No. 15-9999

In the Supreme Court of the United States

TAYLOR BELL,
PETITIONER

v.

ITAWAMBA COUNTY SCHOOL BOARD,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the *Tinker* standard, which allows schools to restrict students' speech on-campus or at school-sponsored events, apply to a student whose speech occurred entirely off-campus, without school resources, and outside school hours?

2. If *Tinker* applies, should the lower court's summary judgment decision and finding of a "substantial disruption" nonetheless be reversed because Bell did not himself play or talk about his protest song at school?

3. By speaking out about allegations of sexual misconduct at his high school through a traditional form of protest — music — does Bell's speech qualify for special First Amendment protection, under the public concern doctrine?

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INTRODUCTION

When four female students at Itawamba Agricultural High School were sexually harassed by two male coaches, Taylor Bell faced a choice. He could say nothing, sweep his sentiments under the rug, and quietly finish out his senior year of high school. Or, he could stand up and speak out. He chose to speak out and, as an aspiring musician, he chose to speak out with his own voice and in his own way. On his own time, using his own computer, and without school resources, he wrote a song about the allegations and posted it to Facebook and YouTube. His rhetoric was heated, and his emotions were real. But most everyone involved – Bell himself, the students, and even one of the alleged harassers – saw it for what it was: "just a rap" that tried to ignite a conversation about sexual harassment and the treatment of women in American society.

The First Amendment would undeniably protect Bell's song if it did not mention the school or the coaches. It would protect it if he made it a few months later, after he graduated. The Constitution would even protect this exact song, with the same lyrics, if it were made by a parent or a student at another school. But the school district argues that the First Amendment wields no power here, and the school district should be allowed to restrict and punish students' off-campus speech. That is a leap this Court has never made and one which insults the First Amendment.

The First Amendment exists to protect uncomfortable, even vile, speech. Protected speech may be provocative and thought-provoking, stirring the deepest of emotions and may even spur people to take extreme action. It may be hurtful, and it may be painstakingly hard to hear. But the Constitution still protects it. The First Amendment wrests the regulating hands of the state away from Americans' private

conversations, public confrontations, and vocal rallying cries. It should be no different for a speaker whose speech would otherwise be protected but for his status as a student.

STATEMENT OF THE CASE

I. Factual Background

In December 2010, Taylor Bell was an eighteen-year old adult senior at Itawamba Agricultural High School in Mississippi. R. at 114a, 117a. Described as "bright" by his teachers, Bell had no record of behavioral issues or school disciplinary proceedings against him, except for one in-school penalty for tardiness. R. at 116a; Ex. 16.

Shortly before Christmas 2010, several female students — all of them minors — informed Bell that two male coaches, Michael Wildmon and Chris Rainey, had sexually harassed them over the course of several months. R. at 46a, 117a, 226a. While a number of girls were subject to inappropriate touching and sexually-charged remarks, Bell was informed of four principal incidents. R. at 117a. First, Coach Wildmon told Renisha Morris that she had a "big butt," that he would like to date her if she was not a minor, and that she was "one of the cutest black female students" at the school. R. at 117a. He also looked down her shirt and touched her. R. at 117a. Second, Coach Rainey told a 16-year-old lesbian student, Shantiqua Shumpert, that he had heard she "messed with some nasty people" but that he could "turn [her] back straight." R. 117a, 227a. Third, Coach Rainey approached yet another student, Keyauna Gaston, and told her, "damn baby, you are sexy." R. 117a, 225a. Finally, Deserae Shumpert was witness to some of the aforementioned conduct and was also subject to Coach Rainey touching her ears until she told him to stop. R. 117a, 221a.

The school district has not contested the veracity of the girls' allegations of sexual misconduct. R. at 60a. Moreover, the school district did not seek to interview the victims

or further investigate the claims at any point prior to this lawsuit. R. at 224a, 226a, 228a.

Bell viewed the school administration as unresponsive to students' claims about teachers' misconduct and believed that the school administration would "ignore" the girls' claims, even if he were to raise them with the administration himself. R. 117a. Instead, Bell expressed his sentiments about the situation through the medium he knew best: music. R. 116a. As an aspiring rap artist, Bell had composed music and lyrics since he was a child and, as a teenager, recorded music in a studio once a week. R. at 116a, n.3.

Seeking to "deploy[] the artistic conventions and style of the rap genre . . . to critique the coaches' sexual harassment of female students," Bell recorded a rap under his stage name "T-Bizzle" at an off-campus recording studio called "Get Real Entertainment" records. R. at 94a. Bell completed the rap over the Christmas holidays, while school was not in session. R. at 117a. Bell posted the rap to only two social media platforms. R. at 122-23a. He first posted an unpolished version of the rap on Facebook, using his own private computer at home, and after school hours. R. 123a. Bell could not have accessed Facebook at school, nor could any other student, because the website was blocked on school computers, and students were not allowed to bring cellphones to school. R. at 98a, 122a. Students responded positively to Bell's artistry, remarking that he "had all the talent in the world" and predicting that he would one day be "famous." R. at 123a, n.21. Bell then created a more polished version of the rap for YouTube, adding sound effects, visual effects, and a monologue explaining the rap's importance to him. R. at 124a. He remarked that the issue of sexual harassment was one he "felt like [he] needed to address . . . [as] an artist." R. at 124a. He also remarked that he had deliberated about writing a song about this issue "for a long time," but that he was

ultimately moved to act by the thought that he might one day have a daughter affected by sexual misconduct. R. at 124a. As with the Facebook post, he used his home computer and posted the song outside of school hours. R. at 125a.

Although he did not believe that the coaches would ever hear the rap, he intended for the rap (1) to "increase awareness of the situation; (2) to enable him to "speak out" about sexual harassment and sexual misconduct generally; and (3) to serve as a vehicle for his "artistic expression" and an outlet to describe his own "real-life experiences." R. at 9a, 59a, 127a.

II. School Disciplinary Proceedings

Bell did not play the song at school nor did he encourage students to listen to the song at school. R. at 98a. He also never accessed the song on any school technology. R. at 98a. After the first version was posted on Facebook, Wildmon's wife had been alerted to the recording and informed her husband about it. R. at 6a. Wildmon then asked his students if they knew of the recording and asked them to play it for him on their cellphone, in contravention of established school policy. R. at 98a. The students knew about the song before Wildmon mentioned it to them, but there is no evidence on the record that they talked about the song at school, played the song at school, or talked to either of the coaches about the song. R. at 98a. The school district is aware of only one instance in which the song was played at school: when Coach Wildmon himself asked the students to play the song for him. R. at 98a.

Upon asking the students to play the song, Wildmon discovered that Bell's song described the aforementioned allegations of sexual misconduct, the underlying factual details of which the school district has not contested. R. at 60a, 119a, 193a. But because Coach Wildmon felt that "his name had been slandered," he immediately informed the

school principal, who then informed the school district superintendent. R. at 123-24a. Bell was not sent home and was allowed to stay on campus throughout the day. R. at 6a, 124a.

The next day, Bell was summoned to the principal's office and the school-board attorney questioned Bell about the contents of his rap. R. at 6a. He was asked about the factual basis for the allegations, who informed him of the misconduct, and about the scope of the allegations. R. at 6a. Bell indicated that he believed all the allegations to be true. R. at 124a. The principal did not contact law enforcement but decided to send Bell home for the rest of the day; the principal personally drove Bell home. R. at 97a. The principal did not indicate that she thought Bell was dangerous or threatening. R. at 11a.

The school then closed for almost one week due to inclement weather. R. at 6a. As he was not told to remove his song from the Internet or that he would suffer disciplinary action for the song, Bell then posted the more polished version of the song on YouTube, during the school break. R. at 97a, 124a. At the end of the inclement weather period, Bell returned to school and attended his morning classes without incident. R. at 6a, 125a. He was then summoned to the assistant principal's office, where he was told that he has been suspended indefinitely, pending the results of a disciplinary hearing with the school board. R. at 125a.

The assistant principal informed Bell that the school board took issue with four segments of the rap out of almost 100 lines of lyrics, in which he "foreshadowe[ed] something that might happen" to the coaches if they were to continue with the sexual misconduct. R. at 3a-5a, 8a. Bell later explained that he thought that "somebody's parents . . . or their brother . . . or their sister or somebody might get word [of the sexual misconduct]" but that he was not "saying that [he] was going to [take action against the

harassers.]" R. at 127a, n.28. In foreshadowing the actions that others might take against the harassers, he included a warning that the coaches should be watchful and he made reference to a "rueger," a type of firearm, which Bell considered to be "hyperbole." R. at 30a, 197a. The school board does not dispute that Bell did not own a firearm, had no immediate access to a firearm, did not possess a firearm, and had no prior experience with firearms. R. at 95a. An expert witness later testified that the recording was "nothing more than 'colorful language' used to entice listeners and [was] reflective of the norm among young rap artists." R. at 11a.

The assistant principal informed Bell that the disciplinary hearing would establish whether he had violated the administrative policy against "harassment, intimidation, or threatening other students and/or teachers." R. at 7a. Despite the school's contention that Bell was being suspended for allegedly threatening speech, the principal did not send Bell home immediately and instead allowed him to remain in the school commons, unsupervised, until the school bus arrived at the end of the day. R. at 97a, 125a.

At the disciplinary hearing several weeks later, the committee indicated that it sought to establish whether Bell had violated school policy. R. at 125a. The school board did not present evidence that the "song had caused or had been forecasted to cause a material or substantial disruption to the school's work or discipline." R. at 127a. Neither Coach Wildmon or Coach Rainey testified, and the school district did not allege that the coaches felt threatened by the song. R. at 128a. The school district did not contend that the song had been heard by any student or staff member on-campus, aside from one instance where Coach Wildmon asked his student to play it in class. R. at 98a. Instead, the hearing concluded with a committee member speaking about his issue with the

vulgar content of the speech, not the potentially threatening nature of the speech. R. at 128a. The committee member suggested that Bell should have "censor[ed]" the material to avoid the use of "bad words." R. at 128a. He suggested that Bell could have replaced the "bad words" with "big words" to avoid discipline. R. at 128a.

After the initial disciplinary hearing, Bell's mother received a letter upholding the suspension on the grounds that his song was intimidating and harassing. R. at 128a. The committee found that the speech could not be considered threatening under school policy, because it was not clear that he made a threat to the school. R. at 129a. Bell's suspension consisted of being placed in an alternative school for nine weeks, the remainder of the school term, and he was banned from any school functions for the same time period. R. at 128-29a. School board policy allowed him to make up missed work but provided an unspecified time frame for doing so. R. at 174a. If he failed to complete the work in the assigned time frame, he would receive no credit. R. at 174a. Bell made attempts to make up work by contacting his teachers, asking them to "not give up on [him]" and affirming that he viewed a high school diploma as a "necessity to survive." R. at Ex. 16, D-13.

A few days after the initial disciplinary hearing, the school district contacted Bell's mother again. R. at 9a. Without providing any further detail or justification, the school district informed her that the school board had reached a revised conclusion about the song. R. at 9-10a. The school district felt that Bell did in fact threaten, harass, and intimidate the teachers, revising its previous finding that it was unclear whether he had threatened them. R. at 9-10a. The district kept the existing suspension in place. R. at 10a.

III. Legal Background

Two weeks after the disciplinary proceeding, Bell and his mother filed this 42 U.S.C. § 1983 civil action in the United States District Court for the Northern District of Mississippi. R. at 130a. The Itawamba County School Board, the school district superintendent, and the school principal were named as defendants, in their individual and official capacities. R. at 130a. Bell claimed that the defendants had violated his First Amendment right to free speech by punishing him for speech that occurred entirely off-campus and without school resources. R. at 130a. He sought injunctive relief to restore his school privileges, expunge the disciplinary action from his record, and enjoin the school board from enforcing its policy against intimidating, threatening, or harassing speech, when the speech occurred entirely off-campus or outside of school-sponsored activities. R. at 130a. He also sought nominal damages. R. at 130a.

Shortly thereafter, the district court held a hearing on Bell's motion for preliminary injunction. R. at 131a. Unlike the disciplinary hearing, the two coaches testified at the preliminary injunction hearing. R. at 131a. Neither coach questioned the veracity of the allegations at the hearing, but they did offer their perspectives about the potential disruptiveness of the song. R. at 131a. Coach Rainey testified that he had never heard Bell's song, that he viewed it as "just a rap," and that his approach to it was to "let it go" because "it would probably just die down." R. at 131a. He did, however, feel that it caused him to re-evaluate how he spoke to students, to ensure that his comments were not viewed as "inappropriate." R. at 131a. He confirmed that there had been not been much discussion about the song at school or in his classes, but that there had been significant chatter about the school's response to the situation and the decision to suspend and transfer Bell. R. at 131a.

Similarly, Wildmon testified that he was more careful of his behavior toward students, making sure that if he was "scanning the classroom, that [he wouldn't] look in one area too long [to avoid being] accused of . . . staring at a girl." R. at 131a. He testified that his students "seem[ed] to act normal" after the release of the song, but that he was disturbed enough to order his players to stay at basketball games, until he was safely in his car. R. at 131a. He also stated that he felt he should now refrain from being "hands on" with the female students on the track team. R. at 98a, n. 23.

Since Bell had only day left in the alternative school at the time of the preliminary injunction hearing, the district court held that the issue was moot. R. at 177a. The parties then filed cross-motions for summary judgment. R. at 178a. The district court granted the defendants' motion for summary judgment. R at 132a. The district's court principal reasoning was that this Court's decision in *Tinker v. Des Moines Independent Community School District* controlled the outcome of Bell's case. R. at 207a. *Tinker* allows schools to restrict students' speech when the school can reasonably forecast that the speech will "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others." R. at 207a. This Court has not extended the same latitude to schools seeking to restrict off-campus speech. R. at 134a. Bell timely appealed to the United States Court of Appeals for the Fifth Circuit, in part on the basis that *Tinker* did not apply. R. at 132a.

The Fifth Circuit reversed the district court's summary judgment order, and held that Bell was entitled to First Amendment protections, for three main reasons. First, *Tinker* is not applicable to Bell's case because this Court's case law does "not address students' speech that occurs off-campus and not at a school-approved event." R. at 133a. Second, even if *Tinker* did apply, the school district has not met its summary judgment

burden in proving that a "material and substantial disruption at school actually occurred or reasonably could have been forecasted." R. at 133-34a. Finally, because Bell's song could not be "reasonably interpreted . . . as a serious expression of an intent to cause harm," the school district could not assert that Bell's speech fell under the "true threat" exception to the First Amendment. R. at 159a.

The school district petitioned the Fifth Circuit for en banc review, and the Fifth Circuit granted review. R. at 14a. Recognizing that there is a well-defined Circuit split whether *Tinker* applies to off-campus speech and that restricting off-campus speech "creates a tension between a student's free-speech rights and a school's official duty to maintain discipline," the en banc majority affirmed the district court's summary judgment order. R. at 21a, 23a. Judge Elrod concurred but stressed that a "broad off-campus application of *Tinker* 'would create a precedent with ominous implications . . . [by] empower[ing] schools to regulate students' express activity no matter where it takes place, when it occurs, or what subject matter it involves.'" R. at 42a (quoting *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (en banc) (Smith, J., concurring)).

Three separate dissents were filed. R. at 46-113a. In his dissent, Judge Dennis reiterated the rationale of the Fifth Circuit panel that *Tinker* did not apply and that Bell's song did not cause a substantial disruption. R. at 46a. In addition, he asserted that Bell's speech was entitled to heightened First Amendment protection, given that he was speaking on a matter of public concern. R. at 46a. Judge Dennis expressed concern that "the majority opinion allows schools to police students' Internet expression anytime and anywhere — an unprecedented and unnecessary intrusion on students' rights." R. at 49a. In particular, he stressed that the school district's position would "effectively

permit[] school officials . . . to punish a student's protest of teacher misconduct regardless of when and where the speech occurs and regardless of whether the student speaker is, at the time of the speech, an adult or a minor fully within the custody and control of his or her parents." R. at 51a.

Seeking to overturn the Fifth Circuit's en banc decision, Bell sought a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENTS

Taylor Bell's song, exposing the sexual misconduct allegations against two high school coaches, is protected by the First Amendment. Under the framework advanced by the school district, schools would be granted unprecedented authority to police and regulate students' off-campus speech — speech that even their parents may approve of. The First Amendment does not give schools that right.

First, the First Amendment protects Bell's speech because he spoke off-campus, without the use of school resources, and on his own time. This Court's standard in *Tinker*, which allows schools to restrict students' *on-campus* speech if it causes a substantial disruption, has never been held to apply to off-campus speech. This Court should decline the school district's invitation to do so today. To accept the school district's invitation would conflict with decades of Supreme Court jurisprudence avoiding intrusions into parents' rights to structure their children's lives and control their children's access to the various forms of speech that they see fit.

While the school district argues that it requires *Tinker* to apply off-campus to protect students' safety, this Court's "true threat" doctrine provides all the tools that schools need to protect their students from off-campus threats. Applying the true threats doctrine to this case, instead of *Tinker*, requires a reversal of the Fifth Circuit,

because the school district cannot reasonably argue that it believed Bell's speech to constitute a true threat.

Basic First Amendment principles control this case. This Court has applied the First Amendment with wide effect and has isolated unprotected speech to a few limited categories, such as obscenity, fighting words, and incitement. Because Bell's speech does not fall into one of these limited categories and because there is no authority for the Court to create a new unprotected category of off-campus speech, this Court should reverse the holding of the Fifth Circuit that the First Amendment does not protect Bell.

Moreover, contrary to the school district's suggestion that this Court should apply increased scrutiny to Internet speech, this Court has held that speech appearing on the Internet is entitled to the same protection as non-Internet speech.

Second, even if *Tinker* does apply to this case, the Fifth Circuit improperly granted summary judgment because the school district has not met its heavy burden of proving that Bell's speech substantially disrupted the school's learning environment. Each "disruption" advanced by the school district is either insubstantial or connected to the release of the misconduct allegations themselves, not Bell's speech.

Finally, Bell's speech is entitled to special First Amendment protections as a matter of public concern. Because Bell was speaking out about sexual misconduct, an issue of great importance for the school community and broader society, and because he was doing so through a public forum — the Internet — he is entitled to heightened First Amendment protection.

For these reasons, Bell respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Fifth Circuit and hold that his speech is protected by the First Amendment.

STANDARD OF REVIEW

An appellate court reviews summary judgment decisions *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014). Summary judgment is properly granted only when "the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In adjudicating summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 245 (1986)).

ARGUMENT

I. The First Amendment Protects a Student's Right to Speak Off-Campus When He is Not Using School Resources or at a School-Sponsored Event.

The First Amendment does not allow a school to punish a student for speech that occurs entirely off-campus, without school resources, and outside of school time. This Court has never before announced such a broad-based rule and should not do so today. First, the First Amendment provides broad protection to citizens engaging in public speech and limits that speech in only a few categories, none of which are applicable to this case. Second, while the school district asks this Court to extend *Tinker* to off-campus speech for the first time, this Court did not expect *Tinker* to apply off-campus when it was decided and has confirmed that understanding time and again. To the contrary, members of this Court have expressed concern that *Tinker* can "easily be manipulated in dangerous ways," and that parents do not "delegate their authority . . . to determine what their children may hear and say . . . to public school authorities." *See Morse v. Frederick*, 551 U.S. 393, 423-24 (2007) (Alito, J., concurring). Third, although

the school district maintains that it needs *Tinker* to protect the safety of its students, this Court has long upheld an exception to First Amendment protections when the state finds that there is a "true threat." Thus, even without *Tinker*, this Court has provided the school district with all the tools it needs to restrict student speech when it is truly threatening to staff or students. But given that there is no credible evidence that Bell posed a true threat to the school community, the school district may not avail itself of this exception in this case. Finally, the First Amendment protects the rights of students to speak freely off-campus, in part because this Court has granted significant latitude to parents to make parenting and discipline decisions within the privacy of their own homes.

A. Established First Amendment Principles Protect Bell's Right to Criticize His Teachers Off-Campus.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This Court has heralded the First Amendment as "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). The First Amendment provides broad protections and prevents the state from using its "power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). These broad protections exist to cultivate a productive national dialogue, such that "*any* restriction on expressive activity . . . would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 96 (emphasis added) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

This Court has recognized a limited number of exceptions to the First Amendment's broad and pervasive reach, in a "few limited areas." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992)). The First Amendment does not grant states "freedom to disregard these traditional limitations" and it does not have "a freewheeling authority to declare new categories of speech." *Id.* at 468, 472. At a minimum, when the state seeks to restrict a previously protected category of speech, it must show that there was a "longstanding tradition" in American society of restricting such speech. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 795 (2011). The limited categories of unprotected speech include incitement to imminent lawless action, "fighting words" or direct inciting insults, and obscenity. *See Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *Terminello v. Chicago*, 337 U.S. 1, 3 (1949); *Roth v. United States*, 354 U.S. 478, 489 (1957).

1. There is no "longstanding tradition" of regulating student speech off-campus.

This Court has been skeptical of states which seek to create new categories of unprotected speech. In *Brown*, the Court rejected California's argument that it should be able to restrict the sale of video games to minors because they constituted "violent speech." 564 U.S. at 792. This Court held that, while violent speech may at first blush seem like an analogue to obscenity, it had previously interpreted obscenity as "shocking . . . depictions of sexual conduct." *Id.* at 793. This Court was not willing to depart from previously established definitions of unprotected speech without strong evidence of a long-held tradition of restrictions in the new category. *Id.* at 795. To hold otherwise would give credence to a "starling and dangerous proposition." *Id.* at 792.

Here, the school district asks this Court to create a new category of unprotected speech: off-campus speech perceived as threatening, harassing, or intimidating, even if the "threats" were not credible, verifiable, or actionable. It is the precise sort of novel restriction that has given this Court pause. Just as graphically violent video games seem like a close analogue to obscene material, a minor's off-campus speech might be viewed as akin to his on-campus speech. *See id.* at 793. But the two are separate categories. As discussed further below, this Court has enshrined the schools' ability to control the on-campus climate by restricting and punishing speech that might disturb the learning environment. But it has not extended that ability to speech occurring entirely off-campus, outside of school events. Because the state has not suggested nor does the record reflect that there is a "longstanding tradition" of schools restricting off-campus speech, this Court need not add to the "few limited categories" of unprotected speech. *See id.* at 795; *Stevens*, 559 U.S. at 468.

While there is no tradition of schools interfering with students' off-campus speech, this Court *has* traditionally safeguarded the rights of parents to structure their family and create the environment for their children that they feel comfortable with. In striking down California's ban on sales of violent video games to minors in *Brown*, the Court expressed concern that the ban substituted the state's judgment for that of the children's parents. *Brown*, 564 U.S. at 804. The majority asserted that the ban's "entire effect is only in support of what the State thinks parents *ought* to want." *Id.* The Court also described the ban as "seriously overinclusive because it abridges the First Amendment rights of young people whose parents . . . think violent video games are a harmless pastime." *Id.* at 805. *Brown* stands for the crucial proposition that children (and therefore, students) "are entitled to a significant measure of First Amendment

protection" in the privacy of their own homes and outside of the classroom. *Id*. at 794. Indeed, it is "only in relatively narrow and well-defined circumstances" that the state may decide to limit the rights of minor children. *Id*.

Brown is central to a consistent line of authority in this Court's jurisprudence that parents are the final arbiters of their children's upbringing. That parents should be able to make disciplinary decisions for their own children "is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). This Court has granted parents the right to choose whether to send their children to public school, the right to expose their children to new ideas, languages, and cultures, even if those principles might conflict with those of normative society, and the right to choose which adults have influence in and access to their children's lives. *See Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Troxel v. Granville*, 530 U.S. 57 (2000).

Brown would be a tiny shadow of its former self if the Court were to create a new unprotected category of students' off-campus speech. It simply cannot be true that on Monday, children could exercise their constitutional right to purchase violent video games on their own — perhaps even video games depicting violent acts against other children or authority figures; on Tuesday, play those violent video games by themselves or with friends; and then on Wednesday, suffer potential consequences of suspension if a school official decides something they said while they were playing that game was "threatening, intimidating, or harassing." To hold otherwise would make real the "dangerous fiction . . . that parents simply delegate their authority — including their authority to determine what their children may say and hear — to public school authorities." *Morse*, 551 U.S. at 424 (Alito, J., concurring).

2. Bell's song does not fall into *any* of the few limited categories of unprotected speech.

Moreover, Bell's speech does not fall into any of the traditional categories of unprotected speech. It did not constitute "fighting words" because Bell did not make face-to-face insults, inciting action. *See Brandenburg*, 395 U.S. at 449. It was not obscene because it did not portray sexual conduct "in a patently offensive way." *See Miller v. California*, 413 U.S. 15, 20 (1973). And, it did not incite others to commit imminent lawless action. *See Hess v. Indiana*, 414 U.S. 105, 108 (1973) (holding that even statements intended to provoke criminal behavior at an undefined future date do not fall under the narrow First Amendment exception of incitement).

B. Restricting Student Speech On-Campus or at School Events is at the "Far Reaches of What the First Amendment Permits."

Because the school district cannot argue that Bell's speech falls under one of the limited categories of unprotected speech, it asks this Court to adopt a sweeping extension of the Court's jurisprudence with respect to off-campus speech. This Court has not previously extended the school's prerogative to restrict speech beyond the school environment or school-sponsored events. And it need not do so here.

Under the school district's framework, this Court would be forced to upend decades of settled law and enshrine a new rule that has no identifiable end point, would chill students' off-campus speech, including claims of teacher misconduct, and open the floodgates to a slew of new student speech cases. For if the school district position is accepted as tenable, a school can discipline a student for *any* off-campus speech that a school official decides is threatening, intimidating or harassing — even if it was in fact completely innocuous or made in jest — and that the school believes might one day cause a disruption to the school. It would not matter whether the statement was made in

the privacy of the student's home, at a birthday party with friends, or in a newspaper editorial. Perhaps most disturbing, the school would be allowed to restrict off-campus speech even if the speaker never uttered a word about it on-campus and it was instead someone else – even a teacher or principal – who brought the speech to the school's attention. If the Court adopted this framework, *Tinker* would be but a distant memory in this Court's jurisprudence.

1. The *Tinker* Standard, Allowing Schools to Restrict Speech On-Campus, was Not Meant to Apply Off-Campus.

In *Tinker*, during a historic period of social upheaval and student protest against the Vietnam War, this Court held that schools could not restrict students who wished to engage in protest against the war. *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 514 (1969). In holding that the students could wear black armbands in support of a truce, this Court warned that "state-operated schools may not be enclaves of totalitarianism . . . [and] do not possess absolute authority over their students." *Id.* at 511. The Court embraced schools as platforms to cultivate the next generation of leaders through a "marketplace of ideas . . . rather than through any kind of authoritative selection." *Id.* at 512 (internal quotations omitted).

This Court stressed, however, that the right to free speech on-campus may be subject to limits which recognize the "special characteristics of the school environment." *Id.* at 507. As a result, schools are allowed to restrict on-campus speech when they can reasonably forecast that the speech will cause a "substantial disruption of or material interference with school activities." *Id.* at 514.

But this Court was careful to stress that its chief concern was speech occurring *inside* classroom environments. The majority was unconcerned that the students'

speech outside the classroom, in the cafeteria, in the hallways, or on the playing field "during authorized [school] hours" had "caused discussion." *Id.* at 512-14. Because there was no interference inside the classroom, the majority was comfortable in allowing the students to engage in their protest. *Id.* at 514.

Tinker's chief focus on the classroom is illuminating. According to the majority, students have the least latitude in engaging in disruptive speech while in the classroom environment. But even outside the classroom, while still on-campus, students have greater latitude in engaging in their own speech. Given the Court's careful tailoring of the *Tinker* standard to focus on limiting classroom speech but granting more latitude outside the classroom, it bends *Tinker* beyond recognition to suggest that the majority considered its "substantial disruption" standard to apply *off*-campus. Indeed, the majority explicitly stated that its decision was made "to prescribe and control conduct *in the schools*." *Id.* at 507. When the majority asserted that students do not "shed their constitutional right[] to freedom of speech . . . at the schoolhouse gate," it did not mean to suggest that students lose their freedom to speak when they walk back out of the schoolhouse gate on their way home.

2. Subsequent Case Law Reaffirms that *Tinker* Does Not Reach Off-Campus Speech.

While this Court has refined the *Tinker* doctrine in subsequent student speech cases, it has retained *Tinker*'s central facet: the school's right to restrict student speech does not extend beyond in-school speech or at a school-sponsored event.

In *Bethel School District v. Fraser*, the Court upheld the right of a school to restrict a student's "lewd and indecent" speech at an on-campus school assembly. 403 U.S. 675, 677, 683 (1986). In nominating a fellow student for a student government

position, the speaker "referred to [the] candidate in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* at 677-78. Before delivering the speech, he delivered copies to several teachers, who all warned him against the use of "sexual innuendo." *Id.* at 678. Specifically, the student referred to his classmate as "firm in his pants," "a man who takes his point and pounds it in," and "a man who will go to the . . . climax for each and every one of you." *Id.* at 687 (Brennan, J., concurring). The majority described the speech as "plainly offensive" and "acutely insulting to teenage girl students." *Id.* at 683. In particular, some students may have felt intimidated by the speech, as some were "bewildered" and witnessed the audience mimicking the actions depicted in the speech. *Id.* at 683-84.

Still, the Court held that the speech could be limited because it took place inside the school environment. The Court held that the same latitude given to adults to make lewd speech outside of school need not be given "to children *in* a public school." *Id.* at 682 (emphasis added). The majority clarified that it viewed "[t]he determination of what manner of speech *in the classroom* or *in school assembly* is inappropriate" as the defining issue in the case. *Id.* at 683.

Thus, one might view *Fraser* as an extension of *Tinker*. But it is a limited one. *Fraser* extended *Tinker* from the classroom to the school assembly room and from protest speech to lewd speech. But it did not grant latitude to the school to restrict speech outside of the school walls.

Then, in *Hazelwood School District v. Kuhlmeier*, this Court held that the school was justified in refusing to publish students' articles about pregnancy and divorce in the school newspaper. 484 U.S. 260, 263, 266 (1988). Applying *Tinker*, the majority held that schools had a degree of latitude in restricting speech in "school-sponsored

publications, theatrical publications, and other expressive activities." *Id.* at 271. The majority rationalized that a school may "set high standards for student speech that is disseminated under its auspices." *Id.* at 271-72. In doing so, the Court clarified that *Tinker* applies to school-sponsored activities that "bear the imprimatur of the school." *Id.* at 271. The majority offered a strict definition for imprimatur: the activity may bear the imprimatur of the school only when it is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.*

Again, in *Hazelwood*, the Court modified *Tinker* on the margins. It extended the substantial disruption test to cases in which students were participating in school-sponsored activities. But by citing a narrow definition for school-sponsored activities, the majority was careful to keep *Tinker*'s reach within the bounds of the school itself. Nowhere in *Hazelwood* does this Court suggest that the imprimatur of the school would extend to a student's reference to the school off-campus; that would be far beyond the definition of imprimatur offered by the Court.

Finally, this Court held in *Morse v. Frederick* that a school may restrict student speech at a school-sponsored, school-sanctioned, and school-supervised event. 551 U.S. 393, 396 (2007). At a school-sponsored sporting event during school hours, one student unfurled a banner which the school principal believed was encouraging students to engage in illicit drug use. *Id.* at 398. Attempting to minimize the reach of the message, she told the student to take the banner down. *Id.* The majority found compelling that "principals have a difficult job and a vitally important . . . and [the principal in this case] had to decide to act . . . on the spot." *Id.* at 409-10.

Morse is particularly instructive here because the Court, more than in any prior student speech case, sought to entrench *Tinker* as an on-campus speech case. As with other student speech cases post-*Tinker*, the Court highlighted that the event took place "during normal school hours" and that the event was sanctioned by the principal. *Id.* at 400. But in *Morse*, the majority went further. Revisiting the lewd, sexualized speech delivered by the student in *Fraser*, the Court stated that "[h]ad Fraser delivered the *same speech* in a public forum *outside the school* context, it would have been protected." *Id.* at 405 (emphasis added).

Moreover, in his concurrence, Justice Alito explained that *Morse* represented "the far reaches of what the First Amendment protects." *Id.* at 425 (Alito, J., concurring). Justice Alito warned that *Morse* "[did not] endorse the broad argument . . . that the First Amendment permits public school officials to censor any speech that interferes with the school's educational mission." *Id.* at 423. In reaching this conclusion, Justice Alito emphatically closed the door on further expansion of *Tinker* and explicitly stated that *Morse* should not be read to suggest that "there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court." *Id.* at 422 (citing *Fraser*, 475 U.S. 675; *Hazelwood*, 484 U.S. 460).

Here, Bell did not ever attempt to speak about the misconduct allegations on-campus nor did he ever bring his song on-campus. R. at 98a. He did not seek to hold a press conference on school property, use school resources to create his song, skip class so he could create his song on school time, promote his song on-campus, or otherwise affiliate his speech with the school. *See* R. at 130a. In creating his song off-campus, Bell functioned as a private citizen would, and he commented on the allegation like any interested observer would have.

Bell's speech does not align with any of the school speech cases in which this Court held that the school could restrict speech. He did not make a speech at a school assembly using lewd and vulgar language. *See Fraser*, 403 U.S. at 677. He did not ask the school newspaper to publish a column about the sexual misconduct allegations. *See Hazelwood*, 484 U.S. at 263. And he did not launch a protest and unfurl a banner at a school-sponsored event. *See Morse*, 551 U.S. at 396. In fact, Bell took absolutely no action on campus.

Most importantly, this Court already gave Bell the protection he needs to write and publish his song off-campus. This Court held in *Morse* that speech which would be disruptive and unacceptable on-campus is perfectly acceptable if it occurs off-campus. *Id.* at 405. *Morse* recalled that the student in *Fraser* delivered a speech which embarrassed and bewildered fellow students. *See Fraser*, 403 U.S. at 683. The Court implied that female students may have even felt intimidated or harassed by the speech, or a school principal could perceive such results. *See id.* But still, this Court said the First Amendment would have protected that *exact same* speech in an off-campus forum. According to the majority in *Morse*, the student could have named his fellow student, made the same sexual innuendo, and with other high school students perhaps even present. And the First Amendment would give him that right. *See Morse*, 551 U.S. at 405.

Therefore, *Morse* dictates that Bell's speech be protected by the First Amendment, as it was akin to the student in *Fraser* delivering his speech off-campus.

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3. Speech Appearing on the Internet is Not Subject to a Higher Level of Scrutiny Than Non-Internet Speech and is Afforded the Same First Amendment Protections.

Bell's speech is entitled to the same First Amendment protections, regardless of whether it appeared on the Internet or not. On several occasions, this Court has been invited to scrutinize and allow more restrictions on speech relating to the Internet and new technological developments. It has repeatedly declined the invitation and should do so again today.

In *Brown*, this Court rejected a ban on the sale of violent video games to minors, even though new technology has made video games more life-like and violent than ever before. 564 U.S. at 798, 805. Rejecting the state's argument that new video games "present special problems because they are interactive," the majority held that minors had encountered other forms of violent entertainment for generations. *Id.* at 795-86. From violent fairy tales, often depicting kidnapping or murder, to run-of-the-mill Saturday morning cartoons, the Court described how technology has changed the method of delivery for violent entertainment, but not the underlying ideas. *Id.* at 796-800. In opting to maintain established First Amendment principles and declining to scrutinize technologically-enabled speech differently, this Court signaled its preference for stable Constitutional frameworks, rather than those which change with rapidly changing technologies.

Similarly, in *Reno v. American Civil Liberties Union*, the Court declined to depart from established First Amendment law in striking down a statute prohibiting obscene communications through the Internet to someone under the age of 18. 521 U.S. 844, 885 (1997). Instead, the majority held that the statute was an unconstitutional

regulation of the content of speech and explicitly stated that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." *Id.* at 870. The Court distinguished the Internet from broadcast media, which it had previously held should be subject to more significant government supervision and regulation. *Id.* at 868-69. Unlike broadcast media, the Internet is not a forum where users happen upon content accidentally. *Id.* The Court was also swayed by the fact that the number of users on the Internet was growing rapidly and implied that it would be a drastic undertaking to monitor and regulate Internet speech. *See id.* at 870. Since the *Reno* decision, that number has grown exponentially, making the majority's rationale that much stronger today. *See* Hien Timothy N. Nguyen, *Cloud Cover: Privacy Protections and the Stored Communications Act in the Age of Cloud Computing*, 86 Notre Dame L. Rev. 2189, 2204-05, n.103 (2011) (finding that over 75 million American households had access to the Internet in 2009).

Here, Bell's song should not be subject to more rigorous scrutiny, just because he happened to post it to the Internet. As the majority cautioned in *Reno*, it would be an incredible exercise of judicial overreach to patrol and restrict anything that a student says on social media, that might be construed as contributing to a disruption in the school environment. *See Reno*, 521 U.S. at 870. If this Court allows schools to constantly police students' social media accounts, debates about seemingly innocuous subjects — everything from immature discussions about high school drama, to unrefined and carelessly worded taunts or threats about prom dates — could open students up to disciplinary action.

Moreover, as in *Brown*, where this Court equated life-like and interactive violent video games with other traditional forms of violent entertainment, here social media

functions in the same way as other traditional methods of student communication. *See Brown*, 564 U.S. at 796-800. Social media serves as another medium for students to have conversations that they would otherwise have on their walk home from school, out at a concert with friends, or in the privacy of each other's living rooms. One need only set off a rumor in a high school cafeteria and watch how quickly it spreads to notice that Twitter and Facebook are just the modern-day equivalents of passing notes in class or the traditional teenage rumor mill.

Also, just as with other forms of entertainment like violent books, fairytales, or cartoons, it is the domain of parents, in consultation with their children, to decide what access their children should have to social media and the Internet. *See Brown*, 564 U.S. at 804. Here, the school has already acted within its own domain by restricting students' access to social media sites such as Facebook on school computers and banning cellphones from being used at school. R. at 98a, 122a. Because the Internet is not as obtrusive as broadcast media, in that it is easier to self-direct searches and activity to acceptable domains, the school district need not usurp parents' discretion to decide what their children are saying and doing on social media, on their own time, in their own homes. *See Reno*, 521 U.S. at 868-69.

4. That Bell Expected the School Community Might Hear His Song is Not Sufficient to Satisfy *Tinker*.

The Fifth Circuit, sitting en banc, concocted an additional way to apply the *Tinker* standard to off-campus speech: whether the speaker intended for his speech to reach the school community. R. at 2a. This test has no roots in this Court's jurisprudence; whether the speaker intended to reach or influence the school community has not been a decisive factor in other school-speech cases.

In *Tinker*, it was clear that the student protestors had an objective to influence their classmates about the Vietnam War. Given that the Vietnam War was "*the* public concern of its day," and that the students themselves might well have known soldiers who had served and died in Vietnam, it is obvious that the *Tinker* students meant to spark a conversation with their protest. R. at 43a; *Tinker*, 393 U.S. at 504. This Court, however, overlooked the students' intentions to determine whether the students retained their First Amendment rights. *See id*. at 513. Setting aside their intentions, the Court upheld their right to protest in school because it did not affect the in-class learning environment. *Id*.

Likewise, in *Fraser* and *Morse*, the decisive factor in restricting the speech of students in those cases was not that they all intended to reach the school, but that they substantially disturbed the learning environment in doing so. The Court did not discuss in *Morse* that the student intended to unfurl the pr0-drug banner at the school event, but that it could cause a disruption of the school's educational mission. *See Morse*, 551 U.S. at 405. Similarly, in *Fraser*, the Court did not discuss that the student intended for his sexualized speech to reach the student body, but that it caused great offense and disruption at the school assembly. *See Fraser*, 478 U.S. at 683.

Here, Bell does not dispute that his intent was to spark a conversation of sexual misconduct, like it was the intent of the *Tinker* students to spark a conversation about the Vietnam War. R. at 124a; *Tinker*, 393 U.S. at 504. Indeed, Bell intended to spark an even less intrusive conversation than the *Tinker* students, since he never once spoke about or played his song at school. R. at 98a. That Bell intended to have some indirect effect on the school community is not sufficient to restrict Bell's speech.

Given that Bell's "intent" to reach the school community is not, by itself, sufficient to restrict his speech, it must at the very least be applied in conjunction with the notion that the speech was threatening, intimidating, or harassing. In other words, if the school district's framework is to be accepted, it must prove that Bell intended not only to reach the school community, but intended to intimidate, threaten, or harass the school community. Bell has repeatedly testified that his subjective intent was not to intimidate or threaten the coaches. R. at 124a. Moreover, as discussed further below, the school itself and the coaches did not construe his speech to be threatening, when it was first presented to them. R. at 97a, 125a.

Moreover, because the school district accepts that Bell's intent was to reach the school community in order to spark a conversation about the sexual misconduct, Bell's intent bolsters his case that he is to receive heightened protection for his speech. As discussed below, this fact aids Bell in arguing that he was speaking on a matter of public concern.

5. A Jury Should Decide Whether Bell's Rap Could be Considered Threatening, Especially Since the School District Itself Thought it was a Close Question

As discussed further below, this Court need not hold that the school district could restrict Bell's speech, unless the school can shoulder the heavy burden of proving that Bell posed a "true threat" to the school environment. But even if this Court holds that *Tinker* does apply, there is a genuine dispute of material fact whether Bell's speech could have been perceived as "harassing, intimidating, or threatening." It is the prerogative of a jury to decide this close question of material fact, not the Court. *See* Fed. R. Civ. Pro 56(a) (requiring the movant to show "that there is no genuine dispute as to any material fact.").

There are a multitude of ways that a jury could reach the conclusion that the school did not perceive Bell's speech or intimidating, harassing or intimidating. First, Coach Rainey testified that he viewed the song as "just a rap," and that he thought it was best to just "let it go." R. at 131a. Second, when the school first heard about the speech, the school district did not act as though it was disturbed by the rap. To the contrary, the school principal personally drove Bell home alone. R. at 97a. Third, even after the school had known about the rap for several days, it let Bell come back to school and attend morning classes. R. at 6a, 125a. When they finally decided to suspend him, they let him spend the rest of the day unsupervised in the school commons. R. at 97a, 125a. At no point did any school official make a call to law enforcement. R. at 97a. Fourth, even the school district's disciplinary committee had difficulty reaching a conclusion about the nature of Bell's speech. Members of the committee expressed concern about the vulgarity of the speech and the choice of "bad words," not the potentially threatening or harassing nature of the speech. R. at 128a. The school district did not present evidence that the coaches felt threatened by the song. R. at 128a.

Any reasonable member of a jury could question the school district's contention that they would found the speech to be a violation of school policy when not one member of the administration indicated that they thought anyone was in immediate danger. Instead, any reasonable member of a jury could conclude that the administration agreed with Coach Rainey that Bell's speech was "just a rap." *See* R. at 131a.

Moreover, a jury could also be presented with expert testimony to better situate Bell's song within the context of rap music. In other cases, district courts have allowed the testimony of expert witnesses who can provide juries with a framework for

interpreting rap music. For example, experts can testify that "rap is not meant to be . . . taken literally, but merely metaphorically." *United States v. Harris*, No. 8:12-CR-205-T-17MAP, 2016 WL 4204633, at *3 (M.D. Fla. July 28, 2016). Of particular relevance to Bell's case is the notion "that rap lyrics are generally not based on a person's actual actions, but merely fabrications; lyrics that are attributed to a . . . rapper are wrongly taken as true threats, as opposed to mere bluster." *Id*; *see also United States v.* Wilson, 493 F. Supp. 2d 484, 486 (E.D.N.Y. 2006) ("Rap music lyrics are often based on imagination and fantasy, rather than on reality."). Others have suggested that expert clarification about rap music is not only helpful but essential to developing "an awareness and understanding of the complexity of the art form," and its regular use of "boasting, metaphor, collective knowledge, narrative, and role play." Andrea L. Dennis, *Poetic (in)justice? Rap Music Lyrics As Art, Life, and Criminal Evidence*, 31 Columb. J. L. & Arts 1, 4 (2007). By understanding the complexities and subtleties of rap as artistry, some courts have concluded that rap music is specifically protected by the First Amendment. *See, e.g., Luke Records, Inc. v. Navarro*, 960 F.2d 134, 137 (11th Cir. 1992).

As an aspiring artist who has been writing lyrics for songs since he was a child, Bell understands the complexities of rap music. R. at 116, n.3. Because he writes music professionally and because his music conforms to the established conventions of rap music, a jury could decide that Bell never intended for the music to be harassing, intimidating, or threatening. At the very least, a more contextual discussion of rap music creates a conflict between the school district's and Bell's interpretations of the lyrics that should be resolved by a jury.

C. This Court Need Not Extend *Tinker* Because Schools Already Have Ample Authority to Restrict Speech if it Constitutes a "True Threat."

If the school district had encountered a threat online toward students or staff that the school believed constituted a legitimate threat, it would not need *Tinker* to take action against the student. This Court's established First Amendment exception for "true threats" would provide everything the school would need to intervene and discipline the student for uttering such a threat. If this Court maintains *Tinker*'s bounds at the "far reaches of what the First Amendment permits" and does not engage in an unprecedented extension to off-campus speech, it would do no harm to schools who seek to patrol legitimate threats to their students. This Court does not need to make the choice between free speech and student safety; it can protect both Bell's speech and his fellow classmates.

In *Watts v. United States*, this Court protected a protestor's right to free speech when he made a threat toward President Lyndon Johnson. 394 U.S. 705, 706 (1969). The protestor was charged with "knowingly and willfully threatening the President" when he chanted: "I have already received my draft classification . . . I am not going. If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers." *Id.* But the Court made clear that "[w]hat is a threat must be distinguished from what is constitutionally protected speech" and all speech must be considered in the context of maintaining "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wideopen." *Id.* at 707-08. Sometimes such speech is even "vehement, caustic, [and may include] sharp attacks on government and public officials." *Id.* The Court held that

the protestor was not guilty of the offense and was engaging in protected speech because "political hyperbole" is part of a strong national debate. *Id.*

Here, just as the protestor in *Watts* engaged in political hyperbole to protest President Johnson, Bell engaged in artistic hyperbole to draw attention to teacher misconduct and the treatment of women. R. at 30a, 197a; *see Watts*, 394 U.S. at 708. In order to contribute to a national debate about sensitive and disturbing subject matter, Bell should be granted the same latitude as the *Watts* protestor to draw attention to his cause in an artistic, and even inflammatory, way. *See id.* The same standard should apply to *Bell*, as would apply to a parent or student at another school making the same "threats."

1. The School District Did Not Believe that Bell's Song Constituted a "True Threat."

It is undisputed that the school district must have discretion to act on immediate threats to the school environment. If Bell had made a face-to-face threat to one of the coaches, the *Morse* rationale of protecting school officials' split second decisions, would apply and allow the school to act. *See Morse*, 551 U.S. at 409-10. Schools need to have the flexibility to react quickly to threats that are proximate to staff and students in time and space. But that rationale dissipates as the potential threat is made off-campus and outside of school hours. It dissipates even more as the school further investigates the threat, without acting and without finding any indication that the threat was real.

In Bell's case, the school district had several key opportunities to assess whether the threat was legitimate and declined at each point to take the threat seriously. First, the school had *one entire week* to evaluate the song during the inclement weather break, after officials first told Bell that they had concerns. R. at 6a. During that time, the school

did not develop any additional indication that Bell's threat was real, actionable, or even plausible. He showed no signs of acting on his threat during the inclement weather break and returned to school normally when the inclement weather break was over. R. at 6a. The school even allowed him to stay in class for the morning when he returned. He showed no signs of aggression, volatility, or anger. That same day, the school summoned him to the office to suspend him but sent him to the school commons, unsupervised, to remain for the rest of the day. Even after being told of a suspension, he acted normally for the rest of the day; there was not even an inkling that he attempted to leave the commons or otherwise engage with any staff or students. R. at 97a, 125a. Even weeks later, having time to sit and digest the content of Bell's speech, the board's disciplinary committee could not decide whether they considered the language to be threatening. R. at 128a. At no point during the entire ordeal — from January 6th, when the recording was posted to February 11th, when the school sent Bell's mother a letter detailing the suspension — did *any* official from the school or school board make a call to law enforcement. R. at 97a.

The school simply did not view this as a "true threat."

II. Even if *Tinker* Applies, Summary Judgment Was Improperly Granted Because the School District Did Not "Reasonably Forecast" a "Substantial Disruption" of School Activities.

Even if this Court holds that *Tinker* applies to off-campus speech, the school district would still be required to shoulder the heavy burden of proving that Bell's song "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. The school district cannot meet this burden and, as a result, the Fifth Circuit improperly granted summary judgment and should be reversed.

Tinker sets a high bar for schools seeking to prove that speech caused a substantial disruption. The Court held that a school must tolerate speech that "deviates from the views of another person [or speech that] may start an argument or cause a disturbance" because "our Constitution says we must take the risk." *Id.* at 508. The Court asserted that "caus[ing] discussion outside of the classrooms, but no interference with work and no disorder" was not a substantial disruption with school activities. *Id.* at 514.

It is important to be mindful of the context in which *Tinker* took place. The Vietnam War was "the public concern of the day." R. at 43a. If the substantial disruption standard was relatively easy to satisfy, the school could have succeeded by forecasting a potential massive disruption between pro-war students and the protesting students. It even would have been reasonable to project a clash in the classrooms. But *Tinker* required more than that: it required a showing of *substantial* disruption of the classroom environment. *Tinker*, 393 U.S. at 514.

The school district cannot meet that standard. Of the purported disruptions caused by Bell's speech, none were substantial. And none were even caused by or involved Bell. First, the one and only time the song was played on-campus was when Coach Wildmon asked a student to play it for him on their cellphone, in contravention of official school policy; Bell never played the song himself. R. at 98a. Notably, Wildmon asked his students whether they had heard of the song. They had, but none had brought it up with him, and none had caused any disruption even having been previously exposed to the song and in the presence of Wildmon after hearing it. R. at 6a. Second, the coaches claimed that it "disrupted" the way they dealt with students. But their cited disruptions — reframing how they talk to students to ensure comments are not

"inappropriate," avoiding staring at female students, and refraining from being "hands-on" with female members of the track team — were all behaviors that the coaches should have been engaging in as part of the normal course of their jobs as educators. R. at 98a, 131a.

Moreover, all of the purported "disruptions," including the fact that Coach Wildmon did not want his players following him to his car, were caused by the revelation of the allegations themselves, not because Bell released a potentially threatening song. The coaches' feelings of discomfort all stemmed from the fact that it had become well-known that they had sexually harassed the female players.

At a minimum, it is the job of the jury to consider whether these purported "disruptions" meet *Tinker*'s high standard of *substantial* disruption.

III. Bell's Speech Exposing the Sexual Misconduct of High School Coaches Qualifies for Heightened First Amendment Protection, Under the Public Concern Doctrine.

Bell's speech was successful because it drew attention to the issue of sexual misconduct. The school district is punishing Bell for speech that evoked emotion about a particular issue, but it is precisely that type of speech which this Court has trumpeted time and again under the public concern doctrine.

Among the most time-tested principles of this Court is the assertion that "[t]the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schneck v. United States*, 249 U.S. 47, 52 (1919). But it is also true that the First Amendment would certainly protect a man whose warning caused extreme havoc, even chaos, if the fire was real. The First Amendment may "best serve its high purpose when it induces a condition of unrest, creates dissatisfactions

with the conditions as they are, or even stirs people to anger. *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965).

This Court held the First Amendment offers special protection to speech that "deals with matters of public concern". *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) Matters of public concern "relat[e] to any matter of political, social, or other concern to the community" and are in contrast to matters of private concern, such as "information about a particular individual's credit report" or "videos of an employee engag[ed] in sexually explicit acts." *Id.* at 453 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983). In deciding whether a matter is of public concern, courts look at three factors of the speech: its content, form, and context. *Id.*

In *Snyder v. Phelps*, this Court upheld the petitioner's right to picket a soldier's funeral, in protest of the United States' "tolerance of sin," under the public concern doctrine. *Id.* at 461. The petitioner, Fred Phelps, was part of the Westboro Baptist Church, which believes that the United States commits serious sins by accepting homosexuality and allowing gay members of the military to serve openly. *Id.* at 448. At the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq, Phelps and other parishioners protested within 200 feet of the procession and carried signs which stated: "God Hates the USA/Thank God for 9/11," "America is Doomed," Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers, and "God Hates You." *Id.*

In assessing the protest, the Court considered the content, form, and context of the signs.

First, with respect to the content of the speech, the Court held that the "signs plainly relate[d] to broad issues of interest to society at large. *Id.* at 454. The Court

expressed its view that the signs may not have been refined or in good taste, but they were related to the "political and moral conduct of the United States and its citizens." *Id.* The majority also highlighted that even though Lance Corporal Synder and his family may have been specific subjects and targets of the speech, the main thrust of the speech related to issues of public concern. *Id.*

Second, with respect to the context of the speech, the Court held that the protest's location in a public place, near the procession of the funeral, weighed in favor of a finding of public concern. *Id.* at 454-55. Again, the Court found unconvincing the fact that the protest was directed at a private matter, the funeral of a U.S. Marine. *Id.* at 455. Because the Church had previously protested in public places — such that it had become a matter of routine — and because they protested from a public space for the funeral, it was immaterial that the immediate subject was a private funeral. *Id.*

Finally, the form of the protest — signs with messages about public issues — also militated in favor of applying the public concern doctrine. *Id.* The soldier's family argued that the Church exploited his son's funeral to deliver their message. *Id.* The Court also found this argument unconvincing. *Id.* at 456. The majority held that, while it was clear that the protests had caused extreme emotional anguish for the soldier's family, the Church did not attempt to cause chaos at the funeral. *Id.* Rather, they peacefully protested on public lands, which had the effect of raising the Church's issue profile. *Id.*

Here, Bell's speech qualifies as a matter of public concern because he spoke on a matter of public concern, in a public forum, and through a form — music — which has historically been used to promote causes and protest issues.

First, the content of Bell's speech was on a matter of public concern: sexual misconduct. As in *Snyder*, where the protestors protested issues of national morality, here Bell protested sexual misconduct, an important issue for the school community, public schools in general, and broader society. R. at 124a; *see Snyder*, 562 U.S. at 454. While Bell used his female friends as the main subjects of his speech, he spoke to the broader issues of mistreatment in the school and greater community; he noted that he was meaning to write about the issue "for a long time" and was moved by the fact that he might have a daughter one day impacted by sexual misconduct. R. at 124a. As with *Snyder*, where the vehicle for the protest was a soldier's funeral, it is immaterial here too that individuals may be the immediate subjects, because broader issues predominate. *See Snyder*, 562 U.S. at 454. *See also* Karen J. Krogman, *Protecting our Children: Reforming Statutory Provisions to Address Reporting, Investigating, and Disclosing Sexual Abuse in Public Schools*, 2011 Mich. St. L. Rev. 1605, 1607-08 n.5 (2011) (citing that over 4.5 million Americans experience sexual misconduct at school between Kindergarten and twelfth grade).

Second, the form of Bell's speech — music — has historically been a forum of public protest. This Court has viewed song lyrics as metaphorical and recognized their value in sparking conversations. In particular, this Court asserted that "lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person." *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015). Moreover, this Court has viewed the performance of music, especially "[m]usic as a form of expression and communication," to be a public display. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). Moreover, just as the public nature of the protest was dispositive in *Snyder*, so too is the fact that Bell did not just make his

music privately, but shared it on publically available platforms. R. at 123a; *see Snyder*, 562 U.S. at 455.

Finally, the context of Bell's speech is well-established: he sought to comment on sexual harassment allegations in a public way, to draw attention to the allegations, and to spark a conversation. R. at 58a. Notably, Bell remarked that the allegations were a subject that "[he] just felt like [he] needed to address . . . [as] an artist [who] speak[s] life experience." R. at 58a. Because Bell's speech was posted "[on] a public place on a matter of public concern," his speech qualifies for special protection under the public concern doctrine.

CONCLUSION

For the foregoing reasons, Bell respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Fifth Circuit and hold that his speech is protected by the First Amendment.

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Respectfully Submitted,

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