R.S.

These policies are constitutional as written. Another student could not be disciplined for off-campus speech unless "the school reasonably forecasts it 'would materially and substantially interfere with the requirements of appropriate discipline in operation of the school,' or 'impinge upon the rights of other students.'" *Taylor*, 713 F.3d at 36 (quoting *Tinker*, 393 U.S. at 505–06). C.G. argues off-campus speech that is "detrimental to the welfare, safety, or morals of other students or school personnel" may not be perfectly coextensive with *Tinker* in every possible application, but such a fine cut wrongly limits the authority recognized in *Tinker* and *Mahanoy* to substantial disruptions and ignores that schools have significant regulatory interests in "the protection of those who make up a school community." *Mahanoy*, 141 S.Ct. at 2045; *see also Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 29 (1st Cir. 2020) ("[B]ullying is the type of conduct that implicates the governmental interest in protecting against the invasion of the rights of others," and "schools may restrict such speech even if it does not necessarily cause substantial disruption . . . .").

C.G. also prescribes medicine too strong for an illusory ill. *See, e.g.*, *West*, 206 F.3d at 1367; *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) ("Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions."). At its core, C.G.'s facial challenge is based on his erroneous view that off-campus speech almost always lies outside the reach of school officials. As discussed in detail above, that is not the law.

Nor is there any basis to conclude the District is going to attempt to regulate off-campus speech beyond what the Supreme Court and this Court's interpretation of the First Amendment allow. Despite his suggestion on appeal of no limiting construction in the record, C.G. alleged in his Complaint that a District witness at the expulsion hearing, Mr. Uhlig, testified CCHS looks for a "nexus" between the speech and the school environment, such that "it impacts students." App. 55, ¶ 70 (Pl.'s Am. Compl.). That approach matched Mr. Silva's statement in his first email, sent a short while after C.G.'s post prompted community concern:

> When an incident happens off campus, we have to make sure there is a nexus to school. This is the case because our primary function is not to police the community. If we can make a case that there is a nexus to school, we can address a situation that happened away from school.

Id. at 47–48, ¶ 46; App. 88 (Ex. 1 to Defs.' Mot. to Dismiss). Although the word "nexus" is not in the policies or *Tinker*, several Circuits so characterize the connection necessary for a school to regulate off-campus speech. *E.g.*, *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707 (9th Cir. 2019) (citing cases from Fourth and Eighth Circuits). Its use by both Mr. Uhlig and Mr. Silva strongly indicates that as construed by the District, Policies JKD-1-E, JICDA, and JICDA do not possibly threaten protected speech. *Cf. West*, 206 F.3d at 1368 (concluding school district would not apply harassment and intimidation policy to innocent conduct).

III. C.G.'s Allegations Establish He Was Provided Ample Process.

Despite an expulsion hearing and an appeal where he was represented by counsel, as well as multiple earlier opportunities to tell his side of the story, C.G. maintains on appeal that he was not afforded an opportunity to be heard, sufficient to satisfy the Fourteenth Amendment. *See* App. 64, ¶ 117 (Pl.'s Am. Compl.). He also argues the District should have considered his First Amendment rights, and its policies are unconstitutional because they do not require such consideration. *See id.* at 56, 64, 66, ¶¶ 73, 117, 134. The district court correctly rejected these contentions, and its dismissal of C.G.'s third and fourth procedural due process claims should be affirmed.

The process due for a suspension of 10 days or less is minimal. In addition to basic notice of the charges, the student must be given "an opportunity to present his side of the story." *Watson v. Beckel*, 242 F.3d 1237, 1240 (10th Cir. 2001) (quoting *Goss v. Lopez*, 419 U.S. 565, 581 (1975)). C.G.'s allegations establish he had that opportunity. Shortly after arriving at school on Monday, September 16, 2019, C.G. was escorted to Ms. Thomas's office. App. 48, ¶¶ 49–50 (Pl.'s Am. Compl.). C.G. was notified of the District's concerns about his post, and he spent "hours" in Ms. Thomas's office before being sent home. *Id.* at ¶¶ 50–51. It does not take an inferential leap, as C.G. puts it, to conclude from these allegations that he had ample opportunity to tell his side of the story.

Indeed, nowhere in his Complaint did C.G. allege otherwise. He alleged he did not receive a "**fair** hearing" before his initial suspension, *id.* at 64, ¶ 118 (emphasis added), which is not the same as being denied an opportunity to say anything about the District's concerns and explain his version of the facts. In *Goss*, the Supreme Court described the minimal process due as "rudimentary precautions" and an "informal[] discuss[ion]." 419 U.S. at 581–82. C.G. may feel it unfair, but the Constitution does not require more at that initial stage. *Cf. Marquez v. Mesa Vista Consol. Sch.*, No. CV O3-917 BB/RLP, 2004 WL 7337820, at *4 (D.N.M. Aug. 31, 2004) (collecting school discipline cases in which sufficient process was provided).

The second extension continued C.G.'s suspension beyond 10 days, but the purpose was to enable expulsion review and accommodate the District's scheduled fall break. App. 53, ¶ 66 (Pl.'s Am. Compl.). Of course, C.G. did face expulsion, and that process subsumed the preceding suspension, both logically and practically. C.G.'s allegations establish the District ultimately afforded him all the process that then could have been due, with a hearing at which evidence was presented and after which a hearing officer made specific findings. *Id.* at 55–53, ¶¶ 70–75. That certainly satisfied *Goss's* suggestion of "more formal procedures" for suspensions over 10 days or expulsions. *See Watson*, 242 F.3d at 1240–41.

Even if the second extension must be viewed in isolation, C.G.'s claim of having no opportunity to be heard still rings hollow. He alleges "his parents sought to work with the School to make th[e] incident a learning and a growth experience," but District employees "rebuffed" them. App. 53, ¶ 67 (Pl.'s Am. Compl.). He further alleges his parents "sent a packet of information" to the individual defendants and other District employees; the packet included letters from C.G., his parents, and community members. *Id.* at 53–54, ¶ 68. There is no allegation, however, that the mailing was refused. The next day, C.G.'s mother called Ms. Stearns, and while she allegedly said there would be no meeting and refused to explain why, it is clear she engaged in conversation. *Id.* at 54–55, ¶ 69. Consequently, the record establishes

C.G. had and exercised multiple opportunities to tell his side of the story during the suspensions and before the expulsion hearing. While he and his parents were dissatisfied that the District did not agree to forgo expulsion, a preferred outcome is not process.

C.G.'s concerns about asserting his First Amendment rights and having them considered under the District's disciplinary policies are unfounded. At the expulsion hearing, C.G. "asserted that his speech was protected by the First Amendment." *Id.* at 55, ¶ 18. While the hearing officer did not make findings on that as a matter of law, there is no question District employees considered the issue. As already discussed, Mr. Silva stated—before C.G. was initially suspended—that "[w]hen an incident happens off campus, we have to make sure there is a nexus to school." *Id.* at 47–48, ¶ 46, 88. Mr. Uhlig testified similarly at the expulsion hearing. *Id.* at 55, ¶ 70.

Furthermore, the above discussion demonstrates the contours of the First Amendment, including the *Tinker* standard, are embedded in District Policies JKD-1-E, JICDA, and JICDA. To discipline a student under these policies for off-campus speech, there must be a reasonable forecast of material and substantial disruption or the violation of the rights of other students. The legal standard is already reflected in the policies' requirements, so factual findings are enough. In any event, C.G.

presents no authority holding a student is entitled to have a ruling from school officials on a First Amendment question of law. And the district court was correct that "public school districts are not courts of law." App. 194 (Order) (quoting *West*, 206 F.3d at 1364). Requiring express consideration of constitutional questions at disciplinary hearings exceeds their scope and "risk[s] overwhelm[ing] administrative facilities . . . , cost[ing] more than it would save in educational effectiveness." App. 194–95 (Order) (quoting *Goss*, 419 U.S. at 583).

It follows that C.G. was not prejudiced by any denial of due process. *See, e.g.*, *Watson*, 242 F.3d at 1242 (explaining "substantial prejudice" must be shown to establish denial of due process). He had a "meaningful opportunity to present [his] case," and any additional process during the suspensions or legal determinations throughout would have added no benefit. *Id.* at 1241 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)). According to the Complaint, C.G. was not disclaiming responsibility for the post during the suspensions. In his letter sent after the second extension, C.G. "apologized for his conduct," called it "a stupid, impulsive lapse in judgment, and stated he had been educating himself about the Holocaust. App. 53–54, ¶ 68 (Pl.'s Am. Compl.). At the expulsion hearing, C.G. "asserted that his speech was protected by the First Amendment." *Id.* at 55, ¶ 18. There is no reason to believe an earlier assertion would have led the District not to expel C.G., as he now

speculates. The District has defended its authority to discipline C.G. for his off-campus hate speech for over two years.

Even if this Court does not affirm on the merits, the individual defendants are entitled to the protections of qualified immunity on C.G.'s third due process claim. *See, e.g.*, *Mallinson-Montague*, 224 F.3d at 1233. As recognized in *Watson*, 242 F.3d at 1240–41, neither the Tenth Circuit nor the Supreme Court have ruled definitively on the procedures required for a suspension of 10 days or more. There also appears to be no clear authority that a school disciplinary process must include resolution of constitutional questions. As a result, there is no clearly established law that would have put the individual defendants on notice that the argued additional procedures must have been provided to C.G.

Dr. Siegfried is entitled to absolute immunity, too. The only allegation in the Complaint regarding his participation in the disciplinary process was that he reviewed the hearing officer's findings and recommendation and affirmed the expulsion. App. 56–57, ¶¶ 76–77 (Pl.'s Am. Compl.). "The Supreme Court has long recognized that officials in administrative hearings can claim the absolute immunity that flows to judicial officers if they are acting in a quasi-judicial fashion . . . . For an official at an administrative hearing to be protected by absolute immunity (a) the officials functions must be similar to those involved in the judicial process, (b) the

officials' actions must be likely to result in damages lawsuits by disappointed parties, and (c) there must exist sufficient safeguards in the regulatory framework to control unconstitutional conduct." *Guttman v. Khalsa*, 446 F.3d 1027, 1033 (10th Cir. 2006) (quotation omitted). Dr. Siegfried's limited role here meets these requirements. *Cf. Starr v. City of Lakewood*, No. No. 08–cv–01390–WYD–KLM, 2009 WL 1120038, **4–5 (D. Colo. Apr. 27, 2009) (holding city manager who reviewed and affirmed hearing officer's findings and decision was entitled to absolute immunity).

IV. C.G. Cannot State a § 1983 Conspiracy Claim Because He Was Not Deprived of His Constitutional Rights to Free Speech and Due Process.

C.G.'s fifth and final claim asserted that all Appellees conspired to violate his constitutional rights to free speech and procedural due process in violation of § 1983. App. 67–70, ¶¶ 141–50 (Pl.'s Am. Compl.). As the district court concluded, the conspiracy claim cannot survive the dismissal of C.G.'s First and Fourteenth Amendment claims. C.G. had to establish a deprivation of one of those constitutional rights to support a conspiracy. *Leatherwood v. Rios*, 705 F. App'x 735, 739 (10th Cir. 2017) (citing *Dixon v. City of Lawton*, 898 F.2d 1443, 1449 n.6 (10th Cir. 1990)); *accord Snell v. Tunnell*, 920 F.2d 673, 701–02 (10th Cir. 1990) ("[D]eprivation of a constitutional right is essential to proceed under a § 1983

conspiracy claim . . . .). As detailed above, he has not done so, and his conspiracy claim was correctly dismissed.

Even if one of C.G.'s constitutional claims could survive, dismissal of the conspiracy claim should be affirmed as to the individual defendants because they are entitled to qualified immunity following the above reasoning and authorities. *See, e.g.*, *Mallinson-Montague*, 224 F.3d at 1233. In the fall of 2019 when C.G. was disciplined, the weight of authority permitted schools to regulate off-campus speech, and there certainly was no clearly established law in the Tenth Circuit prohibiting discipline when substantial disruption is forecast and then results; nor was there clearly established law on the procedures required for a suspension of 10 days or more or the resolution of constitutional questions in a school disciplinary process. *See, e.g.*, *Brown*, 662 F.3d at 1164. Accordingly, nothing put the individual defendants on notice that allegedly cooperating in suspending and expelling C.G. for his post would constitute a conspiracy to violate his constitutional rights to free speech and due process.

CONCLUSION

C.G. was lawfully disciplined after he posted on Snapchat that he and his friends were going "to exterminate the Jews." His alarming and inflammatory hate speech did not stay off campus and quickly spread in a CCHS community that had

suffered anti-Semitism before, generating fear, anger, and sadness. Given the growing disruption to the School's operation and the violation of other students' rights to be free from harassment and receive an education, the District suspended and ultimately expelled C.G. within its authority. During the disciplinary process, C.G. was afforded multiple opportunities to tell his side of the story, including his assertion that his speech could not be regulated, and the policies that were applied to him respect the First and Fourteenth Amendments. With no constitutional violations, he cannot state any claim of civil conspiracy. For these reasons, Appellees respectfully request that this Court affirm the district court's order dismissing C.G.'s Complaint in its entirety.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be permitted because this case involves at least one novel issue of law, and discussion may materially assist the Court.

Respectfully submitted this 12th day of November, 2021.

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Certificate of Compliance with Rule 32(a)

I certify that with respect to this brief:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,730 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 for Office 365 in Times New Roman 14-point font.

Date: November 12, 2021

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Certificate of Privacy Redactions and Digital Submission

I certify that with respect to this brief:

1. All required privacy redactions have been made in compliance with 10th Cir. R. 25.5.
2. Paper copies of the Answer Brief, to be submitted to the Clerk, are exact copies of this ECF submission.
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Date: November 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, I electronically filed the foregoing **ANSWER BRIEF OF APPELLEES** using the court's CM/ECF system which will send notification of such filing to counsel of all parties of record.

s/ Elaine Montoya