No. 15- 9999

IN THE

Supreme Court of the United States

TAYLOR BELL,

Petitioner,

v.

ITAWAMBA COUNTY SCHOOL BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

STUDENT RECORD

(1) Appendix, pp. 1a-228a

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 20, 2015]

No. 12-60264

TAYLOR BELL; DORA BELL, individually and as mother of Taylor Bell,

Plaintiffs-Appellants,

v.

ITAWAMBA COUNTY SCHOOL BOARD; TERESA MCNEECE, Superintendent of Education for Itawamba County, Individually and in her official capacity; TRAE WIYGUL, principal of Itawamba Agricultural High School, Individually and in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, BARKSDALE, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Away from school or a school function and without using school resources (off-campus speech), Taylor Bell, a student at Itawamba Agricultural High School

in Itawamba County, Mississippi, posted a rap recording containing threatening language against two high school teachers/coaches on the Internet (first on his publicly accessible Facebook profile page and then on YouTube), intending it to reach the school community. In the recording, Bell names the two teachers and describes violent acts to be carried out against them. Interpreting the language as threatening, harassing, and intimidating the teachers, the Itawamba County School Board took disciplinary action against Bell.

Bell claims being disciplined violated his First Amendment right to free speech. On cross-motions for summary judgment, the district court ruled, *inter alia*: the school board, as well as the school-district superintendent, Teresa McNeece, and the school principal, Trae Wiygul, acting in their official capacities (the school board), acted reasonably as a matter of law. *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834 (N.D. Miss. 2012).

Primarily at issue is whether, consistent with the requirements of the First Amendment, off-campus speech directed intentionally at the school community and reasonably understood by school officials to be threatening, harassing, and intimidating to a teacher satisfies the almost 50-year-old standard for restricting student speech, based on a reasonable forecast of a substantial disruption. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (infringing otherwise-protected school speech requires "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities"). Because that standard is satisfied in this instance, the summary judgment is AFFIRMED.

I.

On Wednesday, 5 January 2011, Bell, a high-school senior, posted a rap recording on his public Facebook profile page (and later on YouTube), using what appears to be a representation of a Native American as the rap recording's cover image. (His high-school mascot is a Native American.) The recording, in part, alleges misconduct against female students by Coaches W. and R.

Although there are three different versions of the transcribed rap recording in the summary-judgment record, the school board stipulated, at the preliminary-injunction hearing for this action, to the accuracy of the following version provided by Bell, who refers to himself in the recording as "T-Bizzle". (Accordingly, except for deleting part of both coaches' names, the numerous spelling and grammatical errors in the following version are not noted.)

> Let me tell you a little story about these Itawamba coaches / dirty ass niggas like some fucking coacha roaches / started fucking with the white and know they fucking with the blacks / that pussy ass nigga W[.] got me turned up the fucking max /
>
> Fucking with the students and he just had a baby / ever since I met that cracker I knew that he was crazy / always talking shit cause he know I'm from daw-city / the reason he fucking around cause his wife ain't got no tidies /
>
> This niggha telling students that they sexy, *betta watch your back* / *I'm a serve this nigga, like I serve the junkies with some crack* / Quit the damn basketball team / the coach a

pervert / can't stand the truth so to you these lyrics going to hurt

What the hell was they thinking when they hired Mr. R[.] / dreadlock Bobby Hill the second / He the same see / Talking about you could have went pro to the NFL / Now you just another pervert coach, fat as hell / Talking about you gangsta / drive your mama's PT Cruiser / *Run up on T-Bizzle* / *I'm going to hit you with my rueger*

Think you got some game / cuz you fucking with some juveniles / you know this shit the truth so don't you try to hide it now / Rubbing on the black girls ears in the

gym / white hoes, change your voice when you talk to them / I'm a dope runner, spot a junkie a mile away / came to football practice high / remember that day / I do / to me you a fool / 30 years old fucking with students at the school

Hahahah / You's a lame / and it's a dam shame / instead you was lame / eat shit, the whole school got a ring mutherfucker

Heard you textin number 25 / you want to get it on / white dude, guess you got a thing for them yellow bones / looking down girls shirts / drool running down your mouth / *you fucking with the wrong one* / *going to get a pistol down your mouth* / *Boww*

OMG / Took some girls in the locker room in PE / Cut off the lights / you motherfucking freak / Fucking with the youngins / because your pimpin game weak / How he get the head

> coach / I don't really fucking know / But I still got a lot of love for my nigga Joe / And my nigga Makaveli / and my nigga codie / W[.] talk shit bitch don't even know me
>
> Middle fingers up if you hate that nigga / Middle fingers up if you can't stand that nigga / *middle fingers up if you want to cap that nigga* / *middle fingers up* / *he get no mercy nigga*

(Emphasis added.)

At the very least, this incredibly profane and vulgar rap recording had at least four instances of threatening, harassing, and intimidating language against the two coaches:

> 1. "betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack";
>
> 2. "Run up on T-Bizzle / I'm going to hit you with my rueger";
>
> 3. "you fucking with the wrong one / going to get a pistol down your mouth / Boww"; and
>
> 4. "middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga".

Bell's use of "rueger" [sic] references a firearm manufactured by Sturm, Ruger & Co.; to "cap" someone is slang for "shoot".

A screenshot of Bell's Facebook profile page, taken approximately 16 hours after he posted the rap recording, shows his profile, including the rap recording, was open to, and viewable by, the public. In other words, anyone could listen to it.

On Thursday, 6 January, the day after the recording was posted, Coach W. received a text message from his wife, informing him about the recording; she had learned about it from a friend. After asking a student about the recording, the coach listened to it at school on the student's smartphone (providing access to the Internet). The coach immediately reported the rap recording to the school's principal, Wiygul, who informed the school-district superintendent, McNeece.

The next day, Friday, 7 January, Wiygul, McNeece, and the school-board attorney, Floyd, questioned Bell about the rap recording, including the veracity of the allegations, the extent of the alleged misconduct, and the identity of the students involved. Bell was then sent home for the remainder of the day.

Because of inclement weather, the school was closed through Thursday, 13 January. During Bell's resulting time away from school, and despite his having spoken with school officials about his rap recording, including the accusations against the two coaches, Bell created a finalized version of the recording (adding commentary and a picture slideshow), and uploaded it to YouTube for public viewing.

Bell returned to school when it reopened on Friday, 14 January; he was removed from class midday by the assistant principal and told he was suspended, pending a disciplinary-committee hearing. (He was permitted to remain in the school commons until the school bus he rode arrived at the end of the day.) By letter that day to Bell's mother, the superintendent informed her: Bell's suspension would continue until further notification; and a hearing would be held to consider disciplinary action for Bell's "alleged threatening intimidation and/or harassment of one or more school teachers". The listed, possible basis for such

action was consistent with the school district's administrative disciplinary policy, which lists "[h]arassment, intimidation, or threatening other students and/or teachers" as a severe disruption.

The disciplinary-committee hearing, originally scheduled for Wednesday, 19 January, was delayed at Bell's mother's request; it was held on Wednesday, 26 January. Although there is no transcript of the hearing, it was recorded; that recording is in the summary-judgment record. The hearing was facilitated by the school-board attorney, Floyd; three disciplinary-committee members were present, as well as the school principal and Bell, his mother, and their attorney.

The hearing began with the principal's providing a summary of events, after which the YouTube version of the rap recording was played. Among the disciplinary-committee members' questions, one member asked Bell whether he had reported the alleged misconduct to school officials. Bell explained he had not done so because he believed they would ignore his complaints. Instead, he made the rap recording because he knew people were "gonna listen to it, somebody's gonna listen to it", acknowledging several times during the hearing that he posted the recording to Facebook because he knew it would be viewed and heard by students. Moreover, he explained that at least 2,000 people had contacted him about the rap recording in response to the Facebook and YouTube postings.

One of the committee members asked Bell why he had posted a new version of the rap recording on YouTube, after school officials had discussed with him his posting it on Facebook. Bell gave a few (and somewhat conflicting) explanations: the Facebook

version was a raw copy, so he wanted a finalized version on YouTube; the Facebook version was for his friends and "people locally" to hear, whereas the YouTube version was for music labels to hear; and he posted the YouTube version with a slideshow of pictures to help better explain the subject matter of the recording (his Facebook version only included a brief explanation of the backstory in the caption to the rap recording).

Although Bell's attorney, at one point, attempted to discuss the misconduct of the coaches alleged in the rap recording, the school-board attorney redirected the proceeding to its purpose: to resolve whether Bell threatened, harassed, and intimidated the teachers; and, to decide whether his suspension should be upheld. In numerous instances, the school-board attorney emphasized this purpose, noting Bell's "comments made [in the recording that] 'you've f—ed with the wrong one / going to get a pistol down your mouth / POW'[,] those are threats to a teacher".

Bell contested the school-board attorney's interpretation, responding: "Well that ain't really what I said"; and then provided what he described as the written "original copy" of what had been recorded. (It is unclear from the disciplinary-committee-hearing recording, or other parts of the summary-judgment record, which copy Bell provided.) Bell explained he did not mean *he* was going to shoot anyone, but that he was only "*foreshadowing* something that might happen". (Emphasis added.) But, he agreed that individuals "outside the school setting" had made "certain statements" to his mother that "'put a pistol down your mouth'[,] that is a direct threat".

Near the end of the disciplinary-committee hearing, Bell explained again: he put the recording on Facebook

and YouTube knowing it was *open to public viewing*; part of his motivation was to "increase awareness of the situation"; and, although he did not think the coaches would hear the recording and did not intend it to be a threat, he knew students would listen to it, later stating "students all have Facebook".

On 27 January, the day after the hearing, the school-board attorney informed Bell's mother by letter that: the disciplinary committee had determined "the issue of whether or not lyrics published by Taylor Bell constituted threats to school district teachers was vague", but that the publication of the recording constituted harassment and intimidation of two teachers, in violation of school-district policy and state law; as a result, the disciplinary committee recommended to the school board that Bell's seven-day suspension be upheld and that he be placed in the county's alternative school for the remainder of the nine-week grading period (approximately six weeks); Bell would not be "allowed to attend any school functions and [would] be subject to all rules imposed by the Alternative School"; and "[he would] be given time to make up any work missed while suspended or otherwise receive a 0, pursuant to Board policy".

After being informed of the disciplinary-committee's recommendation, Bell's attorney informed the school-board attorney, by 31 January telephone call, that: Bell wished to appeal to the school board the disciplinary-committee's recommendation; and, although Bell and his mother were expected to appear at the board meeting on 7 February, they would be without counsel because he was unable to attend due to a scheduling conflict.

On 7 February, the school board, after being presented with a recitation of the recording, unanimously

found: Bell "threatened, harassed and intimidated school employees". (The only document in the record from the school-board meeting is the minutes, which state: "Chairman Tony Wallace entertained a motion by Clara Brown to accept the discipline recommendation of the Discipline Committee regarding student with MSIS #000252815 (I.A.H.S.) and finding that this student threatened, harassed and intimidated school employees. Wes Pitts seconded the motion. Motion Carried Unanimously.") In other words, unlike the earlier-described disciplinary committee findings, which do not characterize the rap recording as threatening (instead, finding that point "vague"), the school board found Bell had not only harassed and intimidated the teachers, but had also threatened them.

By 11 February letter to Bell's mother, the school-board attorney explained the board's findings: "Bell did threaten, harass and intimidate school employees in violation of School Board policy and Mississippi State Law". (Again, as stated in the written school-district policy, "[h]arassment, intimidation, or threatening other students and/or teachers" constitutes a severe disruption.)

Approximately two weeks later, on 24 February, Bell and his mother filed this action, claiming, *inter alia*, the school board, superintendent, and principal (again, the school board) violated his First Amendment right to free speech. On 2 March, Bell requested a preliminary injunction, seeking his immediate reinstatement to his high school, including the reinstatement of "all privileges to which he was and may be entitled as if no disciplinary action had been imposed", and all references to the incident being expunged from his school records.

At the 10 March hearing for the requested injunction, Bell presented four affidavits from students at his school concerning alleged misconduct by the coaches. (The affidavits, however, were not considered by the court.) In addition, Bell, his mother, school-board attorney Floyd, and Franklin (offered as an expert in rap music) were called as witnesses by Bell; superintendent McNeece and Coaches R. and W., by the school district.

Bell testified about his making and disseminating the recording; the meaning behind certain statements in it; and the resulting events leading up to, and after, school officials disciplined him. Bell's mother testified about her recollection of the events leading up to the disciplinary-committee and school-board hearings. She testified the school principal never stated Bell was dangerous or threatening, and that Bell was told to stay in the school before suspending him.

Floyd testified about her recollection of the events before, during, and after the disciplinary-committee and school-board hearings. During her testimony, the court noted Bell's contention that the rap recording addressed a matter of public concern. Floyd discussed the school-district policy Bell violated: he threatened, harassed, and intimidated school employees; similarly, she testified that, at their respective hearings, the disciplinary committee and the school board discussed the possibility of disruption.

Over the school-district's objection, Franklin was permitted to testify as an expert. Characterizing the statements in Bell's recording as nothing more than "colorful language" used to entice listeners and reflective of the norm among young rap artists, Franklin testified that it gave him no cause for concern. On

cross-examination, however, he testified: if an individual's name is used in a rap recording and precedes the words "[p]ut a pistol in your mouth and cap him", "it would definitely be cause for a conversation with the young man, absolutely".

The superintendent testified: she had attended the school-board meeting; there was a foreseeable danger of substantial disruption at the school as a result of the rap recording; and, a written version of Bell's rap recording was presented to the school board, before it adopted the disciplinary committee's recommendation for suspension and temporary placement in the alternative school.

Both coaches identified in the rap recording testified that it adversely affected their work at the school. Coach R. testified: subsequent to the publication of the recording, students began spending more time in the gym, despite teachers' telling them to remain in classrooms; and the recording affected him in the way he conducted himself around students, noting he would no longer work with female members of the track team, instead instructing males on the team on how to coach the females and then having the males do so. Coach W. testified he: interpreted the statements in the rap recording literally, after hearing it on a student's smartphone at school; was "scared", because "you never know in today's society . . . what somebody means, [or] how they mean it"; and would not allow the members of the school basketball team he coached to leave after games until he was in his vehicle.

After finding Bell's last day attending the alternative school would be the next day, 11 March, the district court ruled whether to grant injunctive relief

was moot. Accordingly, the requested injunction was denied.

It does not appear that any discovery took place after the preliminary-injunction hearing. On 9 May, following a case-management conference, the magistrate judge entered an order stating: "it appears that there are no factual issues and that this case should be resolved by motions for summary judgment"; and the parties had 90 days to file those motions.

Therefore, approximately three months later, the school board filed its summary-judgment motion on 1 August; Bell and his mother, on 5 August. On 15 March 2012, the district court denied the Bells' motion and granted the school board's. In doing so, it concluded the rap recording constituted "harassment and intimidation of teachers and possible threats against teachers and threatened, harassed, and intimidated school employees". *Bell*, 859 F. Supp. 2d at 840 (internal quotation marks omitted). The court also concluded the rap recording "in fact caused a material and/or substantial disruption at school and . . . it was reasonably foreseeable to school officials the song would cause such a disruption". *Id.* Moreover, the court concluded, *inter alia*: (1) the superintendent and principal were entitled to qualified immunity in their individual capacities; and (2) Bell's mother could not show a violation of her Fourteenth Amendment rights (she claimed the school's disciplining Bell violated her right to make decisions regarding the custody and care of her son). *Id.* at 841–42.

On appeal, only the summary judgment against Bell's First Amendment claim was challenged. A divided panel in December 2014 held, *inter alia*: the school board violated Bell's First Amendment right by disciplining him based on the language in the rap

recording. *Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280, 304–05 (5th Cir. 2014), *reh'g en banc granted & opinion vacated*, 782 F.3d 712 (5th Cir. 2015). En-banc review was granted in February 2015.

II.

Because the summary judgment against Bell's mother's Fourteenth Amendment claim and for the school officials' qualified-immunity claim was not contested on appeal, the only issue before our en-banc court is the summary judgment against Bell's First Amendment claim. (The misconduct alleged by Bell against the two teachers is, of course, not at issue.)

A summary judgment is reviewed *de novo*, applying the same standard as did the district court. *E.g.*, *Feist v. La., Dep't of Justice, Office of the Att'y Gen.*, 730 F.3d 450, 452 (5th Cir. 2013). Summary judgment is proper when "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). "A genuine dispute of fact exists when evidence is sufficient for a reasonable jury to return a verdict for the non-moving party, and a fact is material if it might affect the outcome of the suit." *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014) (citations and quotation marks omitted).

In determining whether to grant summary judgment, the court, in its *de novo* review, views the evidence in the light most favorable to the nonmovant. *E.g.*, *Dameware Dev., L.L.C. v. Am. Gen. Life Ins. Co.*, 688 F.3d 203, 206–07 (5th Cir. 2012). Consistent with that, on cross-motions for summary judgment, "we review [*de novo*] each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party". *Cooley v. Hous.*

Auth. of Slidell, 747 F.3d 295, 298 (5th Cir. 2014) (internal quotation marks omitted) (quoting *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001)).

The summary-judgment record at hand includes, *inter alia*: (1) the affidavits of four students regarding the coaches' alleged misconduct; (2) screenshots of Bell's Facebook page; (3) a transcription of the rap recording submitted by the school board; (4) a transcription of the recording submitted by Bell (stipulated version); (5) the letter from the superintendent to Bell's mother, informing the Bells of a hearing before the disciplinary committee; (6) the digital recording of the rap recording; (7) the first screenshot of Bell's Facebook "wall"; (8) the second screenshot of Bell's Facebook "wall"; (9) the recording of the disciplinary-committee hearing; (10) the minutes of that hearing, containing the recommended disciplinary action; (11) the school-board attorney's letter to Bell's mother, informing her of the disciplinary committee's findings and recommended discipline; (12) the school-board-hearing minutes; (13) the school-district's discipline policy; (14) the school-board attorney's letter to Bell's mother informing her of the school-board's determination; and (15) the transcript of the preliminary-injunction hearing.

A.

Students *qua* students do not forfeit their First Amendment rights to freedom of speech and expression. *Tinker*, 393 U.S. at 506, 511 ("School officials do not possess absolute authority over their students . . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."). On the other hand, the First Amendment

does not provide students absolute rights to such freedoms, and those rights must be tempered in the light of a school official's duty to, *inter alia*, "teach[] students the boundaries of socially appropriate behavior", *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), and "protect those entrusted to their care", *Morse v. Frederick*, 551 U.S. 393, 408 (2007). As Justice Oliver Wendell Holmes, Jr., wrote nearly a century ago: "[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919) (citation omitted). Therefore, because "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings", *Fraser*, 478 U.S. at 682, certain speech, which would be protected in other settings, might not be afforded First Amendment protection in the school setting.

Balancing these competing interests, *Tinker* provided in 1969 the standard for evaluating whether the First Amendment protects a student's speech. There, the Court considered the suspension of students for wearing black armbands in protest against the Vietnam War. *Tinker*, 393 U.S. at 505–14. In holding the students' speech protected under the First Amendment, the Court, focusing primarily on the effect of that speech on the school community, held: A student "may express his opinions . . . if he does so without materially and substantially interfer[ing] with the requirements of *appropriate discipline in the operation of the school and without colliding with the rights of others*". *Id.* at 513 (alteration in original) (emphasis added) (internal quotation marks omitted). Put another way, "conduct by the student, *in class or out*

of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized . . .". *Id.* (emphasis added). Approximately three years after *Tinker*, our court held this standard can be satisfied either by showing a disruption has occurred, or by showing "demonstrable factors that would give rise to *any reasonable forecast* by the school administration of 'substantial and material' disruption". *Shanley v. Ne. Indep. Sch. Dist., Bexar Cnty., Tex.*, 462 F.2d 960, 974 (5th Cir. 1972) (emphasis added) (holding school's suspension of students for their off-campus distribution of "underground" newspaper violated *Tinker*).

Since *Tinker*, the Court has revisited student speech on several occasions, each time carving out narrow exceptions to the general *Tinker* standard based on certain characteristics, or content, of the speech. *See, e.g., Morse*, 551 U.S. at 425 (Alito, J, concurring) (grave and unique threats to the physical safety of students, in particular, speech advocating illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (school-sponsored speech); *Fraser*, 478 U.S. at 685 (lewd, vulgar, or indecent speech); *see also Morgan v. Swanson*, 659 F.3d 359, 374 (5th Cir. 2011) (en banc) (describing the Court's holdings as "expand[ing] the kinds of speech schools can regulate . . . . to several broad categories of student speech" (internal quotation marks omitted)). In *Fraser*, the Court held the school board acted within its authority when it disciplined a student for an "offensively lewd and indecent" speech delivered at a student assembly. 478 U.S. at 677–78, 685. In *Hazelwood*, the Court upheld a school's right to "exercis[e] editorial control over the style and content of student speech" in a

school-sponsored newspaper when the student engages in "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" and the school officials' "actions are reasonably related to legitimate pedagogical concerns". 484 U.S. at 262, 271, 273.

And, most recently in *Morse*, the Court considered whether a school infringed a student's First Amendment right of free speech when it disciplined him for holding up a banner that stated "BONG HiTS 4 JESUS" at a school-sponsored event. 551 U.S. at 397–98. The Court, through Justice Alito's controlling concurrence (joined by Justice Kennedy), held a school may discipline a student for speech which poses a "grave and . . . unique threat to the physical safety of students", such as "advocating illegal drug use". *Id.* at 425. (Justice Alito limited his "join[ing] the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions". *Id.* at 423.)

For these exceptions, schools are not required to prove the occurrence of an actual disruption or one that reasonably could have been forecast. Similarly, in *Ponce v. Socorro Independent School District*, our court extended the *Morse* exception to certain threats of school violence. 508 F.3d 765, 771–72 (5th Cir. 2007). In response to a diary brought to school containing "terroristic threat[s]" mirroring recent mass school shootings, the school suspended the student. *Id.* at 767. On appeal, our court upheld the suspension as constitutional, extending *Morse*'s exception to speech "bearing the stamp of . . . mass, systematic school-shootings" based on the "[l]ack of forewarning and the frequent setting within schools [which] give mass

shootings the unique indicia that the concurring opinion [in *Morse*] found compelling with respect to drug use". *Id.* at 771.

In challenging the summary judgment, Bell claims the school board violated his First Amendment free-speech rights by temporarily suspending him and placing him in an alternative school for the six weeks remaining in the grading period. In support, he contends: *Tinker* does not apply to off-campus speech, such as his rap recording; and, even if it does, *Tinker*'s "substantial disruption" test is not satisfied. For the reasons that follow, we hold: *Tinker* applies to the off-campus speech at issue; there is no genuine dispute of material fact precluding ruling, as a matter of law, that a school official reasonably could find Bell's rap recording threatened, harassed, and intimidated the two teachers; and a substantial disruption reasonably could have been forecast, as a matter of law.

1.

As our court explained in *Morgan v. Swanson*, student-speech claims are evaluated "in light of the special characteristics of the school environment, beginning by categorizing the student speech at issue". 659 F.3d at 375 (footnotes and internal quotation marks omitted). We must thus decide whether Bell's speech falls under *Tinker*, or one of the Court's above-described exceptions. *See, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (employing a similar approach, noting "[s]peech falling outside of . . . categories [such as those in *Fraser* and *Hazelwood*] is subject to *Tinker*'s general rule").

The parties do not assert, and the record does not show, that the school board disciplined Bell based on the lewdness of his speech or its potential perceived

sponsorship by the school; therefore, *Fraser* and *Hazelwood* are not directly on point. Bell's speech likewise does not advocate illegal drug use or portend a Columbine-like mass, systematic school-shooting. And, as Justice Alito noted, when the type of violence threatened does not implicate "the special features of the school environment", *Tinker*'s "substantial disruption" standard is the appropriate vehicle for analyzing such claims. *Morse*, 551 U.S. at 425 (citing *Tinker*, 393 U.S. at 508–09) ("[I]n most cases, *Tinker*'s 'substantial disruption' standard permits school officials to step in before actual violence erupts".). Although threats against, and harassment and intimidation of, teachers certainly pose a "grave . . . threat to the physical safety" of members of the school community, *id.*, violence forecast by a student against a teacher does not reach the level of the above-described exceptions necessitating divergence from *Tinker*'s general rule. We therefore analyze Bell's speech under *Tinker*. *See Ponce*, 508 F.3d at 771–72 & n.2 ("[B]ecause [threats of violence against individual teachers] are relatively discrete in scope and directed at adults, [they] do not amount to the heightened level of harm that was the focus of both the majority opinion and Justice Alito's concurring opinion in *Morse*".); *see also Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007) (analyzing threats of violence to individual teachers under *Tinker*); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 982–83 (11th Cir. 2007) (same).

2.

In claiming *Tinker* does not apply to off-campus speech, Bell asserts: *Tinker* limits its holding to speech inside the "schoolhouse gate"; and each of the Court's subsequent decisions reinforces this understanding.

"Experience shows that schools can be places of special danger." *Morse*, 551 U.S. at 424 (Alito, J., concurring). Over 45 years ago, when *Tinker* was decided, the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations. *See, e.g., Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013) ("With the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights."). Students now have the ability to disseminate instantaneously and communicate widely from any location via the Internet. 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. Although, under other circumstances, such communications might be protected speech under the First Amendment, off-campus threats, harassment, and intimidation directed at teachers create a tension between a student's free-speech rights and a school official's duty to maintain discipline and protect the school community. These competing concerns, and differing standards applied to off-campus speech across circuits, as discussed *infra*, have drawn into question the scope of school officials' authority. *See Morse*, 551 U.S. at 418 (Thomas, J., concurring) (lamenting the Court's failure to "offer an explanation of when [*Tinker*] operates and when it does not", and noting: "I am afraid that our jurisprudence now says that students

have a right to speak in schools except when they do not").

Greatly affecting this landscape is the recent rise in incidents of violence against school communities. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001) ("[W]e live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis".). School administrators must be vigilant and take seriously any statements by students resembling threats of violence, *Ponce*, 508 F.3d at 771, as well as harassment and intimidation posted online and made away from campus. This now-tragically common violence increases the importance of clarifying the school's authority to react to potential threats before violence erupts. *See Morse*, 551 U.S. at 408 (pressing that dangerous speech, such as speech advocating drug use, is substantially different from the political speech at issue in *Tinker*, because it presents a "far more serious and palpable" danger than an "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" (citation and internal quotation marks omitted)); *see also Ponce*, 508 F.3d at 772 ("School administrators must be permitted to react quickly and decisively to address a threat of physical violence . . . without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance.").

In the light of these competing interests and increasing concerns regarding school violence, it is necessary to establish the extent to which off-campus student speech may be restricted without offending the First Amendment. Our holding concerns the paramount

need for school officials to be able to react quickly and efficiently to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community. *See, e.g., Morse*, 551 U.S. at 425 (Alito, J., concurring) ("[D]ue to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence."); *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) ("School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.").

a.

Despite Bell's recognizing the wealth of precedent across numerous circuits contrary to his position, he asserts: *Tinker* does not apply to speech which originated, and was disseminated, off-campus, without the use of school resources. Bell's position is untenable; it fails to account for evolving technological developments, and conflicts not only with our circuit's precedent, but with that of every other circuit to have decided this issue.

Since *Tinker* was decided in 1969, courts have been required to define its scope. As discussed below, of the six circuits to have addressed whether *Tinker* applies to off-campus speech, five, *including our own*, have held it does. (For the other of the six circuits (the third circuit), there is an intra-circuit split. *See Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219–20 (3d Cir. 2011) (en banc) (Jordan, J., concurring) (discussing that *Tinker*'s applicability to off-campus speech remains unresolved in the third circuit); *see also J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 931 & n.8 (3d Cir. 2011) (en banc) (divided court assuming, without deciding, that the *Tinker*

substantial-disruption test applies to online speech harassing a school administrator).) The remainder of the circuits (first, sixth, seventh, tenth, eleventh, D.C.) do not appear to have addressed this issue.

Although the Supreme Court has not expressly ruled on this issue, our court, 43 years ago, applied *Tinker* to analyze whether a school board's actions were constitutional in disciplining students based on their off-campus speech. *E.g., Shanley*, 462 F.2d at 970 ("When the *Burnside* / *Tinker* standards are applied to this case . . . ".); *see also Sullivan v. Hous. Indep. Sch. Dist.*, 475 F.2d 1071, 1072 (5th Cir. 1973) ("This case arises from the unauthorized distribution of an underground newspaper *near a high school campus*, and presents the now-familiar clash between claims of First Amendment protection on the one hand and the interests of school boards in maintaining an atmosphere in the public schools conducive to learning, on the other." (emphasis added)); *Wisniewski*, 494 F.3d at 39 (interpreting *Sullivan* as applying *Tinker* to off-campus speech); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22, 619 n.40 (5th Cir. 2004) (same).

In *Shanley*, students distributed newspapers containing articles they authored "during out-of-school hours, and without using any materials or facilities owned or operated by the school system", "near but outside the school premises on the sidewalk of an adjoining street, separated from the school by a parking lot". 462 F.2d at 964. In concluding the students' speech was protected, our court ruled: "[T]he activity punished here does not even approach the 'material and substantial' disruption . . . either in fact or in reasonable forecast [and] [a]s a factual matter . . . there were no disturbances of any sort, on or

off campus, related to the distribution of the [newspaper]". *Id.* at 970.

Further, as noted *supra*, four other circuits have held that, under certain circumstances, *Tinker* applies to speech which originated, and was disseminated, off-campus. *See, e.g., Wynar*, 728 F.3d at 1069; *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766–67 (8th Cir. 2011); *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 573–74 (4th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 48–50 (2d Cir. 2008). Therefore, based on our court's precedent and guided by that of our sister circuits, *Tinker* applies to off-campus speech in certain situations.

b.

Therefore, the next question is under what circumstances may off-campus speech be restricted. Our court's precedent is less developed in this regard. For the reasons that follow, and in the light of the summary-judgment record, we need not adopt a specific rule: rather, Bell's admittedly intentionally directing at the school community his rap recording containing threats to, and harassment and intimidation of, two teachers permits *Tinker*'s application in this instance.

i.

In 1972 in *Shanley*, our court expressly declined to adopt a rule holding a school's attempt to regulate off-campus speech under *Tinker* was *per se* unconstitutional. 462 F.2d at 974. Our court explained: "[E]ach situation involving expression and discipline will create its own problems of reasonableness, and for that reason we do not endeavor here to erect any immovable rules, but only to sketch guidelines". *Id.* Likewise, in 1973 in *Sullivan*, our court considered

Tinker, but did not address any parameters for its application to off-campus speech. 475 F.2d at 1076–77.

Our court's far more recent, 2004 opinion in *Porter*, however, provides valuable insight in this regard. There, the school expelled a student after his brother brought to school a sketchpad containing a two-year-old drawing of the school's being attacked by armed personnel. 393 F.3d at 611. The depiction, albeit violent in nature, "was completed [at] home, stored for two years, and *never intended* by [the creator of the drawing] to be brought to campus". *Id.* at 615 (emphasis added). After concluding *Tinker* applied to the school's regulations, our court held the speech was protected because the student never *intended* for the drawing to reach the school, describing its introduction to the school community as "accidental and unintentional". *Id.* at 618, 620 ("Because [the student's] drawing was composed off-campus, displayed only to members of his own household, stored off-campus, and not purposefully taken by him to [school] or publicized in a way certain to result in its appearance at [school], we have found that the drawing is protected by the First Amendment".). Of importance for the issue at hand, and after describing precedent from our and other circuits' applying *Tinker* to off-campus speech, our court stated its holding was "not in conflict with this body of case law" regarding the First Amendment and off-campus student speech because the drawing's being "composed off-campus and remain[ing] off-campus for two years until it was *unintentionally* taken to school by his younger brother takes the present case outside the scope of these precedents". *Id.* at 615 n.22 (emphasis added).

Porter instructs that a speaker's intent matters when determining whether the off-campus speech

being addressed is subject to *Tinker*. A speaker's intention that his speech reach the school community, buttressed by his actions in bringing about that consequence, supports applying *Tinker*'s school-speech standard to that speech.

In addition, those courts to have considered the circumstances under which *Tinker* applies to off-campus speech have advocated varied approaches. *E.g., Wynar*, 728 F.3d at 1069 (holding that, regardless of the location of the speech, "when faced with an identifiable threat of school violence [(threats communicated online via MySpace messages)], schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*"); *Snyder*, 650 F.3d at 940 (Smith, J., concurring) (noting that any standard adopted "cannot turn solely on where the speaker was sitting when the speech was originally uttered [because s]uch a standard would fail to accommodate the somewhat 'everywhere at once' nature of the [I]nternet", and advocating allowing schools to discipline off-campus speech "[r]egardless of its place of origin" so long as that speech was "intentionally directed towards a school"); *Kowalski*, 652 F.3d at 573 (applying *Tinker* when a "sufficiently strong" nexus exists between the student's speech and the school's pedagogical interests "to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being"); *D.J.M.*, 647 F.3d at 766 (applying *Tinker* because "it was reasonably foreseeable that [the student's] threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment"); *Doninger*, 527 F.3d at 48 (holding *Tinker* applies to speech originating off-campus if it "would foreseeably create a risk of substantial

disruption within the school environment, at least when it was similarly foreseeable that the off-campus expression might also reach campus" (internal quotation marks omitted)).

The pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction advocated by Bell, "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". *Layshock*, 650 F.3d at 220–21 (Jordan, J., concurring). Accordingly, in the light of our court's precedent, we hold *Tinker* governs our analysis, as in this instance, when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources.

This holding is consistent with our circuit's precedent in *Shanley* and *Sullivan*, that of our sister circuits, and our reasoning in *Porter*. Further, in holding *Tinker* applies to the off-campus speech in this instance, because such determinations are heavily influenced by the facts in each matter, we decline: to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other circuits.

ii.

Turning to the matter before us, there is no genuine dispute of material fact that Bell intended his rap recording to reach the school community. He admitted during the disciplinary-committee hearing that one of the purposes for producing the recording was to "increase awareness of the [alleged misconduct]" and that, by posting the rap recording on Facebook and

YouTube, he knew people were "gonna listen to it, somebody's gonna listen to it", remarking that "students all have Facebook". In short, Bell produced and disseminated the rap recording knowing students, and hoping administrators, would listen to it.

Further, regardless of whether Bell's statements in the rap recording qualify as "true threats", as discussed in part II.B., they constitute threats, harassment, and intimidation, as a layperson would understand the terms. The Oxford English Dictionary defines: "threaten" as "to declare (usually conditionally) one's intention of inflicting injury upon" another, 17 Oxford English Dictionary 998 (2d ed. 1989); "harass" as "[t]o wear *out*, tire *out*, or exhaust with fatigue, care, [or] trouble", 6 *id.* at 1100 (emphasis in original); and "intimidate" as "[t]o render timid, inspire with fear; [or] to force to or deter from some action by threats or violence", 8 *id.* at 7–8. *See also* Black's Law Dictionary 1708 (10th ed. 2014) (defining "threat" as "[a] communicated intent to inflict harm or loss on another or on another's property"); *id.* at 831 (defining "harassment" as "[w]ords, conduct, or action . . . that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose"); *Elonis v. United States*, 135 S. Ct. 2001, 2011–12 (2015) (explaining that a "threat" can have different definitions based on context (for example, the difference between its use in criminal statutes and its being protected speech under the First Amendment)).

A reasonable understanding of Bell's statements satisfies these definitions; they: threatened violence against the two coaches, describing the injury to be inflicted (putting the pistol down their mouths and pulling the trigger, and "capping" them), described the

specific weapon (a "rueger" [sic], which, as discussed *supra*, is a type of firearm), and encouraged others to engage in this action; and harassed and intimidated the coaches by forecasting the aforementioned violence, warning them to "watch [their] back[s]" and that they would "get no mercy" when such actions were taken. Accordingly, as further discussed *infra*, there is no genuine dispute of material fact that Bell threatened, harassed, and intimidated the coaches by intentionally directing his rap recording at the school community, thereby subjecting his speech to *Tinker*.

3.

Having held *Tinker* applies in this instance, the next question is whether Bell's recording either caused an actual disruption or reasonably could be forecast to cause one. Taking the school board's decision into account, and the deference we must accord it, *see, e.g., Wood v. Strickland*, 420 U.S. 308, 326 (1975), *overruled in part on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Shanley*, 462 F.2d at 975; *Callahan v. Price*, 505 F.2d 83, 87 (5th Cir. 1974), this question becomes whether a genuine dispute of material fact exists regarding the reasonableness of finding Bell's rap recording threatening, harassing, and intimidating; and, if no genuine dispute precludes that finding, whether such language, as a matter of law, reasonably could have been forecast to cause a substantial disruption.

a.

As noted by our court in *Shanley*, "in deference to the judgment of the school boards, we refer ad hoc resolution of . . . issues [such as this one] to the neutral corner of 'reasonableness'". 462 F.2d at 971; *see also id.* at 975 ("[T]he balancing of expression and discipline is

an exercise in judgment for school administrations and school boards, subject only to the constitutional requirement of reasonableness under the circumstances".). For the reasons discussed *supra*, there is no genuine dispute of material fact that the school board's finding the rap recording threatened, harassed, and intimidated the two coaches was objectively reasonable.

b.

Next, we consider whether the school board's disciplinary action against Bell, based on its finding he threatened, harassed, and intimidated two coaches, satisfies *Tinker*. Arguably, a student's threatening, harassing, and intimidating a teacher inherently portends a substantial disruption, making feasible a *per se* rule in that regard. We need not decide that question because, in the light of this summary-judgment record, and for the reasons that follow, Bell's conduct reasonably could have been forecast to cause a substantial disruption.

i.

As discussed *supra*, *Tinker* allows a school board to discipline a student for speech that either causes a substantial disruption or reasonably is forecast to cause one. 393 U.S. at 514. The *Tinker* test is satisfied when: an actual disruption occurs; or the record contains facts "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities". *Id.*

"*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Saxe*, 240 F.3d at 211. "School officials must be able to show that their actions were caused by something more than a mere desire to avoid the

discomfort and unpleasantness that always accompany an unpopular viewpoint." *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 221 (5th Cir. 2009) (alterations and internal quotation marks omitted). "Officials must base their decisions on fact, not intuition", *id.* at 221–22 (internal quotation marks omitted); and those decisions are entitled to deference, *Shanley*, 462 F.2d at 967 ("That courts should not interfere with the day-to-day operations of schools is a platitudinous but eminently sound maxim which this court has reaffirmed on many occasions."). *See also Wood*, 420 U.S. at 326 ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.").

As our court has held: "While school officials must offer facts to support their proscription of student speech, *this is not a difficult burden, and their decisions will govern if they are within the range where reasonable minds will differ*". *Cash*, 585 F.3d at 222 (emphasis added) (internal citations and quotation marks omitted). Accordingly, school authorities are not required expressly to forecast a "substantial or material disruption"; rather, courts determine the possibility of a reasonable forecast based on the facts in the record. *See, e.g., id.* at 217, 222; *see also Tinker*, 393 U.S. at 514 ("[T]he record does not demonstrate any facts which *might reasonably have led* school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred". (emphasis added)).

Factors considered by other courts in determining, pursuant to *Tinker*, the substantiality *vel non* of an actual disruption, and the objective reasonableness *vel*

non of a forecasted substantial disruption, include: the nature and content of the speech, the objective and subjective seriousness of the speech, and the severity of the possible consequences should the speaker take action, *e.g., Wynar*, 728 F.3d at 1070–71; the relationship of the speech to the school, the intent of the speaker to disseminate, or keep private, the speech, and the nature, and severity, of the school's response in disciplining the student, *e.g., Doninger*, 527 F.3d at 50–52; whether the speaker expressly identified an educator or student by name or reference, and past incidents arising out of similar speech, *e.g., Kowalski*, 652 F.3d at 574; the manner in which the speech reached the school community, *e.g., Boim*, 494 F.3d at 985; the intent of the school in disciplining the student, *Snyder*, 650 F.3d at 926, 929 (majority opinion), 951 (Fisher, J., dissenting); and the occurrence of other in-school disturbances, including administrative disturbances involving the speaker, such as "[s]chool officials ha[ving] to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place", *D.J.M.*, 647 F.3d at 766, brought about "because of the need to manage" concerns over the speech, *Doninger*, 527 F.3d at 51.

ii.

Applying this precedent to the summary-judgment record at hand, and for the reasons that follow, a substantial disruption reasonably could have been forecast as a matter of law. Viewing the evidence in the requisite light most favorable to Bell, including his assertions that he wanted only to raise awareness of alleged misconduct by two teachers (Bell admitted at the disciplinary-committee hearing that his recording was meant to "increase awareness of the situation"

and that he was "*foreshadowing something that might happen*" (emphasis added)), the manner in which he voiced his concern—with threatening, intimidating, and harassing language—must be taken seriously by school officials, and reasonably could be forecast by them to cause a substantial disruption.

The speech pertained directly to events occurring at school, identified the two teachers by name, and was understood by one to threaten his safety and by neutral, third parties as threatening. (Bell agreed at the disciplinary-committee hearing that "certain statements" were made to his mother "outside the school setting" that "'put a pistol down your mouth'[,] that is a direct threat".) The possible consequences were grave—serious injury to, including the possible death of, two teachers. Along that line, Bell admitted he intended the speech to be public and to reach members of the school community, which is further evidenced by his posting the recording to Facebook and YouTube.

As noted, the school district's Discipline – Administrative Policy lists "[h]arassment, intimidation, or threatening other students and/or teachers" as a severe disruption. Although we may not rely on *ipse dixit* in evaluating the school board's actions, *Shanley*, 462 F.2d at 970, the school-district's policy demonstrates an awareness of *Tinker*'s substantial-disruption standard, and the policy's violation can be used as evidence supporting the reasonable forecast of a future substantial disruption. *See, e.g., Morse*, 551 U.S. at 408–10 (relying on, *inter alia*, the student's violation of established school policy in holding the school board did not violate the student's First Amendment right); *Fraser*, 478 U.S. at 678, 686 (noting that the "[t]he school disciplinary rule proscribing 'obscene' language

and the prespeech admonitions of teachers gave adequate warning to [the student] that his lewd speech could subject him to sanctions").

Further, even after finding Bell threatened, intimidated, and harassed two teachers, the school board's response was measured—temporarily suspending Bell and placing him in an alternative-education program for the remainder of the nine-week grading term (about six weeks). The reasonableness of, and amount of care given to, this decision is reinforced by the school board's finding, differently from the disciplinary committee's, that Bell's statements also constituted threats.

And finally, numerous, recent examples of school violence exist in which students have signaled potential violence through speech, writings, or actions, and then carried out violence against school communities, after school administrators and parents failed to properly identify warning signs. *See, e.g.,* Report of the Virginia Tech Review Panel, Mass Shootings at Virginia Tech April 16, 2007, 52 (August 2007), *available at* https://governor.virginia.gov/media/3772/full report.pdf (section entitled "Missing the Red Flags"); *see also Ponce*, 508 F.3d at 771 ("[T]he difficulty of identifying warning signs in the various instances of school shootings across the country is intrinsic to the harm itself".); *LaVine*, 257 F.3d at 987 ("After Columbine, Thurston, Santee and other school shootings, questions have been asked how teachers or administrators could have missed telltale 'warning signs,' why something was not done earlier and what should be done to prevent such tragedies from happening again.").

In determining objective reasonableness *vel non* for forecasting a substantial disruption, the summary-

judgment record and numerous related factors must be considered against the backdrop of the mission of schools: to educate. It goes without saying that a teacher, which includes a coach, is the cornerstone of education. Without teaching, there can be little, if any, learning. Without learning, there can be little, if any, education. Without education, there can be little, if any, civilization.

It equally goes without saying that threatening, harassing, and intimidating a teacher impedes, if not destroys, the ability to teach; it impedes, if not destroys, the ability to educate. It disrupts, if not destroys, the discipline necessary for an environment in which education can take place. In addition, it encourages and incites other students to engage in similar disruptive conduct. Moreover, it can even cause a teacher to leave that profession. In sum, it disrupts, if not destroys, the very mission for which schools exist—to educate.

If there is to be education, such conduct cannot be permitted. In that regard, the real tragedy in this instance is that a high-school student thought he could, with impunity, direct speech at the school community which threatens, harasses, and intimidates teachers and, as a result, objected to being disciplined.

Put succinctly, "with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment". *Snyder*, 650 F.3d at 951–52 (Fisher, J., dissenting). As stated, the school board

reasonably could have forecast a substantial disruption at school, based on the threatening, intimidating, and harassing language in Bell's rap recording.

B.

In considering Bell's First Amendment claim, and our having affirmed summary judgment for the school board under *Tinker*, it is unnecessary to decide whether Bell's speech also constitutes a "true threat" under *Watts v. United States*, 394 U.S. 705 (1969) (holding hyperbolic threats on the President's life are not "true threats"). *See Elonis*, 135 S. Ct. at 2012 (declining to address the First Amendment question (whether the speech was a "true threat" not protected by that amendment) after resolving the case on other grounds).

III.

For the foregoing reasons, the judgment is AFFIRMED.

E. GRADY JOLLY, specially concurring:

In determining the contours of constitutionally permissible school discipline, older cases are relevant for block building, but only block building, as we decide what speech schools may discipline under the First Amendment. In *Tinker*, there was no threat to kill a teacher, no threat of violence, and no lewd or slanderous comments regarding a teacher. *Tinker* also did not address the intersection between on-campus speech and off-campus speech. When *Tinker* refers to a disruption, it is saying that student ideas may be expressed on campus unless they are so controversial that the expression creates a disruption. Those principles are controlling where the facts fit, but *Tinker's* admonitions—or the admonitions in various precedents—are not equally forceful in every case. The same can be said of *Morse.* It is perhaps more applicable here than *Tinker*, because it speaks in terms of physical and moral danger to students. *Morse* makes clear that such danger does not require proof of disruptive effects that the speech may cause, as would be required in the case of mere expression of non-lethal statements.

It is true that in a footnote in *Ponce* we indicated that individual threats of violence are more appropriately analyzed in the light of *Tinker* as opposed to threats of mass violence, which we analyzed under *Morse*. These are evolving principles, however, and we now have before us a different case from *Tinker*, *Morse*, *Ponce*, or *Porter*. *Tinker* may well be a relevant precedent here. But that does not mean that all aspects of a political speech case must be slavishly applied to a case of threats to kill teachers.

We should apply reasonable common sense in deciding these continually arising school speech and

discipline cases, as we would in any case dealing with the evolving common law, which takes into account the technological and societal environs of the times. When *Tinker* was written in 1969, the use of the Internet as a medium for student speech was not within the Court's mind. It is also true that this issue was not in the forefront of the Court's mind when *Porter* was written in 2004, or even when *Morse* and *Ponce* were written. Ever since *Morse*, the use, the extent and the effect of the online speech seem to have multiplied geometrically.

Judges should also view student speech in the further context of public education today—at a time when many schools suffer from poor performance, when disciplinary problems are at their highest, and when schools are, in many ways, at their most ineffective point. Judges should take into account the effect the courts have had on these problems in school discipline. Increasing judicial oversight of schools has created unforeseen consequences, for teachers and for schools as much as for students. Students feel constraints on conduct and personal speech to be more and more permissive. Teachers will decide not to discipline students, given the likelihood of protracted litigation and its pressures on the time and person of those who work hard to keep up with the increasing demands placed on them as teachers. Schools will not take on the risk of huge litigation costs when they could use these resources on school lunches, textbooks, or other necessary school resources to educate children, all of which are sorely lacking in so many, many instances.

Judges can help to address these concerns by speaking clearly, succinctly and unequivocally. I would decide this case in the simplest way, consonant

with our cases and the cases in other circuits, by saying as little as possible and holding:

> Student speech is unprotected by the First Amendment and is subject to school discipline when that speech contains an actual threat to kill or physically harm personnel and/or students of the school; which actual threat is connected to the school environment; and which actual threat is communicated to the school, or its students, or its personnel.

With these comments, I join Judge Barksdale's opinion.

JENNIFER WALKER ELROD, Circuit Judge, joined by JONES, Circuit Judge, concurring:

I fully concur in the careful, well-reasoned majority opinion, because Bell's rap was directed to the school and contained threats of physical violence. *See Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) (declining to consider threshold tests from other circuits and holding only that schools may discipline off-campus student speech under the *Tinker* standard "when faced with an identifiable threat of school violence"); *see also Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring) (remarking that "any argument for altering the usual free speech rules in the public schools . . . must . . . be based on some special characteristic of the school setting," and recognizing only one such special characteristic: "threat[s] to the physical safety of students"); *Ponce v. Socorro Ind. Sch. Dist.*, 508 F.3d 765, 770–72 (5th Cir. 2007) (interpreting *Morse* to allow punishment of off-campus speech threatening a mass shooting).

Most importantly, nothing in the majority opinion makes *Tinker* applicable off campus to non-threatening political or religious speech, even though some school administrators might consider such speech offensive, harassing, or disruptive. *See Morse*, 551 U.S. at 403, 409 (majority opinion) (noting that the student speech in *Morse* did not "convey[] any sort of political or religious message" and recognizing that while "much political and religious speech might be perceived as offensive to some," such speech "is at the core of what the First Amendment is designed to protect") (internal quotation marks omitted); *id.* at 422–23, 424 (Alito, J., concurring) (emphasizing the First Amendment's protection of speech that comments on political or social issues and observing that "[i]t is . . . wrong to

treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*").

Indeed, as Judge D. Brooks Smith has cautioned, because *Tinker* allows the suppression of student speech (even political speech) based on its consequences rather than its content, broad off-campus application of *Tinker* "would create a precedent with ominous implications. Doing so would empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school." *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (en banc) (Smith, J., concurring) (five-judge concurrence opining that *Tinker* does not apply off campus). I agree with my learned colleague on the Third Circuit that the First Amendment does not, for example, allow a public school to punish a student for "writ[ing] a blog entry defending gay marriage" from his home computer, even if the blog entry causes a substantial disruption at the school. *Id.* (Smith, J., concurring).

By my read, the majority opinion avoids such "ominous implications" and does not subject a broad swath of off-campus student expression to *Tinker*. Rather, it quite sensibly decides only the case before it, applying *Tinker* to Bell's rap, which was intentionally directed toward the school and contained threats of physical violence. Because this cautious approach does not place public school officials *in loco parentis* or confer upon them a broad power to discipline non-threatening off-campus speech, I concur in full.

GREGG COSTA, Circuit Judge, joined by OWEN and HIGGINSON, Circuit Judges, concurring:

This case involves two serious problems that arise all too frequently in today's classrooms: violence and sexual harassment. Judge Dennis's dissent points out that the harassment of female students is a matter of vital public concern that Bell's song sought to expose. The problem for Bell is that his song—with its graphic discussion of violence against the coaches—goes well beyond blowing the whistle on the alleged harassment.

Judge Dennis's dissent contends that these whistle-blowing aspects of the song nonetheless entitle the speech to "special protection" under the First Amendment. Dissent at 1, 12. It treats this argument as a separate basis for ruling in Bell's favor. But fitting this case within *Snyder v. Phelps*, public employee speech cases like *Pickering*, and the litany of other cited cases assumes that *Tinker* is not implicated. *Tinker*, of course, involved speech on not just a matter of public concern, but *the* public concern of its day—the war in Vietnam. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). Yet the Court still balanced the value of that speech against its impact on the learning environment. *See id.* at 509. That disruption analysis may well have come out differently had the Tinkers combined their armband protest with talk of violence. Identifying some aspect of Bell's song that addresses a matter of public concern therefore is not enough to elevate it above the *Tinker* framework unless *Tinker* does not apply to this type of off-campus speech (in which case the speech would enjoy First Amendment protection from school discipline so long as it constitutes any form of protected speech, not just the "highest rung").

Whichever First Amendment doctrine one tries to latch onto, the inescapable question is thus whether *Tinker*'s balancing approach governs "off-campus" student speech that is directed at the school community. For the reasons discussed in the majority opinion, along with the views expressed by every other circuit that has taken a position on this issue, I agree that it does, at least when the speech is threatening, harassing, and intimidating as it is here.

Broader questions raised by off-campus speech will be left for another day. That day is coming soon, however, and this court or the higher one will need to provide clear guidance for students, teachers, and school administrators that balances students' First Amendment rights that *Tinker* rightly recognized with the vital need to foster a school environment conducive to learning. That task will not be easy in light of the pervasive use of social media among students and the disruptive effect on learning that such speech can have when it is directed at fellow students and educators. Indeed, although Judge Dennis's dissent extols the aspects of Bell's song that sought to combat sexual harassment, the blanket rule it advocates—one that would deprive schools of any authority to discipline students for off-campus speech published on social media no matter how much it disrupts the learning environment—would allow sexual harassment and ferocious cyberbullying that affect our classrooms to go unchecked. *See Morrow v. Balaski*, 719 F.3d 160, 164 (3d Cir. 2013) (describing multiple cyberbullying incidents in which students were threatened by phone and on MySpace by another student); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 773 (8th Cir. 2012) (explaining that students' posts on a blog they created "contained a variety of offensive and racist comments as well as sexually explicit and

degrading comments about particular female classmates, whom they identified by name"); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 568 (4th Cir. 2011) (detailing online bullying incident in which high school students created webpage called "Students Against Shay's Herpes" in reference to another high school student).

With these additional observations, I join the majority opinion.

JAMES L. DENNIS, Circuit Judge, with whom GRAVES, Circuit Judge, joins in full, and with whom PRADO, Circuit Judge, joins except as to Parts I and II. B., dissenting:

Although mischaracterizing itself as "narrow" in scope, the *en banc* majority opinion broadly proclaims that a public school board is constitutionally empowered to punish a student whistleblower for his purely off-campus Internet speech publicizing a matter of public concern. As if to enforce the adage that "children should be seen and not heard," the majority opinion holds that the Itawamba County School Board did not violate the First Amendment when it suspended high school senior Taylor Bell for composing and posting a rap song on the Internet using his home computer during non-school hours, which criticized two male teachers for their repeated sexual harassment of minor female students. In my view, the majority opinion commits serious constitutional and summary-judgment procedural errors because: (1) Bell is entitled to summary judgment because his off-campus rap song was specially protected speech on a matter of public concern; (2) the School Board was not authorized by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), to censor students' off-campus online speech; and (3) even assuming *arguendo* that *Tinker* granted the School Board power to censor such speech, the School Board was not entitled to summary judgment under *Tinker*, because the evidence, viewed in the light favorable to the non-movant, Bell, does not support the conclusion that Bell's speech caused a substantial disruption of school activities or justified a reasonable forecast of such a disruption by school officials. The majority opinion thereby denigrates and undermines not only Bell's First Amendment right to engage in off-

campus online criticism on matters of public concern but also the rights of untold numbers of other public school students in our jurisdiction to scrutinize the world around them and likewise express their off-campus online criticism on matters of public concern. In doing so, the majority opinion obliterates the historically significant distinction between the household and the schoolyard by permitting a school policy to supplant parental authority over the propriety of a child's expressive activities on the Internet outside of school, expanding schools' censorial authority from the campus and the teacher's classroom to the home and the child's bedroom.

As detailed herein, the majority opinion commits a number of fundamental errors that necessitate highlighting lest readers be misinformed by its version of the relevant facts and law. *First and foremost*, the majority opinion erroneously fails to acknowledge that Bell's rap song constitutes speech on "a matter of public concern" and therefore "occupies the highest rung of the hierarchy of First Amendment values." *See Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (internal quotation marks and citation omitted). Instead, by narrowly focusing its analysis on a few, plainly rhetorical lyrics in Bell's song, the majority opinion wholly glosses over the urgent social issue that Bell's song lays bare and thus flouts Supreme Court precedent requiring us to evaluate whether "the overall thrust and dominant theme of [Bell's song] spoke to broader public issues"—which it did. *See id*. at 454.

Second, in drastically expanding the scope of schools' authority to regulate students' off-campus speech, the majority opinion disregards Supreme Court precedent establishing that minors are entitled

to "significant" First Amendment protection, including the right to engage in speech about violence or depicting violence, and that the government does not enjoy any "free-floating power to restrict the ideas to which children may be exposed." *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2735–36 (2011). Similarly, the majority opinion also altogether fails to consider Supreme Court precedents that substantially restrict the government's ability to regulate Internet speech, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868–70 (1997), and the extent to which the majority opinion's vague framework fails to provide constitutionally adequate notice of when student speech crosses the line between permissible and punishable off-campus expression, *see id*. at 871–72; *accord Brown*, 131 S. Ct. at 2744–46 (Alito, J., concurring). Further, by deriving its rule from a school policy that focuses on whether a layperson might view Bell's speech as "threatening," "harassing," or "intimidating," the majority opinion ignores First Amendment precedents demanding that the government prove more than mere negligence before imposing penalties for so-called "threatening" speech. *See Virginia v. Black*, 538 U.S. 343, 359 (2003); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 904, 928–29 (1982).

Third, by holding that the *Tinker* framework applies to off-campus speech like Bell's, the majority opinion simply ignores that *Tinker*'s holding and its *sui generis* "substantial-disruption" framework are expressly grounded in "the special characteristics of the school environment," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), and the need to defer to school officials' authority "to prescribe and control conduct *in the schools*," *id*. at 507 (emphasis added), whereas Bell's rap song was recorded and

released entirely outside the school environment. The Court's post-*Tinker* precedents make clear this critical distinction. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring) (noting that *Tinker* allows schools to regulate "in-school student speech . . . in a way that would not be constitutional in other settings"). In this regard, the majority opinion also fails to account for the vital fact that the *Tinker* framework is far too indeterminate of a standard to adequately protect the First Amendment right of students, like Bell, to engage in expressive activities outside of school, as well as their parents' constitutional right to direct their children's upbringing and the First Amendment right of adults and children alike to receive students' speech. In other words, the majority opinion allows schools to police their students' Internet expression anytime and anywhere—an unprecedented and unnecessary intrusion on students' rights.

Fourth and finally, the majority opinion also errs in its very application of the *Tinker* framework. As detailed in the panel majority's opinion, the summary-judgment evidence simply does not support the conclusion, as required by *Tinker*, that Bell's song substantially disrupted school activities or that school officials reasonably could have forecasted that it would do so. In reaching the opposite conclusion, the majority opinion not only fails to view the summary-judgment evidence in the light most favorable to the non-movant, Bell, *accord Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014), but also dilutes the *Tinker* "substantial-disruption" framework into an analytic nullity.

Even in the most repressive of dictatorships, the citizenry is "free" to praise their leaders and other people of power or to espouse views consonant with

those of their leaders. "Freedom of speech" is thus a hollow guarantee if it permits only praise or state-sponsored propaganda. Freedom of speech exists exactly to protect those who would criticize, passionately and vociferously, the actions of persons in power. But that freedom is denied to Bell by the majority opinion because the persons whose conduct he dared to criticize were school teachers. If left uncorrected, the majority opinion inevitably will encourage school officials to silence student speakers, like Taylor Bell, solely because they disagree with the content and form of their speech, particularly when such off-campus speech criticizes school personnel. Such a precedent thereby clearly contravenes the basic principle that, "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the States chooses to communicate. They may not be confined to expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511. Today, however, the majority opinion exempts the children of Texas, Louisiana, and Mississippi from this long-established constitutional safeguard. Because the majority opinion's undue deference to a public school board's assertion of authority to censor the speech of students while not within its custody impinges the very core of our Constitution's fundamental right to free speech, I respectfully but emphatically dissent.

I.

The *en banc* majority opinion completely ignores Bell's argument that the School Board violated his First Amendment rights in punishing him for his rap song, which he contends was protected speech on "a matter of public concern." Although Bell strenuously made his "speech on a matter of public concern" argument at every opportunity, including at the

en banc oral argument, the *en banc* majority opinion fails to address this critical point. Instead, the majority opinion transforms the Itawamba County School Board disciplinary policy into an unprecedented rule of constitutional law that effectively permits school officials across our Circuit to punish a student's protest of teacher misconduct regardless of when or 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. I respectfully but strongly disagree with the majority opinion's silent rejection of Bell's argument, not only because Bell's argument is meritorious, but also because the opinion's *sub silentio* decision of the issue presented has led it into several serious and unfortunate constitutional errors.

Speech on "matters of public concern" is "at the heart of the First Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (internal quotation marks and citation omitted). "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id*. at 452 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Id*. (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). "Accordingly, 'speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Id*. (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

Although the Supreme Court has noted that "the boundaries of the public concern test are not well defined," *San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per

curiam), it has "articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors," *Snyder*, 562 U.S. at 452. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id*. at 453 (internal quotation marks and citations omitted). "The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'" *Id*. (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).

Determining whether speech involves a matter of public concern "requires us to examine 'the content, form, and context' of th[e] speech, as revealed by the record as a whole." *Id*. (quoting *Dun & Bradstreet*, *Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)). "As in other First Amendment cases, the court is obligated 'to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)). "In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Id*. at 454.

In *Snyder*, the Supreme Court applied this framework to hold that the First Amendment barred an aggrieved father from recovering for, *inter alia*, intentional infliction of emotional distress, against an

anti-gay church congregation whose picketing coincided with the funeral of his son, who was a marine, notwithstanding the alleged outrageousness and hurtfulness of the picketers' speech to Snyder.[1] 562 U.S. at 460. Specifically, in that case, Fred Phelps, the founder of the Westboro Baptist Church, traveled to Maryland, along with six parishioners, in order to hold a protest on public property 1,000 feet from the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. *Id*. at 448. The picketing was conducted under police supervision and out of the sight of those at the church. *Id*. at 457. The protest was not unruly; there was no shouting, profanity, or violence. *Id*. The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. *Id*. The picketers peacefully displayed signs that read "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," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." *Id*. at 448. The Westboro picketers displayed these signs for about 30 minutes before the funeral began. *Id*. at 449.

Snyder's father thereafter filed a diversity action against Phelps and other picketers alleging, *inter alia*, state tort claims of intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. *Id*. at 449–50. After a jury awarded millions of

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[1] "The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event." *Id*. at 449.

dollars in damages, Phelps and his congregants argued that they were entitled to judgment as a matter of law because the First Amendment fully protected their speech. *Id*. at 450. The district court reduced the punitive damages award, but left the verdict otherwise intact. *Id*. The Fourth Circuit reversed, concluding that Westboro's statements were entitled to First Amendment protection because those statements "were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric." *Id*. at 451.

The Supreme Court granted *certiorari* and affirmed. *Id*. at 461. Evaluating the "content, form and context" of the congregants' protest, the Court concluded that Westboro's speech addressed a matter of public concern and was entitled to "special protection" under the First Amendment, thus barring Snyder from recovering in tort on the basis of the "outrageousness" of their speech. *Id*. at 458. According to the Court:

> Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995).

Id. Further, the Court concluded:

> Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder's funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.
>
> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

Id. at 460-461.

Applying these principles to the instant case, the record indisputably reveals that Bell's speech addressed a matter of public concern. Bell composed his song after a number of his female friends at school informed him that Coaches Wildmon and Rainey had frequently sexually harassed them during school. The

lyrics of Bell's song[2] describe in detail the female students' allegations of sexual misconduct, *e.g.*, describing Coach Wildmon as "telling students that they [were] sexy," and Coach Rainey as "rubbing on the black girls' ears in the gym." With a darkly parodic—and, by many standards, crude—tone, the song ridicules the coaches for their outrageously inappropriate conduct with the female students, *e.g.*, describing one coach as having "drool running down [his] mouth" while he "look[s] down girls' shirts," and positing that Wildmon is "fucking around" because of his wife's appearance (the song states that "his wife ain't got no titties").[3] By describing Rainey as "Bobby Hill the second," the song also draws parallels between the coaches' alleged sexual misconduct and the alleged sexual misconduct of a former Itawamba coach, Bobby Hill, who was arrested the previous year for sending sexually explicit text messages to a female student. Although the song does contain some violent lyrics, the song's overall "content" is indisputably a darkly

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[2] Bell's Facebook page labels the song "P.S. Koaches," but Bell's complaint identifies the song's title as "PSK The Truth Needs to be Told."

[3] Notably, the instances of sexual misconduct detailed in Bell's lyrics were not unsubstantiated. Four different female students submitted sworn affidavits detailing the sexual harassment they endured at the hands of the coaches. For instance, consistent with Bell's lyrics, one female student stated in her sworn affidavit that Rainey had rubbed her ears without her permission. Likewise, another female student claimed that Wildmon had looked down her shirt; told her that she "was one of the cutest black female students" at Itawamba; commented on her "big butt"; and told her that he "would date her if [she] were older." Another female student consistently stated that Rainey told her, "Damn, baby, you are sexy," while in the school gym. Another female student stated that Rainey told her that he would "turn" her "back straight from being gay."

sardonic but impassioned protest of two teachers' alleged sexual misconduct, *e.g.*, opining that Rainey is "a fool/30 years old fucking with students at the school." That Bell's song may fall short of the School Board's aesthetic preferences for socio-political commentary is not relevant to determining whether the rap song's content addresses a matter of public concern. *See, e.g., Snyder*, 562 U.S. at 453 (observing that "[t]he arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern") (internal quotation marks omitted). In *Snyder*, the Supreme Court explicitly rejected the argument that the crude and egregiously offensive messages on the anti-gay protesters' signs—which included "Fag Troops," "God Hates the USA/Thank God for 9/11" and "Thank God for Dead Soldiers"—should affect the inquiry into whether the signs addressed a matter of public concern. *Id*. at 454. According to the Court, "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight . . . are matters of public import." *Id*. So much more so here where Bell addresses a serious issue of alleged teacher sexual misconduct toward minor students. Indeed, similar to *Snyder*, even if some of Bell's lyrics were crude and contained violent imagery, "th[is] would not change the fact that the overall thrust and dominant theme of [Bell's song] spoke to broader public issues." *See id*.

The "form" of Bell's speech, *i.e.*, a rap song, likewise militates in favor of finding that it addresses a matter of public concern. It is axiomatic that music, like other art forms, has historically functioned as a mechanism

to raise awareness of contemporary social issues.[4] Rap is no exception. "Over the past twenty years there has been extensive academic discourse on the role of rap music . . . as a form of political expression." *Commonwealth v. Gray*, 463 Mass. 731, 755 n.24 (2012) (collecting authorities). A long aspiring rap artist himself,[5] Bell invoked this same tradition by deploying the artistic conventions and style of the rap genre in order to critique the coaches' sexual harassment of female students.

Finally, the "context" of Bell's speech likewise evinces that it addresses a matter of public import. By releasing his song on the Internet, Bell sought to bring attention to the coaches' sexual misconduct against his female classmates, just as the Westboro group in *Snyder* sought to bring attention to its protest by picketing in public. *See Snyder*, 562 U.S. at 454–55 (concluding that the "context" of "[the protesters'] signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society"). In a monologue introduction on the YouTube version of his song, Bell described the genesis of the rap as follows:

> A lot of people been asking me lately you know what was my reasoning behind creating P.S. Koaches. It's . . . something that's been going on . . . for a long time [] that I just felt like I needed to address. I'm an artist . . . I speak real life experience. . . .

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[4] *See, e.g.*, Bob Dylan, *The Times They Are A-Changin'*, on The Times They Are a Changin' (Columbia Records 1964) ("Come Senators, Congressmen, please heed the call. Don't stand in the doorway, don't block up the hall.").

[5] Bell's stage name is "T-Bizzle."

Later, at the Disciplinary Committee meeting, Bell likewise explained that the song was an effort to "speak out" on the issue of teacher-on-student sexual harassment.[6]

Although Bell was an enrolled high school student, he was not within the custody of the school system when he initially composed, recorded, and posted his rap song on the Internet during the Christmas holidays. At that time he was eighteen years old but living with his mother, and therefore was an adult capable of making his own decisions as to expressing his views publicly. Even if he had still been a minor at the time he composed and posted his song, he would have been subject to the exclusive control, custody, and discipline of his parent—not the school system. *See Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 964 (5th Cir. 1972). Because Bell's speech did not fall within any of the narrow unprotected categories of speech recognized by the Supreme Court (*e.g.,* obscenity or a true threat),[7] it was fully protected speech and presumptively not subject to governmental regulation or censorship on the basis of its content. *See Erznoznik*

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[6] Bell also explained that he did not immediately report the teachers' misconduct to school authorities because, in his view, school officials generally ignored complaints by students about the conduct of teachers.

[7] Although the School Board claims that Bell's speech constitutes a "true threat," this argument is without merit for the reasons explained in the panel majority opinion. *See Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280, 300–03 (5th Cir. 2014) (explaining that Bell's song did not constitute a "true threat," "as evidenced by, *inter alia,* its public broadcast as a rap song, its conditional nature, and the reactions of its listeners"). In any event, as explained herein, the majority opinion does not conclude that Bell's song was a true threat. *See* Maj. Op. pp. 26, 33–34. Nor could it.

v. City of Jacksonville, 422 U.S. 205, 213 (1975) ("Speech that is neither obscene as to youths nor subject to some other legitimate proscriptions cannot be suppressed solely to protect the young . . ."). Beyond that basic First Amendment protection, however, the content, form, and context of Bell's speech indisputably reveals that it was also entitled to "special protection" against censorship because it was speech on a matter of public concern safeguarded "at the heart" of the First Amendment's protections. *Snyder*, 562 U.S. at 451–52. Therefore, at a bare minimum, Bell was entitled to as much, if not more, First Amendment protection as tortfeasors and public employees when the state attempts to regulate their speech addressing matters of public concern. *See, e.g., Snyder*, 562 U.S. at 459–60 (holding that speakers on matters of public concern could not be held liable in tort for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy on the basis of their speech); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 466–68 (1995) (explaining the restrictions upon the government to punish employees when they speak on matters of public concern); *Rankin*, 483 U.S. at 386–89 (holding that threatening statement by public employee addressed a matter of public concern and government could not terminate her on the basis of that speech). Moreover, while it is not dispositive of this case, it bears mentioning that the School Board has never attempted to argue that Bell's song stated any fact falsely.

The majority opinion, however, wholly ignores these critical aspects of Bell's speech,[8] instead reflexively

[8] The majority opinion instead summarily concludes that the "misconduct alleged by Bell against the two teachers is, of course,

reducing Bell's rap song to "intimidating, harassing, and threatening" speech without any analysis whatsoever. Indeed, under the majority opinion's newfound approach, Bell's off-campus speech is regulable by school officials pursuant to *Tinker* because (i) Bell wanted his speech to be heard by community members *and* (ii) "a layperson" apparently would view some of the lyrics in the rap as "threatening," "harassing," and "intimidating." As an initial matter, I am compelled to point out that the majority opinion's test unabashedly adopts almost the precise wording of the Itawamba County School Board's disciplinary policy. Unmoored from traditional constitutional law analysis, the majority opinion instead exalts this single school board's policy to a new rule of constitutional law. *See* Maj. Op. p. 25 (holding that *Tinker* applies where student's off-campus speech is threatening, harassing and intimidating).

Furthermore, *Snyder* itself squarely illumines the errors in the majority's two-prong test. Turning first to the majority opinion's flawed criticism of Bell's intention to publicize his message, the Supreme Court in *Snyder* explicitly held that a speaker's efforts to communicate his message to the public is a reason to provide his speech with *heightened* protection—not a reason to permit greater regulation by the state. 562

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not at issue." *See* Maj. Op. p. 13. Of course, I agree that the *veracity* of these allegations is not the "issue" in this case anymore than the veracity of Westboro's signs was the "issue" in *Snyder*. What is at issue, however, is whether publicly protesting that alleged misconduct warrants "special protection" for Bell's speech. The answer to that question, as explained above, is yes. In any event, however, Bell has offered uncontroverted proof of the coaches' sexual harassment of the minor female students in the form of sworn affidavits detailing that abuse, which were introduced into evidence in this case.

U.S. at 454–55 (concluding that protesters' decision to conduct their protest "on public land next to a public street" evinced that the speech addressed a matter of public concern). Yet, in direct contradiction to *Snyder*, the majority opinion's proffered framework perversely *faults* Bell for his efforts to publicize the teachers' sexual misconduct, thus creating precedent that contravenes the very values that the First Amendment seeks to protect. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.").

In addition, contrary to the majority opinion's focus on how a "layperson" apparently would perceive Bell's speech, the Supreme Court's cases, including *Snyder*, demonstrate that listeners' subjective opinions about speech cannot control whether speech addresses a matter of public concern or not. For example, in *Snyder*, the Court explained that "[t]he arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'" 562 U.S. at 453. (quoting *Rankin*, 483 U.S. at 387). Specifically, in *Snyder*, a layperson likewise might have viewed the anti-gay protesters' messages as harassing ("God Hates You"), intimidating ("You're Going to Hell"), and threatening ("Thank God for Dead Soldiers," "Thank God for IEDs"), but the Court nevertheless held that "the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues" entitling it to "special protection." *Id*. at 454. Thus, the "special protection" that must be afforded to Bell's speech here cannot be qualified by the majority opinion's mere conjecture that some hypothetical "layperson" *might* consider a few of Bell's lyrics to

fit the Oxford English Dictionary's definition of "threatening," "harassing" or "intimidating." *See id*. Indeed, there is no constitutional basis for excluding "threatening," "harassing," or "intimidating" speech from the "special protection" that is afforded speech on matters of public concern. The majority opinion's approach is thus tantamount to permitting mainstream sensitivities to define whether speech addresses a matter of public concern or not. *Snyder* clearly demonstrates that approach is flawed. *Id.* at 453; *see also Cohen v. California*, 403 U.S. 15, 21 (1971) (recognizing that the First Amendment does not permit "a majority to silence dissidents simply as a matter of personal predilections").

In sum, by refusing to recognize that Bell's speech addresses a matter of public concern and is thereby entitled to "special protection" against censorship, the majority opinion creates a precedent that effectively inoculates school officials against off-campus criticism by students. In so doing, the majority opinion fails to take seriously the long-established principle that the First Amendment was adopted to protect "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270; *cf. City of Houston v. Hill*, 482 U.S. 451, 465 (1987) (holding that the First Amendment does not permit states to "provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them"). Contrary to the majority opinion's position, school officials are no exception. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."); *Shanley*, 462 F.2d at 964 ("It should have come as a shock to the parents of five high school seniors . . . that

their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust that it will come as no shock whatsoever to the school board that their assumption of authority is an unconstitutional usurpation of the First Amendment.").

II.

The *en banc* majority opinion affirms the School Board's punishment of Bell pursuant to its new and unprecedented rule of constitutional law whereby schools may punish students' off-campus speech pursuant to *Tinker* if that speech is intentionally directed at the school community and is "threatening, harassing, and intimidating" to the ears of a "layperson" without any instruction on the meaning of these terms. The majority opinion's content-based, vague, and "layperson"-based restriction directly conflicts with the core principles underlying the First Amendment's guarantees as explained by the Supreme Court.

A.

"The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010). As a general matter, the First Amendment prohibits the government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations." *Stevens*, 559

U.S. at 468. "These limited areas—such as obscenity, incitement, and fighting words—represent well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) (internal quotation marks and citations omitted).

In *Brown*, the Supreme Court specifically rejected the argument that state officials retain a broad "free-floating power" to create whole new categories of unprotected speech that are applicable solely to minors, even if such speech is deemed harmful in the eyes of the government. *Id*. at 2735–36. In that case, the Court struck down as violative of the First Amendment a California law that prohibited the sale or rental of violent video games to minors. *Id.* at 2732-33. Specifically, the law proscribed the sale or rental to minors of video "games 'in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted' in a manner that '[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,' that is 'patently offensive to prevailing standards in the community as to what is suitable for minors,' and that 'causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.'" *Id.* (quoting Cal. Civ. Code. Ann. § 1746(d)(1)(A)). California purportedly enacted the law based on its legislative judgment, which it claimed was supported by research, that such games were harmful to children. *Id*. at 2738-39. In defending the law, California argued, *inter alia*, that the First Amendment permitted it "to create a wholly new category of content-based regulation that is permitted only for speech directed at children"—*viz*.,

"violent" speech as defined above that lacked "serious literary, artistic, political, or scientific value for minors." *Id*. at 2733–35.

In a strongly worded opinion by Justice Scalia, the Supreme Court rejected California's arguments and struck down the law. Concluding that its recent decision in *United States v. Stevens*, 559 U.S. 460 (2010),[9] controlled the outcome of the case, the Court held that California could not defend its law by analogizing the violent speech at issue to the obscenity exception to the First Amendment because its prior

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[9] In *Stevens*, the United States government had attempted to leverage similar arguments in defending a federal statute banning depictions of animal cruelty. 559 U.S. at 468-69. The United States argued that "depictions of animal cruelty" should be added to the list of categories of unprotected speech, alongside obscenity, incitement, and defamation. *Id*. However, because there was no "tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment," the Court refused to create a new category of unprotected speech for such depictions. *Id*. The Court also explicitly rejected "as startling and dangerous" the government's contention that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular type of speech against its social costs. *Id*. at 470. According to the Court,

> [t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the cost. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id. A subsequent, much more narrow version of the statute at issue in *Stevens*, was upheld by our court. *United States v. Richards*, 755 F.3d 269, 271, 279 (5th Cir. 2014) (discussing history of 18 U.S.C. § 48 and upholding version that proscribed only "unprotected obscenity"), *cert. denied*, 135 S. Ct. 1546 (2015).

"cases have been clear that the obscenity exception . . . does not cover whatever a legislature finds shocking, but only depictions of sexual conduct." *Id*. at 2734. More critically, however, the Court outright rejected California's argument that the First Amendment permitted the state "to create a wholly new category of content-based regulation," *i.e.,* speech containing violent imagery, "that is permissible only for speech directed at children." *Id*. at 2735. Although acknowledging that the state "possesses legitimate power to protect children from harm," the Court concluded that such power "does not include a free-floating power to restrict the ideas to which children may be exposed." *Id*. at 2736. Further, while noting that California's argument would "fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence," the Court observed that there was no such tradition, as evidenced by the extent of violence contained in common children's stories (*e.g.,* Hansel and Gretel) and high school reading lists (*e.g.,* the description in "Lord of the Flies" of a schoolboy who is savagely murdered by other children). *Id*. at 2736. Accordingly, as in *Stevens*, because there was no "longstanding tradition" of prohibiting minors' participation in speech containing violent imagery, the Court refused to hold that such speech is categorically exempted from First Amendment protection. *Id.* at 2736-38.

Applying these principles to the instant case, *Brown* represents a forceful reaffirmation by the Court that the First Amendment applies to minors,[10] *id.* at 2735,

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[10] In so holding, the Court also explicitly rejected Justice Thomas' contention in his dissent that minors have no right to speak absent their parents' consent. *Id*. at 2736 n.3 (noting that

and that the government may only restrict that constitutional right in "narrow and well-defined circumstances," *id*. at 2736 (citing *Erznoznik*, 422 U.S. at 212–13). Indeed, after *Brown*, it cannot seriously be contested that minors enjoy the First Amendment right to engage in speech containing violent imagery when they are at home, away from school, so long as that speech does not rise to the level of a true threat, incitement or fighting words. *See id.* at 2736-38 (holding that speech containing violent imagery is protected under the First Amendment, even for minors). Nevertheless, the majority opinion wholly fails to reckon with these important statements by the Court. Instead, by simply assuming that all children speak "*qua* students," its legal analysis begins with the false premise that the speech at issue constitutes "student speech" that must be "tempered in the light of a school official's duty" to teach students appropriate behavior. *See* Maj. Op. p. 14 (discussing the First Amendment rights of "[s]tudents *qua* students"). But the Supreme Court has never suggested that minors' constitutional rights *outside of school* are somehow qualified if they coincidentally are enrolled in a

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Justice Thomas "cites no case, state or federal, supporting this view, and to our knowledge there is none"). Although conceding that the government may have authority to enforce parental prohibitions in certain circumstances (*e.g.,* forcing concert promoters not to admit minors whose parents have forbidden them from attending), the Court nevertheless observed that "it does not follow that the state has the power to prevent children from hearing or saying anything *without their parents' prior consent.* The latter would mean, for example, that it could be made criminal to admit persons under 18 to a political rally without their parents' prior written consent—even a political rally in support of laws against corporal punishment of children, or laws in favor of greater rights for minors." *Id*. (emphasis in original).

public school. To the contrary, *Brown* evinces that the majority opinion instead should have begun its analysis from the basic premise that children are entitled to "significant" First Amendment rights. 131 S. Ct. at 2735–36.

Further, *Brown* and *Stevens* illuminate the error in the majority opinion's decision to proclaim an entirely new, content-based restriction on students' First Amendment rights. Although acknowledging that the government has certain powers to protect children from harm, the Supreme Court in *Brown* expressly held that this "does not include a free-floating power to restrict the ideas to which children may be exposed." 131 S. Ct. at 2736. In so holding, the Court echoed the principles announced in *Stevens* and rejected the argument that the state is empowered to carve out new "categorical exemptions" to the First Amendment's protections (*e.g.*, obscenity) that are solely applicable to minors absent a "longstanding tradition" of restricting such speech. *Id*. In direct contradiction to these principles, however, the majority opinion here affords state officials with precisely such a "free-floating power" by effectively permitting them to regulate an unprecedented and content-based category of speech, *i.e.,* "threatening," "harassing," and "intimidating" speech that is directed at the school community. Yet, the majority opinion cites no "longstanding tradition" in this country of "specially restricting" children's ability to engage off campus in "threatening," "harassing," or "intimidating" speech. Nor could it. *See id.* ("California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none."); *Stevens*, 559 U.S. at 469 ("But we are unaware of any similar tradition excluding *depictions* of animal cruelty from

'the freedom of speech' codified in the First Amendment, and the Government points us to none."). To the extent the majority opinion posits this category of speech is without redeeming social value[11] or that its risks outweigh its costs, the Supreme Court has flatly rejected such a rationale for carving out new categories of unprotected speech. *See Stevens*, 559 U.S. at 470 ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."). In this connection, the Court in *Brown* likewise held that majoritarian abhorrence for a category of speech (*i.e.,* violent speech) will not justify a categorical restriction upon that type of speech. *See Brown*, 131 S. Ct. at 2733 ("Under our Constitution, esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." (internal quotation marks and citation omitted)). Moreover, contrary to the majority opinion's approach, the Supreme Court in both *Brown* and *Stevens* emphasized that the "historic and traditional categories" of unprotected speech (*e.g.,* fighting words, obscenity) are "well defined and narrowly limited." *See Brown*, 131 S. Ct. at 2733; *Stevens*, 559 U.S. at 468-69. Here, far from announcing a "narrow" or "well defined" restriction on speech, the majority opinion simply declares that schools may regulate off-campus student speech that its invented layperson might consider "threatening," "harassing," or "intimidating." As detailed below, the breadth of these content-based restrictions will leave students to

[11] However, as explained above, Bell's speech clearly had "social value" as it constituted speech on a matter of public concern.

speak at their own peril away from school, because school officials will be unconstrained due to the majority opinion's failure to provide any specific or determinate definition of "threatening," "harassing," or "intimidating."

B.

The Court's opinion in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), further reveals the flaws in the majority opinion's holding that schools may regulate students' off-campus online speech, like Bell's. *Reno* was the first significant First Amendment case specifically pertaining to the Internet to reach the Supreme Court, and concerned a facial challenge to a congressional statute, the Communications Decency Act of 1996 ("CDA"), which was aimed at protecting minors from "indecent" and "patently offensive" material on the Internet by prohibiting the transmission of those materials to minors. 521 U.S. at 858-59. In striking down the CDA as violative of the First Amendment, the Court articulated a number of principles that are directly pertinent to the instant case.

First, *Reno* reveals that the majority opinion here is in error in concluding that the advent of the Internet and other technologies necessitates expanding schools' authority to regulate students' off-campus speech. *See* Maj. Op. p. 19. In direct contradiction to the majority opinion's logic, the Court in *Reno* held that Supreme Court precedents "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." *Id.* at 870. Although the Court previously had recognized that special factors justify greater regulation of speech expressed in *broadcast* media, *see, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court explicitly found that

"[t]hose factors are not present in cyberspace." *Reno*, 521 U.S. at 868.[12] Nevertheless, the majority opinion overlooks these unequivocal statements by the Supreme Court. *See, e.g.,* Maj. Op. p. 19 (concluding that "[t]he advent of [the Internet and other] technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations").

In addition, the Court's analysis in *Reno* reveals how the majority opinion's ill-devised framework for regulating minors' off-campus Internet speech would be too vague altogether for the First Amendment to tolerate. The Court in *Reno* took special issue with the vagueness of the terms that the CDA utilized to describe the proscribed speech. *Id*. at 871. For example, the Court emphasized that the statute did not define either "indecent" material or material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id*. As the Court observed, "[g]iven the absence of a definition of either term, this difference in language

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[12] The Court in *Brown* echoed this principle in observing that government should not be afforded greater deference to restrict speech when new communication technologies emerge. 131 S. Ct. at 2733 ("[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears.") (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)); *accord Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 326 (2010) ("Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.").

will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA?" *Id*.

Similar vagueness concerns drove Justice Alito to conclude that the California "violent video game" regulation in *Brown* violated the Constitution. *Brown*, 131 S. Ct. at 2743-46 (Alito, J., joined by Roberts, C.J., concurring in the judgment). As Justice Alito observed, one of the elements defining the proscribed violent video games was whether a "reasonable person, considering [a] game as a whole," would find that it "appeals to a *deviant* or *morbid* interest of minors." *Id*. at 2745. However, as Justice Alito observed, the "prevalence of violent depictions in children's literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite 'deviant' or 'morbid' impulses." *Id*. at 2746.

Here, the *en banc* majority opinion similarly announces a new, categorical restriction upon students' off-campus speech that fails to "give people of ordinary intelligence fair notice of what is prohibited." *See id*. at 2743. Specifically, the majority opinion holds that school officials may punish students' off-campus speech when (i) it is intended to be heard by the school community; (ii) could be perceived by a layperson as "threatening," harassing," and "intimidating,"; and (iii) satisfies the *Tinker* "substantial-disruption" framework. *See* Maj. Op. pp. 25–26. As with the statute struck down in *Reno*, however, each one of

these three prongs to the majority opinion's framework contains defects that fail to provide students, like Bell, with adequate notice of when their off-campus speech crosses the critical line between protected and punishable expression. *First*, the majority opinion's focus on whether the student "intended" his speech to reach the school community significantly burdens the ability of students to engage in online speech, because virtually any speech on the Internet can reach members of the school community. *See Reno*, 521 U.S. at 870 (observing that the Internet permits "any person . . . [to] become a town crier with a voice that resonates farther than it could from any soapbox"). How, then, can a student be certain that his off-campus blog posting will not be read by members of the school community and thereby be deemed by school officials to be "intentionally direct[ed] at the school community"? As a result of the ambiguities in the majority opinion's framework, he simply cannot. *See id.* ("Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.").

Second, the majority opinion's "threatening, harassing, and intimidating" test suffers from the precise same ambiguities that drove the Court to strike down the CDA in *Reno*. As with the CDA, the majority opinion fails to provide any meaningful definition of what constitutes "threatening," "harassing," or "intimidating" speech. Rather, the majority opinion merely concludes that if a "layperson would understand"[13] speech to qualify as "threatening," "harassing," and "intimidating," then that speech is regulable

[13] Unfortunately, the majority opinion provides virtually no details about the identity of its apocryphal layperson. In any event, I am dubious that a school board may punish students for

under *Tinker*. In so holding, the majority opinion fails to apprehend that reasonable minds may differ about when speech qualifies as "threatening," harassing," or "intimidating." As the Supreme Court's First Amendment precedents make clear, "it is . . . often true that one man's vulgarity is another's lyric," *Cohen v. California*, 403 U.S. 15, 25 (1971), and that the very same words may simultaneously be perceived as repulsive to some and political to others, *see Snyder*, 562 U.S. at 444–45 ("Westboro may have chosen the picket location to increase publicity for its views, and its speech may have been particularly hurtful to Snyder. That does not mean that its speech should be afforded less than full First Amendment protection under the circumstances of this case."). Thus, "[g]iven the vague contours of the coverage of the [majority opinion's framework], it [will] unquestionably silence[] some speakers whose messages would be entitled to constitutional protection." *Reno*, 521 U.S. at 874.

Third, the aforementioned concerns are exacerbated by the fact that the *Tinker* standard itself could be

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making statements at home and on the Internet that the most sensitive of listeners in society would find to be "threatening," "harassing," or "intimidating." *See Ashcroft*, 542 U.S. at 674 (Stevens, J. concurring) ("I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption."). Nevertheless, by permitting school officials to punish off-campus speech like Bell's pursuant to *Tinker*, the majority opinion announces a precedent whereby the First Amendment rights of minors outside of school are "only . . . as strong as the weakest, or at least the most thin-skinned, listener in a crowd." *Cuff ex re. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 120 (2d Cir. 2012) (Pooler, J., dissenting).

viewed as somewhat vague.[14] *Tinker* permits schools to regulate on-campus expressive activities *not only* when the speech, in fact, causes a substantial disruption, *but also* when school officials can "reasonably forecast" such a disruption, *Tinker*, 393 U.S. at 514. If this standard were applied off campus, how can a student or a student's parents know with any degree of certainty when off-campus online speech can be "forecasted" to cause a "substantial disruption"? Although *Tinker* is not a completely toothless standard, *see A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 221 (5th Cir. 2009), its framework inherently requires guesswork about how a third-party school official will prophesize over the effect of speech. Thus, in light of the majority opinion, before a student drafts an email or writes a blog entry, he hereinafter will be required to conjecture over whether his online speech *might* cause a "disruption" that is "substantial" in the eyes of school officials, or, alternatively, whether a school official *might* reasonably portend that a substantial disruption *might* happen. In this way, the majority opinion erroneously defines the contours of protected speech with reference to the potential reactions of listeners. *See Beckerman v. City of Tupelo*, 664 F.2d 502, 509 (5th Cir. 1981) (observing that the Supreme Court's cases concerning the "hecklers' veto" show that it "is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others").

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[14] As explained below, this framework makes sense for student speech occurring on campus, where school officials have competing interests in maintaining conduct in the schools. However, this standard is inappropriate where, as here, the school's interest is comparatively attenuated.

What will be the direct consequence of these various layers of vagueness upon students' First Amendment freedoms? "[I]t will operate[] to chill or suppress the exercise of those freedoms by reason of vague terms or overbroad coverage." *See Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (Kennedy, J. concurring). Indeed, for students, whose performance at school largely determines their fate in the future, even the specter of punishment will likely deter them from engaging in off-campus expression that could be deemed controversial or hurtful to school officials. *Accord Reno*, 521 U.S. at 871–72 ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."). Such a burden on student's expressive activities simply cannot be reconciled with the long-established principle that "the point of all speech protection . . . is to shield [from censorship] just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995).

C.

Further, by adopting a rule that focuses on whether a "layperson" would perceive Bell's speech as "threatening," "harassing," and "intimidating," the majority opinion also ignores Supreme Court case law that demands a more burdensome showing upon the government before levying penalties upon a speaker based on the content of his speech.

Amongst the most consistent principles of First Amendment jurisprudence has been the need for "[e]xacting proof requirements" before imposing liability for speech. *See Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 620

(2003). For example, the Supreme Court has explicitly rejected arguments permitting tort liability to be imposed for speech pertaining to public figures simply because it "is patently offensive and is intended to inflict emotional injury." *Falwell*, 485 U.S. at 50. Rather, in order to "give adequate 'breathing space' to the freedoms protected by the First Amendment," the Court has held that a public figure must prove not only falsity but also actual malice. *Id.* at 56. Similarly, in the criminal context, "mens rea requirements . . . provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment). Thus, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued, relying on "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where* such advocacy *is directed* to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id*. at 447 (emphasis added); *see also Noto v. United States*, 367 U.S. 290, 297–98 (1961) ("[T]he mere abstract teaching of . . . the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."). Subsequently, the Court applied *Brandenberg*'s focus on the "intent" of the speaker to hold that a speaker may not be held liable for damages in a civil case even when his remarks "*might have been understood* . . . as intending to create a fear of violence." *N.A.A.C.P. v. Claiborne*

Hardware Co., 458 U.S. 886, 904, 927 (1982) (emphasis added).

Applying these well-established First Amendment principles, the Supreme Court in *Virginia v. Black*, 538 U.S. 343 (2003), struck down a Virginia statute that criminalized burning a cross in public "with the intent of intimidating any person," and which provided that the public burning of a cross "shall be prima facie evidence of an intent to intimidate." *Id*. at 347–48. Although cross burning is "widely viewed as a signal of impending terror," *id*. at 391 (Thomas, J., concurring), "in light of [its] long and pernicious history as a signal of impending violence," *id.* at 363 (opinion of O'Connor, J.), a plurality of the Court held that a subjective intent requirement was necessary in order to distinguish "constitutionally proscribable intimidation" from "core political speech," *id*. at 365–66. "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." *Id*. at 360 (emphasis added). As the plurality explained, the prima facie evidence provision of the statute was facially unconstitutional because it "ignore[d] all the contextual factors that are necessary to decide whether a particular cross burning was intended to intimidate. The First Amendment does not permit such a short cut." *Id*. at 367. In other words, the prima facie evidence provision "strip[ped] away the very reason a state may ban cross burning with the intent to intimidate." *Id*. at 365.

Recently, in *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Supreme Court was presented with the opportunity to revisit its reasoning in *Virginia v. Black* and clarify whether or not the First Amendment

requires a speaker to have a "subjective intent" to threaten an individual before the government can impose criminal penalties for a threat. *Id*. at 2004 ("The question is whether [18 U.S.C. § 875(c)] . . . requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing."). The Court, however, avoided this constitutional question by deciding the case on narrower grounds, *viz.*, that a jury instruction explaining that petitioner could be convicted upon a showing of negligence was inconsistent with the statute's implicit *mens rea* requirement. *Id*. at 2012 ("The jury was instructed that the Government need only prove that a reasonable person would regard Elonis's communications as threats, and that was error. . . . Given our disposition, it is not necessary to consider any First Amendment issues."). Specifically, the Court outright rejected the government's contention that the statute permitted petitioner to be convicted if he (i) knew the "contents and context" of his speech and (ii) "a reasonable person would have recognized that the [speech] would be read as genuine threats." *Id*. at 2011. While recognizing that such a "'reasonable person' standard is a familiar feature of civil liability in tort law," the Court concluded that the standard is "inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrong doing." *Id*. (internal quotation marks omitted).

Applying the foregoing principles to the instant case, the majority opinion errs by making the scope of Bell's First Amendment rights outside of school contingent upon whether a "layperson" might interpret his speech to be "threatening," "harassing," and "intimidating," *see* Maj. Op. pp. 26–27, and whether a

school official might "reasonably" forecast a substantial disruption based on his speech, *see* Maj. Op. pp. 30–31. The majority opinion's test effectively amounts to the very kind of negligence standard that the Supreme Court has rejected for determining whether a speaker may be held liable on the basis of his words. *See, e.g., Claiborne Hardware Co.*, 458 U.S. at 928–29; *Brandenburg*, 395 U.S. at 447. Further, by permitting Bell to be punished solely on the basis that a third-party might consider his speech "intimidating" or "threatening," the majority opinion ignores the Court's explanation in *Black* that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." 538 U.S. at 360 (emphasis added). Instead, perhaps conceding *sub silentio* that Bell's speech does not satisfy the demanding "true threat" standard described in *Black*, the majority opinion circumvents this issue altogether by creating an entirely new and diluted test that renders speech unprotected so long as its invented layperson might view the speech as "intimidating," "harassing," and "threatening," despite the fact that such speech does not constitute a "true threat." *See Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280, 300–03 (5th Cir. 2014) (explaining that Bell's song did not constitute a "true threat," "as evidenced by, *inter alia,* its public broadcast as a rap song, its conditional nature, and the reactions of its listeners"). Moreover, the majority opinion's approach is especially problematic in light of the critical fact that Bell's speech addresses a matter of public concern. In cases involving speech addressing public figures and matters of public import, the Court has consistently

applied a stricter evidentiary burden before permitting liability to be imposed on a speaker on the basis of his speech. *See, e.g., Falwell*, 485 U.S. at 56 (holding that "public figures and public officials" must prove "actual malice" in addition to falsity before recovering for intentional infliction of emotional distress on the basis of speech directed at them); *Sullivan*, 376 U.S. at 279–80 (holding that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'"). Here, in sharp contrast, the majority opinion announces a constitutional rule whereby students, like Bell, may be held liable for their off-campus speech that criticizes official misconduct based largely on the reactions of the very officials in question or the perception of the majority opinion's invented "layperson." Such a flimsy standard simply cannot be squared with the foregoing First Amendment precedents. *See also Pacifica Foundation*, 438 U.S. at 745–46 ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.").

III.

In ultimately holding that the *Tinker* framework applies to off-campus speech like Bell's, the majority opinion ignores that *Tinker*'s holding and its *sui generis* "substantial-disruption" framework are expressly grounded in "the special characteristics of the school environment." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In *Tinker*, the Court confronted the question whether school officials may, consistent with the First Amendment,

restrict students' expressive activities that occur at school. *Id*. Specifically, the students in *Tinker* were suspended for wearing to school armbands that expressed their opposition to the Vietnam War. *Id*. at 504. While recognizing that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id*. at 506, the Court also observed that students' exercise of their First Amendment rights at school must be calibrated against the competing need of school officials "to prescribe and control conduct *in the schools*," *id*. at 507 (emphasis added). To reconcile the interests at stake that may collide when student speech occurs on campus, the Court articulated a rule that has become the lodestar for evaluating the scope of students' on-campus First Amendment rights ever since: while on campus, a student is free to "express his opinions, even on controversial subjects, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id*. at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

The Supreme Court's holding in *Tinker* is expressly based upon the "special characteristics of the school environment," *id*. at 506, and the need to defer to school officials' authority "to prescribe and control conduct in the schools," *id*. at 507. Indeed, the very analytic content of the resulting "substantial-disruption" framework evinces that the Court was solely concerned with the potentially disruptive consequences of speech by students that occurs on campus, where school officials and fellow students may be directly affected. *See, e.g., id*. at 514 ("[The students] neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They

caused discussion outside of the classrooms, but no interference with work and no disorder."). Moreover, the Court's later school-speech cases emphasize that the *Tinker* framework is limited to speech occurring within the school environment. For example, according to the Court's decision in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Tinker* rests on the premise that "the constitutional rights of students *in public schools* are not automatically coextensive with the rights of adults in other settings." *Id*. at 682 (emphasis added); *see also id*. at 688 n.1 (Brennan J., concurring in judgment) (stating that the Court's student-speech precedents "obviously do not [apply] outside of the school environment" and also observing that if the plaintiff in *Fraser* "had given the speech [for which he was punished] outside of the school environment, he could not have been penalized simply because [school] officials considered his language to be inappropriate"). Subsequently, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court described its decision in *Tinker* as "address[ing] educators' ability to silence a student's personal expression that happens *to occur on the school premises*." *Id*. at 271 (emphasis added); *see also id.* at 266 (observing that schools may regulate some on-campus speech "even though the government could not censor similar speech outside the school").

Most recently, in *Morse*, Justice Alito's controlling concurrence observed that *Tinker* allows school officials to regulate "in-school student speech . . . in a way that would not be constitutional in other settings." 551 U.S. at 422 (Alito, J. concurring). Justice Alito further emphasized the historically significant distinction between on-campus and off-campus expression by comparing the unique harms of speech that occurs within the schoolyard as opposed to outside of school:

"School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate." *Id.* at 424 (Alito, J. concurring). In this regard, Justice Alito also rejected the contention that school officials "stand in the shoes of the students' parents," explaining that "[i]t is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities." *Id*. Further, Justice Alito observed that he joined the majority opinion on the understanding that the Court's holding does not justify "any other speech restriction" based on the "special characteristics" of the school environment beyond those already recognized in the Court's prior student-speech cases. *Id*. at 423. Indeed, in narrowly limiting the reach of the Court's holding, Justice Alito characterized school officials' regulation of the student-speech at issue in that case[15] as "standing at the far reaches of what the First Amendment permits." *Id*. at 425. As the foregoing demonstrates, *Morse* and

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[15] In *Morse*, the Court held that the First Amendment did not prevent school officials from punishing a student who unfurled at a school-sanctioned event a banner that reasonably could be perceived as promoting illegal drug use. 551 U.S. at 396. Notably, the majority opinion in this case overstates *Morse*'s narrow holding by describing that holding as extending to "*grave and unique threats to the physical safety of students*, in particular speech advocating illegal drug use." *See* Maj. Op. p. 15 (emphasis added). Contrary to the majority opinion's description, Justice Alito's concurrence explicitly stated that the Court's holding was limited to the specific speech at issue in that case, *viz*., speech advocating drug use at a school event. *See Morse*, 551 U.S. at 425 (Alito, J. concurring).

the Court's other post-*Tinker* precedents make crystal clear what the majority opinion and some of our sister circuits' decisions[16] fail to follow: *Tinker* does not authorize school officials to regulate student speech that occurs off campus and not at a school-sponsored event, where the potential "collision" of interest upon which *Tinker*'s holding pivots simply is not present.

Further, even assuming *arguendo*, without deciding, schools possess some authority to regulate students' off-campus speech under certain circumstances, the majority opinion errs in deeming the *Tinker* framework as the appropriate standard to delineate the scope of that authority. In reaching this conclusion, the majority opinion's logic is flawed from the very start. The majority opinion oddly begins its analysis by citing our opinion in *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc), for the proposition that the threshold task facing the *en banc* court is "categorizing the student speech at issue." *Id*. at 375. Without ever mentioning that *Morgan* was a case involving qualified immunity for school officials' suppression of *on-campus* speech,[17] the majority opinion then

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[16] For example, in concluding that *Tinker* applies to off-campus speech, the Eighth Circuit committed the same fundamental misreading of *Tinker* that the district court committed in the instant case. *D.J.M. ex rel D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 765 (8th Cir. 2011). Specifically, the Eighth Circuit read wholly out of context the Court's statement in *Tinker* that schools may regulate student speech "in class *or out of it*," 393 U.S. at 513 (emphasis added), in order to hold that the school district in that case was permitted to punish a student for his off-campus online speech pursuant to *Tinker*'s substantial-disruption framework. The majority opinion likewise commits the same error in emphasizing this very language in reasoning that *Tinker* applies to off-campus speech. *See* Maj. Op. p. 15.

[17] The majority opinion in *Morgan* ultimately held that the school officials' conduct of prohibiting students from passing out

proceeds to determine whether it should evaluate Bell's claim under the *Tinker* framework or under one of the other categorical exemptions for student speech that the Supreme Court or this court has recognized. *See* Maj. Op. pp. 17–18. Then, after determining that the School Board here did not punish Bell because his speech was lewd (*Fraser*) or school-sponsored (*Hazelwood*) or threatened a Columbine-style mass shooting (*Ponce*), the majority opinion summarily concludes via process-of-elimination that the *Tinker* framework *must* be the appropriate framework for evaluating whether Bell's speech is protected or not. *See* Maj. Op. p. 18 ("We therefore analyze Bell's speech under *Tinker*."). But the majority opinion suspiciously neglects to note that not a single one of these precedents has *ever* been applied by the Supreme Court or our Circuit[18] to regulate a student's off-

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religious messages on campus violated the constitution. 659 F.3d at 364 (explaining that Judge Elrod's opinion represented the majority opinion on this point). However, the majority of the *en banc* court found that the right announced was not "clearly established." *Id*. The reason that "categorization" of the speech was important in that case was because of Establishment Clause concerns if the speech could be perceived as school-sponsored. *Id*. at 375. The analysis there has little to do with the matters at issue here.

[18] The majority opinion mischaracterizes our precedents by suggesting that we previously have held that *Tinker* applies to purely off-campus speech. *See* Maj. Op. pp. 15, 22. In *Shanley*, we held that school officials violated the First Amendment when they punished students for selling underground newspapers "near but outside the school premises on the sidewalk of an adjoining street, separated from the school by a parking lot." 462 F.2d at 964. Although we held that the speech in question did not meet the *Tinker* standard, *id*. at 970, we did not hold that *Tinker* necessarily can be applied to *uphold* the punishment of a student for purely off-campus speech.

campus Internet speech, like Bell's. Nevertheless, the majority opinion simply assumes that those precedents apply under these circumstances without first conducting any meaningful analysis to justify its logic. In other words, by comparing apples to oranges, the majority opinion puts the proverbial cart before the horse. Indeed, as explained above, the *Tinker* standard

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The same is true of our decision in *Sullivan v. Houston Independent School District*, 475 F.2d 1071 (5th Cir. 1973). In *Sullivan,* the court did not apply the *Tinker* substantial-disruption test to assess whether school officials violated the First Amendment. The *Sullivan* court recognized that there is nothing *per se* unreasonable about requiring a high school student to submit written material to school authorities prior to distribution on campus or resulting in a presence on campus, and that it could not be seriously urged that the school's prior submission rule is unconstitutionally vague or overbroad. 475 F.2d at 1076 (citing *Shanley*, 462 F.2d at 960; *Pervis v. LaMarque Indep. Sch. Dist.*, 466 F.2d 1054 (5th Cir. 1972)). Instead, the court held that the school principal had disciplined a student for failure to comply with the school's rules requiring prior submission to the school principal of all publications, not sponsored by the school, which were to be distributed on the campus or off campus in a manner calculated to result in their presence on the campus. *Id. at 1073, 1076.* The student was disciplined for twice selling newspapers at the entrance of the school campus, to persons entering therein, without making prior submission of the papers, and for using profanity towards the principal ("the common Anglo–Saxon vulgarism for sexual intercourse") and in the presence of the principal's assistants (specifically, "I don't want to go to this goddamn school anyway"). *Id*. at 1074. Thus, notwithstanding the *Sullivan* court's references to *Tinker* in that decision, that opinion did not hold that the *Tinker* substantial-disruption test applies to off-campus speech.

In sum, contrary to its suggestion that its decision logically follows from our prior precedents, the majority's opinion today is the first time our circuit has ever held that school officials *may* punish students' purely off-campus speech pursuant to the *Tinker* framework.

was invented, in part, to counteract the consequences of speech that actually occurs within the school environment and to take account of school officials' competing interest to "control conduct in the schools." *See Tinker*, 393 U.S. at 507. Specifically, in *Tinker*, the competing state interest was in avoiding the disruptive consequences of speech that occurs within school. *See id*. Accordingly, the Supreme Court crafted a specific level of scrutiny (the "substantial-disruption" test) to evaluate restrictions on speech *within school* that strikes a balance between the competing interests at stake. Even assuming *arguendo* schools had some authority to punish students' off-campus speech, it is therefore simply a *non sequitur* for the majority opinion to reflexively assume that the same analysis should regulate the scope of schools' authority to punish students' expression *off campus*, where the consequences of the speech in question and the constitutional interests at stake are simply not the same as in *Tinker*.

The majority opinion's flawed logic in this regard stems naturally from a more fundamental error: the majority opinion fails to take seriously the significance of the various constitutional interests that are implicated by its decision to expand *Tinker*'s reach. As detailed above, the particular facts of this case principally concern the First Amendment right of students to speak out on "matters of public concern" when they are away from school by utilizing the unrivaled power of the Internet to make those messages heard. But narrowly focusing on this issue alone ignores the constellation of other constitutional interests that the majority opinion will negatively impact. For example, even when their off-campus expression does not have a "political" or "religious" dimension, children still maintain "significant" First Amendment rights, *Brown*,

131 S. Ct. at 2735–36, which indisputably include a right to express disrespect or disdain for their teachers when they are off campus. *See Kime v. United States*, 459 U.S. 949, 951 (1982) ("[T]he First Amendment does not permit a legislature to require a person to show his respect for the flag by saluting it. The same constitutional principle applies when the legislature, instead of compelling respect for the flag, forbids disrespect."). Further, for purposes of the First Amendment, it is simply irrelevant whether prevailing social mores deem a child's disrespect for his teacher to be contemptible. "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *See United States v. Playboy Entertainment Grp.*, 529 U.S. 803, 826 (2000).

Moreover, the majority opinion's extension of *Tinker* to off-campus speech additionally burdens the long-established constitutional interest of parents in the rearing of their children. The Supreme Court has "consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *see also, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000) (observing that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by the Court"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). This fundamental right of parents indisputably includes the right to inculcate their children with ideologies and values that the state or mainstream

society may consider repugnant. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding that a war-era law banning teaching of German language violated parents' substantive due process rights); *accord Morse*, 551 U.S. at 424 (Alito, J., concurring) (observing that "[i]t is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities"). The majority opinion's extension of the *Tinker* framework will inevitably frustrate this constitutional right, because school officials will hereinafter be empowered to supplant parents' control over their children's off-campus speech that is critical of their teachers.

In addition, authorizing schools to regulate students' off-campus speech likewise burdens the constitutional interest of fellow citizens in hearing students' off-campus speech. Courts have long recognized that the First Amendment protects not only the right to speak but also the right to receive speech from others. *See, e.g., First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (stating that the "First Amendment . . . afford[s] public access to discussion, debate, and the dissemination of information and ideas"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (explaining that the First Amendment "embraces the right to distribute literature . . . and necessarily protects the right to receive it"); *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) ("The First Amendment . . . protects *both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas." (emphasis in original)). The facts of the instant case poignantly illustrate how the suppression of students' off-campus speech will burden the First Amendment right of other citizens to receive that

speech. As detailed above, Bell authored and publicized his rap song in an effort to raise awareness of a crucial issue to members of his community, *viz*., the sexual harassment of female students by male school officials. Receiving this information would be critically important to community members, particularly parents of female students at Itawamba, in order to ensure that such conduct ceased and did not recur.[19] Nevertheless, by endorsing the School Board's punishment of Bell, the majority's opinion will empower school officials to censor other students' efforts to inform fellow citizens of information that they have the right—and the urgent need—to receive. *Cf. Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J. concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

Exacerbating the violence committed against these constitutional interests is the unprecedented amount of deference that the majority opinion affords school boards in disciplining off-campus speech pursuant to *Tinker*. Again, Maj. Op. p. 27, and again, Maj. Op. p. 28, and again, Maj. Op. p. 29, the majority opinion emphasizes the extent of "deference" that, in its view, courts are required to provide school board disciplinary decisions under *Tinker*. Contrary to the majority opinion's approach, however, we do not "defer" to schools in interpreting and applying the Constitution.

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[19] As explained above, allegations that coaches sexually harassed students were nothing new at Itawamba Agricultural High School when Bell composed his rap song. In 2009, Itawamba coach Bobby Hill was arrested and accused of sending sexually explicit text messages to a minor student.

"The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Further, while it is true that *Tinker* "is *not* a difficult burden," *Cash*, 585 F.3d at 222 (internal quotation marks omitted), this is the very reason that we must *not* apply *Tinker* to off-campus speech, like Bell's. Otherwise, armed with the comfort that courts will simply defer to their decisions, schools will largely have *carte blanche* to regulate students' off-campus speech, thus significantly burdening not only the First Amendment rights of students but also the constitutional rights of their parents and their listeners.

IV.

As explained above, the Supreme Court has not decided whether, or, if so, under what circumstances, a public school may regulate students' online, off-campus speech, and it is not necessary or appropriate for the majority opinion to anticipate such a decision here. That is because, even if *Tinker* were applicable to the instant case, the evidence does not support the conclusion, as would be required by *Tinker*, that Bell's Internet-posted song substantially disrupted the school's work and discipline or that the school officials reasonably could have forecasted that it would do so.

In considering the School Board's motion for summary judgment, we are required to view the evidence in the light most favorable to Bell, the non-movant. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (per curiam). The majority opinion, however, wholly disclaims this duty by ignoring material facts and refusing to draw inferences in Bell's favor—particularly those facts and inferences clearly evincing that

Bell's song was not and could not be regarded as a threat. For example, Bell has been an aspiring musician since he was a young boy. He began writing lyrics as a child and started to pursue a musical career in earnest while in his teens. Like many musical artists, Bell has a stage name, "T-Bizzle," and he regularly[20] records music in a professional studio. Indeed, the very rap that gave rise to this case was recorded at a recording studio off campus called "Get Real Entertainment" records. As he explained to the Disciplinary Committee, Bell considers himself "an artist," and, as explained above, he originally composed and publicized the song in an effort to "speak out" on and raise awareness of an important issue in his community, *i.e.,* sexual harassment of students. Moreover, consistent with his musical aspirations, Bell explained that the version of the song posted to YouTube was also intended to attract the attention of record labels. Further, the screenshot of Bell's Facebook page reveals that his friends who commented on the song viewed it as the product of Bell's musical talent as a rap musician rather than a threat of violence (*e.g.*, "Hey, don't forget me when you're famous" and "Lol . . . been tellin you since we was little . . . you got all the talent in the world . . ."). In addition, no one—neither Wildmon, Rainey, nor any other teacher or school official—testified that s/he thought Bell, himself, subjectively intended to cause anyone to fear that Bell personally would harm any person. Nor was there any evidence that Bell was a dangerous person or that he had ever engaged in violent or unlawful conduct. Although Bell in his rap song referred to a firearm, the evidence does not reflect that Bell had ever owned, possessed, or had any actual

[20] "Once a week," if possible.

experience with firearms. Except for a single tardiness, Bell had an unblemished school conduct record. These crucial facts not only impeach the School Board's contention that Bell's song could reasonably be perceived as a legitimate threat of violence, but also illuminate the fallacies in the majority opinion's comparison between this case and other circuit decisions that have condoned punishment for intentionally violent student speech.[21]

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[21] For example, the majority opinion compares Bell's rap song to the potential violence "signaled" in *Ponce v. Socorro Independent School District*, 508 F.3d 765 (5th Cir. 2007) and *LaVine v. Blaine School District*, 257 F.3d 981, 987 (9th Cir. 2001). But even a cursory comparison between this case and the facts of those cases reveals the majority opinion's flawed logic. In *Ponce*, a student *brought to campus* a private diary, which was written in the first-person narrative, and showed its contents to a classmate. 508 F.3d at 766. The diary detailed the plan of his "pseudo-Nazi" group to conduct coordinated "Columbine-style" shootings at his school and at other schools in the district. *Id*. As the *Ponce* opinion explains:

> The notebook describes several incidents involving the pseudo-Nazi group, including one in which the author ordered his group "to brutally injure two homosexuals and seven colored" people and another in which the author describes punishing another student by setting his house on fire and "brutally murder[ing]" his dog. The notebook also details the group's plan to commit a "[C]olumbine shooting" attack on Montwood High School or a coordinated "shooting at all the [district's] schools at the same time." At several points in the journal, the author expresses the feeling that his "anger has the best of [him]" and that "it will get to the point where [he] will no longer have control." The author predicts that this outburst will occur on the day that his close friends at the school graduate.

Id. Likewise, in *LaVine*, a student *brought to campus* a poem written in the first person describing how the narrator murdered

Moreover, the majority opinion likewise either ignores or glosses over other relevant evidence tending to show that school officials did not consider Bell's song threatening but instead punished him merely because they did not like the content of his speech. For example, during the closing remarks of the Disciplinary Committee meeting, one member of the committee provided the following admonition to Bell:

> I would say censor your material. . . . Because you are good [at rapping], but everybody doesn't really listen to that kind of stuff. So, if you want to get [] your message out to everybody, make it where everybody will listen to it. . . . You know what I'm saying? Censor that stuff. Don't put all those bad words in it. . . . The bad words ain't making it better. . . Sometimes you can make emotions with big words, not bad words. You know what I'm saying? . . . Big words, not bad words. Think about that when you write your next piece.

The school's censorial focus on the "bad words" in Bell's song can also be gleaned from the transcript of the preliminary-injunction hearing:

> School Board Lawyer: You realized what you had done in publishing this song, while it may be, in your perception, an artistic endeavor, was filthy; and it was filled with words like fuck, correct?
>
> Bell: Yes, sir.

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without remorse 28 people at his school and which ominously concluded with the narrator's prediction that he "may strike again." *LaVine*, 257 F.3d at 983–84.

Further, although the majority opinion emphasizes Wildmon's testimony that Bell's rap song allegedly scared him, the majority opinion refuses to acknowledge that Rainey testified that he viewed the song as "just a rap" and that "if [he] let it go, it will probably just die down." In addition to ignoring these material facts, the majority opinion likewise refuses to draw obvious inferences from the record which further evince the fact that school officials did not consider Bell's song to be threatening in nature. For example, in sharp contrast to other cases in which courts have upheld discipline for a student's purportedly "violent" speech,[22] nothing in the record reflects that school officials ever contacted law enforcement about Bell's song. To the contrary, Bell's principal drove him home that day, and he thereafter was allowed to return to classes. Later, when Bell was suspended pending the outcome of the Disciplinary Committee hearing, he nevertheless was allowed to remain unattended in the school commons for the remainder of the day. These are simply not the actions of school officials who seriously or reasonably believe a student poses a threat of violence to school officials.

Had the majority opinion properly reviewed all the relevant facts and drawn the clear inferences therefrom, it would have been compelled to conclude that the evidence here does not support a finding, as would be required by *Tinker*, that a "substantial disruption" occurred or that school officials reasonably could have "forecast" a substantial disruption as a result of Bell's rap. 393 U.S. at 514. As an initial matter, the evidence plainly shows that there was

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[22] *See, e.g., Ponce*, 508 F.3d at 767; *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1065–66 (9th Cir. 2013); *LaVine*, 257 F.3d at 985.

no commotion, boisterous conduct, interruption of classes, or any lack of order, discipline and decorum at the school, as a result of Bell's posting of his song on the Internet. *Cf. Shanley*, 462 F.2d at 970 ("Disruption in fact is an important element for evaluating the reasonableness of a regulation screening or punishing student expression."). In fact, at the preliminary injunction hearing, Wildmon explained that his students "seem[ed] to act normal" after Bell's rap was released, and Rainey testified that most of the talk amongst students had not been about Bell's song but rather about his suspension and transfer to alternative school. Aside from the single instance when Wildmon requested a student play the song for him, there was no evidence that any student played the song at school. Indeed, school computers blocked Facebook, and cellphones were prohibited, which decreased the likelihood that students could access the song on campus. Further, Bell testified that he never encouraged students or staff to listen to the song at school, and there is no evidence to the contrary. Tellingly, when asked if she could point to any disruption at the school as a result of Bell's song, the superintendent referred only to the fact that the coaches said that they had altered their "teaching styles" in order to avoid any appearance of initiating or engaging in sexual relationships or harassment with female students.[23] Yet, neither the superintendent nor the coaches described how this alleged

[23] For example, Wildmon testified: "I tried to make sure, you know, if I'm teaching, and if I'm scanning the classroom, that I don't look in one area too long. I don't want to be accused of, you know, staring at a girl or anything of that matter." Rainey testified that he no longer felt he could be as "hands on" with his female members of the track team, and thus "sometimes I tell the boys to go and work with the girls."

change in "teaching styles" had substantially harmed their ability to teach their assigned courses. And, in any event, it is self-evident that a teacher's effort to avoid the appearance that he is engaging in sexual relationships with students should be deemed a dictate of the classroom and not a disruption of it.[24] In sum, even assuming *arguendo* that *Tinker* could be applied to Bell's speech in this case, the School Board failed to satisfy its burden under the "substantial-disruption" framework.

In reaching the opposite conclusion, however, the majority opinion reasons that Bell's "threatening, intimidating, and harassing language . . . could be forecast by [school officials] to cause a substantial disruption." *See* Maj. Op. p. 31. But, the "evidence" that the majority opinion cites for this conclusion is, at the very best, sorely lacking. For example, the majority opinion emphasizes that Wildmon and some unnamed "third parties"[25] purportedly perceived Bell's rap song as threatening. *See* Maj. Op. p. 31. Yet, the majority opinion fails to apprehend that an individual's perception of speech is not necessarily tantamount to a rational assessment of that speech nor a valid basis for concluding that such speech is "unprotected" under the First Amendment. Indeed, regardless of how some individuals might view Bell's

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[24] Even assuming *arguendo* these changes in the coaches' teaching and coaching styles could be classified as "disruptions," the School Board has not presented any evidence to support a finding that such disruptions were "substantial," as required by *Tinker*.

[25] During a seconds-long aside at the Disciplinary Committee hearing, Bell simply alluded to such statements by third parties. Neither Bell nor anyone else provided any details whatsoever about these third parties, nor did he specify whether he heard these statements himself or via a third party.

speech, no *reasonable* listener could perceive Bell's lyrics as threats in light of the particular context; nor did the particular listeners here. *See United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012) ("A reasonable listener understands that a gangster growling 'I'd like to sew your mouth shut' to a recalcitrant debtor carries a different connotation from the impression left when a candidate uses those same words during a political debate. And a reasonable listener knows that the words 'I'll tear your head off' mean something different when uttered by a professional football player from when uttered by a serial killer."). Critically, the speech at issue in this case occurred in a rap song, a musical genre in which hyperbolic and violent language is commonly used in order to convey emotion and meaning—not to make real threats of violence. *See, e.g.,* Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. and Arts 1, 22 (2007). Further, as detailed above, Bell is a long-aspiring rapper; he composed the song in a professional studio; and he publically broadcast the song to raise public awareness and to attract the attention of record labels. These crucial contextual facts reveal that Bell's song was just that: a song, authored by a young and aspiring musical artist—not the calling card of a would-be killer. The majority opinion therefore errs by relying upon unsubstantiated and unreasonable beliefs that Bell's song was "threatening" in order to support its conclusion that the School Board satisfied its burden under *Tinker*. *Accord Cash*, 585 F.3d at 221–22 (observing that school "[o]fficials must base their decisions on fact, not intuition") (internal quotation marks omitted).

For additional support that *Tinker* is satisfied, the majority opinion also emphasizes the wording of the

School Board's Discipline-Administrative Policy. *See* Maj. Op. p. 31. Specifically, the majority opinion derives meaning from the parallels between *Tinker*'s "substantial disruption" framework and the School Board's decision to place the heading "SEVERE DISRUPTIONS" above twenty-one different disciplinary "offenses," one of which is the school's prohibition on "[h]arassment, intimidation, or threatening other students and/or teachers." Under the policy, other "severe disruptions" include, *inter alia*, "stealing," "cutting classes," and "profanity, or vulgarity (to include acts, gestures, or symbols directed at another person.)" According to the majority opinion, this "policy demonstrates an awareness of *Tinker*'s substantial-disruption standard,[26] and the policy's violation can be used as evidence supporting the reasonable forecast of a future substantial disruption." The majority opinion's reasoning in this regard is flawed. As an initial matter, this policy nowhere states that it applies to student conduct or speech that, like Bell's, occurs away from school or school-related activities. In this respect, the policy is facially distinguishable from those on-campus policies in *Morse* and *Fraser* to which the majority opinion analogizes. Moreover, however, the majority opinion's logic is entirely circular. The very task before our court is determining *whether* the School Board's decision to discipline Bell under a school policy comported with constitutional dictates. According to the majority opinion, however, the School's Board's decision to discipline Bell under a school policy is *evidence* that the punishment comported with constitutional

[26] The majority opinion cites no evidence to substantiate that the somewhat parallel language is anything more than a mere coincidence.

dictates. Contrary to the majority opinion's assertions otherwise, this is prototypical *ipse dixit*.

V.

"[A] 'function' of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965). By raising awareness of high school athletic coaches' sexual misconduct toward minor female students, Taylor Bell's rap song had this exact effect, and amongst those most "stir[red] to anger" were Itawamba school officials. The First Amendment prohibited Itawamba from expressing that anger by punishing Bell for the content of his speech. *See Barnette*, 319 U.S. at 637 ("The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574. The majority opinion, however, forsakes its duty to uphold this most elementary and important of our Constitution's guarantees.

In its conclusion, the majority opinion observes that the "mission" of schools is "to educate." Maj. Op. p. 32. Yet, the majority opinion fails to apprehend the breadth of what an "education" encompasses. As the Supreme Court has explained, "[t]he vigilant protection of constitutional freedoms is nowhere more vital

than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Teachers are "charge[d] . . . with the task of [i]mbuing their students with an understanding of our system of democracy." *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Brennan, J., concurring in part and dissenting in part). "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. "[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). Accordingly, "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Viewed in the light of these longstanding principles, Bell's song was not a disruption of school activities but rather was an effort to participate as a citizen in our unique constitutional democracy by raising awareness of a serious matter of public concern. Yet, rather than commending Bell's efforts, the Itawamba County School Board punished him for the content of his speech, in effect teaching Bell that the First Amendment does not protect students who challenge those in power. The majority opinion teaches that same mistaken lesson to all the children in our Circuit. Indeed, in concluding that the First Amendment officially condones Bell's censoring and punishment by the School Board, instead of safeguarding his freedom of speech, the majority opinion undermines the rights of all students and adults to both speak and receive

speech on matters of public concern through the Internet.

For these reasons, I respectfully and earnestly dissent.

EDWARD C. PRADO, Circuit Judge, dissenting:

I agree with Judge Dennis's dissent that Bell's rap song constitutes expressive speech protected by the First Amendment and that the school's discipline for that speech violated the First Amendment under existing Supreme Court precedent. I therefore respectfully dissent and join Judge Dennis's dissent in part.[1]

I write separately because off-campus online student speech is a poor fit for the current strictures of First Amendment doctrine, which developed from restrictions on other media, and I hope that the Supreme Court will soon give courts the necessary guidance to resolve these difficult cases. *See* David L. Hudson, Jr., *The First Amendment: Freedom of Speech* § 7:6 (2012) ("[T]he next frontier in student speech that the U.S. Supreme Court will explore is online

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[1] I do not join Part I of Judge Dennis's dissent. Unlike the dissent, I would conclude that speech is presumptively protected by the First Amendment unless it fits within a specific category of unprotected speech—regardless of the subject matter of the speech. Thus, I would not extend the doctrinal distinction between private speech and speech on a matter of public concern from the torts and public-employment contexts into the student-speech context.

I also do not join Part II(B) of the dissent. I agree with the dissent's larger point that the majority opinion's standard is vague and will prove difficult to apply; however, I am not as sure as the dissent that the Supreme Court's 1997 decision in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), remains indicative of how the Court would resolve this case today. The Internet has changed dramatically since 1997, so much so that I wonder whether the Court's views on online student speech have evolved to take into account the potential for harm that simply did not exist to the same degree when *Reno* was decided eighteen years ago. *See, e.g.*, *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 863 (Pa. 2002) (observing that "the advent of the Internet has complicated analysis of restrictions on speech").

speech."). This issue has divided the circuits and state supreme courts. Some have concluded that the *Tinker* standard categorically does not apply to online off-campus speech. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 937 (3d Cir. 2011) (en banc) (Smith, J., concurring) (noting that "[l]ower courts . . . are divided on whether Tinker's substantial-disruption test governs students' off-campus expression"); *see also Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1053 n.18 (2d Cir. 1979) ("[W]e believe that [the] power [to regulate expression] is denied to public school officials when they seek to punish off-campus expression simply because they reasonably foresee that in-school distribution may result."). Some courts have assumed without deciding that *Tinker* applies. *See, e.g.*, *J.S.*, 650 F.3d at 928–31 (majority op.). And some courts have held that *Tinker* applies to online off-campus speech if "it was foreseeable . . . [that the] conduct would reach the school via computers, smartphones, and other electronic devices," *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 574 (4th Cir. 2011), or if there is a "sufficient nexus between the website and the school campus to consider the speech as occurring on campus," *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002). I am unaware of a circuit or state supreme court going as far as the majority in this case and holding that threatening, harassing, or intimidating online speech that occurred purely off campus may be prohibited or punished. The majority's holding appears to depart from the other, already divided circuits in yet another direction.

Bell's speech does not fit within the currently established, narrow categories of unprotected speech, and I would wait for the Supreme Court to act before exempting a new category of speech from First

Amendment protection. As we previously stated in *Porter v. Ascension Parish School Board*, the *Tinker* standard only applies to substantially disruptive "student speech *on the school premises*." 393 F.3d 608, 615 (5th Cir. 2004) (emphasis added) (internal quotation marks omitted); *see also id.* at 615 n. 22 (criticizing other courts for "[r]efusing to differentiate between student speech taking place on-campus and speech taking place off-campus"). Schools officials may also punish speech that advocates illegal drug use and that takes place at off-campus school-sanctioned activities during school hours. *Morse v. Frederick*, 551 U.S. 393, 400–01 (2007) (*citing Porter*, 393 F.3d at 615 n.22); *see also id.* at 425 (Alito, J., concurring) (reasoning that the location of the speech matters and that, "due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence"). But this exception does not apply to purely off-campus speech. *See id.* at 405 (majority op.) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.").

Moreover, Bell's speech does not fall within the First Amendment exception we have previously recognized for student speech that threatens "violence bearing the stamp of a well-known pattern of recent historic activity: *mass, systematic school-shootings* in the style that has become painfully familiar in the United States." *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770–71 (5th Cir. 2007) (emphasis added). Indeed, in *Ponce*, we emphasized the narrow scope of this exception, concluding that this exception does not include "threats of *violence to individual teachers*[, which should be] analyzed under *Tinker*" or not at all, *id.* at 771 n.2 (emphasis added), meaning that threatening language about an individual teacher is

not within the *Morse* exception and may be punished only if it is either "on school premises" within the meaning of *Tinker*, *Porter*, 393 F.3d at 615, or if it constitutes a true threat. We reasoned: "Such threats [to teachers], because they are relatively discrete in scope and directed at adults, do not amount to the heightened level of harm that was the focus of both the majority opinion and Justice Alito's concurring opinion in *Morse*." *Ponce*, 508 F.3d at 771 n.2 (citing *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007)). "The harm of a *mass school shooting* is, by contrast, so devastating and so particular to schools that *Morse* analysis is appropriate." *Id.* (emphasis added).

In this case, Bell's rap song was performed and broadcasted entirely off-campus, and the song described violence directed at individual teachers—not a Columbine-type mass school shooting. Therefore, Bell's rap does not fall within the *Tinker* or the *Morse* categories of unprotected speech under our Circuit's decisions in *Porter* and *Ponce*. Further, in the context of expressive rap music protesting the sexual misconduct of faculty members, no reasonable juror could conclude that Bell's rap lyrics constituted a "true threat." *See Virginia v. Black*, 538 U.S. 343, 359 (2003) ("'True threats' encompass [only] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."). Therefore, I would reverse the district court and render judgment for Bell.

I therefore agree with Judge Dennis's dissent that our Circuit should hesitate before carving out a new category of unprotected speech.

Even so, I share the majority opinion's concern about the potentially harmful impact of off-campus online speech on the on-campus lives of students. The ever-increasing encroachment of off-campus online and social-media speech into the campus, classroom, and lives of school students cannot be overstated. *See Kowalski*, 652 F.3d at 567–69, 571 (confronting a situation in which one high-school student created a webpage dedicated to spreading rumors about the sexually transmitted disease of another student and her supposed sexual promiscuity, thereby "singl[ing] out [that student] for harassment, bullying and intimidation"). Ultimately, the difficult issues of off-campus online speech will need to be addressed by the Supreme Court.

For the foregoing reasons, I respectfully dissent.

HAYNES, Circuit Judge, dissenting in part:

I respectfully dissent from the portion of the majority opinion affirming the district court's grant of summary judgment in favor of the School Board on Bell's claim.[1] I conclude that the majority opinion greatly and unnecessarily expands *Tinker* to the detriment of Bell's First Amendment rights. I would reverse the district court's grant of summary judgment to the School Board and remand for further proceedings on those matters for substantially the same reasons set forth in Section III of the original panel majority opinion. *See Bell*, 774 F.3d at 290–303.

[1] Credibility and inferences matter here, so I would not reverse the denial at Bell's summary judgment motion.

JAMES E. GRAVES, JR., Circuit Judge, dissenting:

I join Judge Dennis's dissenting opinion. Like Judge Dennis, my view is that the *Tinker* framework was not intended to apply to off-campus speech. I recognize, however, that current technology serves to significantly blur the lines between on-campus and off-campus speech. In the light of this undeniable reality, and in the alternative, I would apply a modified *Tinker* standard to off-campus speech. My *Tinker-Bell* standard would begin with the *Tinker* substantial disruption test. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *see also Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972). It would further include a nexus prong that is derived most significantly from the Fourth Circuit's nexus test in *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011). The nexus prong would incorporate the important factors, considered by other appellate courts, of foreseeability and the speech's predominant message.

This standard would protect the First Amendment rights of students to engage in free expression off campus, while also recognizing that school officials should have some ability, under very limited circumstances, to discipline students for off-campus speech. Mindful of these core principles and concerns, I would apply the following test.

In order for a school to discipline a student for off-campus speech, the school must:

(1) provide evidence of facts which might reasonably have led school authorities to forecast a substantial disruption OR

evidence of an actual, substantial disruption;[1] AND

(2) demonstrate a sufficient nexus between the speech and the school's pedagogical interests that would justify the school's discipline of the student.[2] In this regard, I would consider three non-exclusive factors:

a. whether the speech could reasonably be expected to reach the school environment.[3]

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[1] *Tinker*, 393 U.S. at 509, 513–14; *see also Shanley*, 462 F.2d at 974 ("We emphasize . . . that there must be demonstrable factors that would give rise to any reasonable forecast by the school administration of 'substantial and material' disruption of school activities before expression may be constitutionally restrained.").

[2] *See Kowalski*, 652 F.3d at 573 ("There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of [the student's] speech to [the high school's] pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.").

[3] *See Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008) (expanding the reach of *Tinker* to include off-campus speech that is reasonably foreseeable to "come to the attention of school authorities"); *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (applying *Tinker* to off-campus speech where the speech is reasonably foreseeable to reach the school property); *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 766 (8th Cir. 2011) (same, where speech was reasonably foreseeable to be brought to the attention of school authorities).

b. whether the school's interest as trustee of student well-being[4] outweighs the interest of respecting the traditional parental role[5] in disciplining a student for off-campus speech . . .

   i. giving particular weight to evidence, experiential or otherwise (like the bullying research in the Fourth Circuit's *Kowalski* decision),[6] which indicates that particular off-campus speech has a unique and *proven* adverse impact on students and the campus environment.

c. whether the predominant message of the student's speech is entitled to heightened protection.[7]

In my view, if this test were applied to the facts of this case, the school's discipline of Bell would clearly fail. For this additional, alternative reason, I dissent.

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[4] *See Kowalski*, 652 F.3d at 573.

[5] Our court has held in high regard the traditional role of parents to discipline their children off campus. *See Shanley*, 462 F.2d at 964 ("It should have come as a shock to the parents of five high school seniors . . . that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts."); *id.* at 966 (explaining that the parents filed the lawsuit in "objecti[on] to the school board's bootstrap transmogrification into Super-Parent").

[6] *Kowalski*, 652 F.3d at 572.

[7] *See* Section I of Judge Dennis's dissenting opinion; *see also Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280, 299 n.46 (5th Cir. 2014), *rev'd en banc*.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: December 12, 2014]

No. 12-60264

TAYLOR BELL; DORA BELL, individually and as mother of Taylor Bell,

Plaintiffs–Appellants

v.

ITAWAMBA COUNTY SCHOOL BOARD; TERESA MCNEECE, Superintendent of Education for Itawamba County, individually and in her official capacity; TRAE WIYGUL, Principal of Itawamba Agricultural High School, individually and in his official capacity,

Defendants–Appellees

Appeal from the United States District Court
for the Northern District of Mississippi

Before BARKSDALE, DENNIS, and GRAVES, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:

This appeal raises a First Amendment challenge to a public high school student's suspension and transfer to alternative school for his off-campus posting on the Internet of a rap song criticizing, with vulgar and violent lyrics, two named male athletic coaches for

sexually harassing female students at his school. The aspiring student rapper, Taylor Bell, composed the song off campus, recorded it at a professional studio unaffiliated with the school, and posted it on his Facebook page and on YouTube using his personal computer while at home. Bell had never before been charged with a serious school disciplinary violation. After the disciplinary action was imposed and affirmed by the Itawamba County School Board, Bell and his mother, Dora Bell, sued the School Board, its Superintendent, and the school's Principal, for violation of Bell's freedom of speech under the First Amendment and Dora Bell's substantive-due-process right to parental authority under the Fourteenth Amendment. Upon cross-motions for summary judgment, the district court rendered summary judgment for the School Board and its officials. The Bells appealed.

We reverse the district court's judgment in favor of the School Board against Taylor Bell and render summary judgment against the School Board in favor of Taylor Bell, awarding him nominal damages as prayed for, and other relief, for the Board's violation of his First Amendment right to freedom of speech. The summary-judgment evidence and materials establish that Bell composed and recorded his rap song completely off campus; that he used his home computer to post it on the Internet during non-school hours; and that the School Board did not demonstrate that Bell's song caused a substantial disruption of school work or discipline, or that school officials reasonably could have forecasted such a disruption. Otherwise, the district court's grant of summary judgment in favor of Defendants-Appellees against Dora Bell is affirmed,

as well as the district court's summary judgment for the individual school officials.[1]

I.

A.

In December 2010, Taylor Bell was an eighteen-year-old senior at Itawamba Agricultural High School with no record of any disciplinary problem aside from a single in-school suspension for tardiness. Bell is an aspiring rap[2] musician, has written lyrics and music since he was a young boy, and began recording and seriously pursuing music in his early teens.[3] In this

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[1] The Bells waived their appeal of the district court's ruling on Dora Bell's Fourteenth Amendment substantive-due-process claim by failing to raise that issue in their initial brief. We therefore affirm the district court's ruling without addressing the merits of that claim. For the same reason, we affirm the district court's alternative holding that qualified immunity bars Taylor Bell's suit against the individual defendants. Therefore, we consider only Taylor Bell's First Amendment claim against the School Board.

[2] "Rap has been defined as a 'style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment.'" *Campbell v. Acuff-Rose Music, Inc*.,510 U.S. 569, 572, n.1 (1994) (quoting The Norton/Grove Concise Encyclopedia of Music 613 (1988)). According to scholars, the genre "derives from oral and literary traditions of the Black community." Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 22 (2007). Today, rap music is not only a musical form with its own unique artistic conventions, *id*. at 20, but also a multi-billion-dollar commercial industry. *See, e.g*., Julie Watson, *Rapper's Delight: A Billion-Dollar-Industry*, Forbes.com (Feb. 18, 2004), http://www.forbes.com/2004/02/18/cx_jw_0218hiphop.html.

[3] Bell testified that he regularly records music in a studio ("once a week" if possible).

respect, Bell considers himself an "artist." Bell testified that several of his female friends at school told him before Christmas 2010 that two male athletic coaches at school, Michael Wildmon and Chris Rainey, had inappropriately touched them and made sexually-charged comments to them and other female students at school. The record also contains affidavits from female students stating that they informed Bell of this misconduct by Wildmon and Rainey. According to these affidavits, Wildmon told one of Bells classmates, R.M.,[4] that she had a "big butt" and that he would date her if she were older. She also stated that Wildmon had looked down her shirt, inappropriately touched her, and told her that she was "one of the cutest black female students" at Itawamba. Another student, D.S., told Bell that she witnessed these incidents between Wildmon and R.M.; in addition, D.S. informed Bell that Rainey had "rubbed [her] ears at school without her permission, and [that she] had to tell him to stop." Yet another student, S.S., told Bell that Rainey commented to her that he thought she had "'messed' with some nasty people" and suggested that he otherwise would have, in S.S.'s words, "turn[ed] [her] back 'straight' from being 'gay.'" A fourth student, K.G., told Bell that Rainey approached her in the gym and said, "damn baby, you are sexy."

Bell admitted that he did not report these complaints to school authorities, but he explained that, in his view, the school officials generally ignored complaints by students about the conduct of teachers and coaches. During the Christmas holidays, while school was not in session, Bell composed and recorded a rap

[4] As the students are not parties to this suit and were minors at the time these events took place, we use only their initials to protect their privacy.

song about the female students' complaints at a professional recording studio unaffiliated with the school. Bell did not use any school resources in creating or recording the song. According to Bell, he believed that if he wrote and sang about the incidents, somebody would listen to his music and that it might help remedy the problem of teacher-on-student sexual harassment.

The song[5] accused Wildmon of telling students that they are "sexy" and looking down female students' shirts, and it stated that he "better watch [his] back," and that "white dude, guess you got a thing for them yellow bones / looking down girls shirts / drool running down your mouth / you fucking with the wrong one / gonna get a pistol down your mouth." The refrain of the song repeated lines to the effect of "middle fingers up if you hate that nigga / middle fingers up if you can't stand that nigga / middle fingers up if you want to cap that nigga." The song referred to Rainey as a second "Bobby Hill," a former Itawamba football coach who was arrested and accused of sending explicit text messages to a minor in 2009. The lyrics also accused Rainey of "rubbing black girls' ears in the gym." The song's lyrics in full were as follows:[6]

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[5] Bell's Facebook page labels the song "P.S. Koaches," but Bell's complaint identifies the song's title as "PSK The Truth Needs to be Told."

[6] The record contains an audio recording of the song lyrics and three different transcripts of the recording : (1) a transcript submitted by the School Board in its response to Bell's preliminary-injunction motion, (2) a transcript submitted by Bell at the preliminary-injunction hearing, and (3) a transcript submitted by the School Board at the preliminary-injunction hearing. Where appropriate, spelling and typography are standardized and the lyrics are harmonized as between the recorded and transcribed versions of the song entered into the

Let me tell you a little story about these
Itawamba coaches
Dirty ass niggas like some fucking
coacha roaches
Started fucking with the whites and now
they fucking with the blacks
That pussy ass nigga Wildmon got me
turned up the fucking max.[7]

Fucking with the students and he
just had a baby
Ever since I met that cracker I knew
that he was crazy
Always talking shit cause he know
I'm from the city[8]
The reason he fucking around cause his
wife ain't got no titties

This nigga telling students that they sexy,
betta watch your back
I'm a serve this nigga like I serve the
junkies with some crack
Quit the damn basketball team /
The coach a pervert
Can't stand the truth so to you these
lyrics going to hurt[9]

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district court record. Where the lyrics differ between the three different transcriptions in the record, the differences are noted. However, none of the lyrical differences is dispositive to the outcome of this case.

[7] Or "turnin' to a fucking mess."

[8] Or "daw-city."

[9] Or "So the union league is gone [*sic*] hurt."

What the hell was they thinking when
they hired Mr. Rainey
Dreadlock Bobby Hill the second /
He the same see
Talking about you could have
went pro to the NFL
Now you just another pervert coach,
fat as hell[10]

Talking about you gangsta / Drive your
mama's PT Cruiser[11]
Run up on T-Bizzle[12]/ I'm going to
hit you with my rueger [13]

Think you got some game / Cuz you
fucking with some juveniles
You know this shit the truth
so don't you try to hide it now
Rubbing on the black girls'
ears in the gym
White hoes, change your voice
when you talk to them

I'm a dope runner,
spot a junkie a mile away
Came to football practice high,
remember that day
I do, to me you a fool nigga

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[10] Or "as bad as hell."

[11] Or "try your mama beat crews up."

[12] "T-Bizzle" refers to Taylor Bell.

[13] Or "ruler." The transcript of the lyrics submitted by Bell at the preliminary-injunction hearing specifies the lyric is "rueger." However, as noted *supra*, our holding does not pivot on the applicability of one term or the other.

30 years old fucking with
students at the school

Hahahah You's a lame and
it's a damn shame

Instead you was lame, eat shit,
the whole school got a ring mutherfucker.[14]

Heard you textin'[15] number 25[16] /
You want to get it on

White dude, guess you got a thing
for them yellow bones

Looking down girls' shirts /
Drool running down your mouth

You fucking with the wrong one /
Going to get a pistol down your mouth/Pow[17]

OMG[18]took some girls in
the locker room in PE

Cut off the lights
you motherfucking freak

Fucking with the youngins

Because your pimpin game weak[19]

How he get the head coach
I don't really fucking know

But I still got a lot of love
for my nigga Joe

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[14] Or "You so lame it's a damn shame/Instead you wadn't shit, the whle team gotta reign Mother Fucker."

[15] Or "kissing."

[16] "Number 25" refers to one of the female students.

[17] Or "boww" according to the transcript of lyrics provided by Bell at the preliminary injunction hearing.

[18] "[O]h my God."

[19] Or "cause you pimpin can't read."

And my nigga Makaveli
and my nigga Cody
Wildemon talk shit bitch
don't even know me

Middle fingers up if you
hate that nigga
Middle fingers up if you
can't stand that nigga
Middle fingers up if you
want to cap that nigga
Middle fingers up /
he get no mercy nigga.

In the first few days of January 2011,[20] Bell uploaded the song to his profile on Facebook using his private computer during non-school hours. On Facebook, the song was accessible to Bell's pre-approved online "friends."[21] The Facebook website was blocked

[20] Bell testified at the preliminary-injunction hearing that he posted the song "on the first Wednesday in January," which would be January 5, but Bell's brief in support of his preliminary-injunction motion states that the song was posted on January 3.

[21] Although a screen shot of Bell's Facebook page contained in the record indicates he had approximately 1,380 "friends," there is no evidence of how many of his "friends" were current students at Itawamba. In addition, the evidence does not reflect how many "friends" listened to the song. The dissent argues that three of the "friends" shown in a screen shot of Bell's Facebook page were Bell's "fellow students." However, at most, the screen shot shows only that three "friends" were a part of the Itawamba Agricultural High School network, and does not evince whether those individuals were students currently enrolled at the high school, former students who had graduated or transferred but remained on the network, or individuals who were part of the Itawamba network for some other reason. Although comments directly below Bell's Facebook posting indicate that some individuals

on school computers. Although any of Bell's Facebook "friends" potentially could use a cellphone to access the song on Facebook, school regulations prohibited students from bringing cellphones to school.

Upon returning to school after the Christmas holidays, Bell testified that he never encouraged anyone at school—students or staff—to listen to the song. He further testified that he never played the song at school. No evidence was offered by the School Board to the contrary.

On January 6, 2011,Wildmon received a text message inquiring about the song from his wife, who had been informed of Bell's Facebook posting by a friend. In response to Wildmon's inquiry, a student allowed him to listen to the song on the student's cellphone. Wildmon immediately reported it to the Principal, Trae Wiygul, who, in turn, informed Teresa McNeece, the Superintendent.

The next day, Wiygul, McNeece, and the school district's attorney, Michele Floyd, questioned Bell about the song and its accusations. According to McNeece, she asked whether Bell meant that the teachers were having sexual relations with students,

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listened to the song, there is no evidence whether those individuals were fellow students.

Moreover, as discussed at greater length *infra*, an examination of those Facebook comments (*e.g.*, "Hey, don't forget me when you're famous" and "Lol. . . Mane Im tellin you cuz . . . been tellin you since we was little . . . keep fuckin with it man you got all the talent in the world . . .") and Bell's response to them (*e.g.*, "thanks mane . . . I JUST NEED A BIG BREAK THROUGH . . . no wut I mean??") undermines the dissent's contention that the song was viewed or reasonably could have been viewed as a genuine threat of violence by Bell against the coaches rather than the artistic expression of an aspiring rap musician seeking fame and fortune.

to which Bell responded that the lyrics meant the teachers were "messing with kids"—not having sexual relations with them. Bell testified, somewhat differently, that he told the school officials that "everything [he] said in the song was true." According to Bell, the school officials never suggested that Wildmon or Rainey felt threatened; instead, it seemed to Bell, the problem was that Wildmon felt as though "his name had been slandered." Bell testified that the officials never said that school had been disrupted as a result of the song. After speaking with McNeece and the other officials, Bell was sent home for the rest of that day, which was a Friday. Bell testified that he was not given a clear answer as to the specific reason why he was being sent home that day.

Due to snow, the school was closed until Friday of the following week. During that time, Bell created a more polished version of the song,[22] which included various sound effects, a slideshow,[23] and a brief monologue at the conclusion. In this monologue, Bell explained the genesis of his song:

> A lot of people been asking me lately you know what was my reasoning behind creating P.S. Koaches. It's . . . something that's been going on . . . for a long time [] that I just felt like I needed to address. I'm an artist . . . I speak real life experience. . . . The way I look at it, one day, I'm going to have a child. If something like this was going on with my

[22] He explained that the version initially posted to Facebook had been a "raw" and "unfinished" copy of the song.

[23] The record lacks details about the precise contents of the slideshow.

> child . . . it'd be '4:30.'[24] . . . That's just how it is . . .

Bell then uploaded the final version of the song to YouTube from his home computer before classes resumed. Bell later explained that he created and posted this YouTube version of the song to help people, including school officials, "more clearly understand exactly what [he] was saying" in the song.

When school resumed on the following Friday, Bell returned to school. He testified that he could discern no disruption due to the song, nor did he tell anyone at school—students or staff—to listen to the song. However, around mid-day on that date, he was removed from class by the Assistant Principal, who informed him that he was suspended effective immediately, pending a disciplinary hearing. However, school officials did not require Bell to immediately vacate the school, and he remained in the school commons until his school bus arrived at day's end.

B.

At the disciplinary/due process hearing before the school's Disciplinary Committee on January 26, 2011, the school district's attorney, Michele Floyd, stated that the purpose of the hearing was to determine whether Bell had "threaten[ed], intimidat[ed], and/or harass[ed] one or more school teachers."[25] Bell and his

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[24] Bell explained that "4:30" means "it's over" or "I'm leaving."

[25] During the hearing, Bell's counsel requested information about the initial decision by school officials to suspend Bell and what the basis for that decision had been. Floyd responded that those issues were not the purpose of the hearing, explaining again that the hearing's purpose was to determine if Bell had harassed, intimidated, or threatened teachers through his off-campus posting of his song on the Internet. In addition, when

mother, Dora Bell, were present and were represented by counsel. At the beginning of the hearing, Principal Wiygul presented a brief summary of the events leading up to the disciplinary hearing. The Committee then listened to the YouTube version of the song.

Bell was asked why he composed, recorded, and posted the song. He explained that he had written the rap song in response to the coaches' inappropriate behavior toward female students. He testified that he did not believe that telling the school authorities about the coaches' misconduct would have accomplished anything because school officials had failed to respond to other students' complaints in the past.[26] During the hearing, Bell presented letters from female students corroborating the allegations of the coaches' misconduct. The Committee stated that the Board was concerned about the coaches' possible misconduct and would investigate those allegations, but it explained that those allegations were not relevant to Bell's hearing.

The Committee also questioned Bell about his intentions with respect to the song and whether the violent lyrics reflected an intention to harm the coaches. Bell conveyed that the song was a form of artistic

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Bell's attorney sought to bring attention to affidavits from the female students corroborating the song's accusations, Floyd stated that the Committee would not consider at the proceeding the truth or merits of the female students' allegations that the coaches sexually harassed them.

[26] His testimony was unclear whether he meant that school officials failed to respond to student complaints generally or to complaints specifically concerning the allegations made in the song.

expression meant to reflect his real-life experiences[27] and to increase awareness of the situation. Bell explained that the lyrics were not intended to intimidate, threaten, or harass Wildmon or Rainey. However, he indicated that the lyrics did reflect the possibility that a parent or relative of one of the female students might eventually react violently upon learning that the coaches were harassing their children—not that *Bell* would react violently.[28] Bell explained that he uploaded the remastered version of the song to YouTube because he wanted people to "clearly understand" his intentions with respect to the song and that the YouTube version was more targeted at record labels than the Facebook version. He also explained that he did not tell anyone to listen to the song at school.

At the disciplinary/due process hearing, no evidence was presented that the song had caused or had been forecasted to cause a material or substantial disruption to the school's work or discipline. In addition, there was no evidence presented indicating that any student or staff had listened to the song on the school

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[27] The dissent concludes that Bell's statement that he was writing about real-experiences is an indication that Bell's rap was not rhetorical but instead constituted a real threat of violence. To the contrary, when Bell stated that he was writing about real-life experiences, he was referring to the real-life experience of male high school coaches sexually harassing female students.

[28] Specifically, Bell stated: "I didn't say that I was going to do that. . . . I'm from the country. And you know, I know how people are. . . . Eventually . . . somebody's parents . . . or their brother . . . or their big sister or somebody might get word . . . I was just foreshadowing something that might happen. . . . I wasn't saying that I was going to do that." One of the Committee members indicated that she agreed with Bell, stating ". . . it sound like to me you were saying that if they don't stop what they're doing then a parent kinda is gonna do that, not really him [indicating Bell]."

campus, aside from the single instance when Wildmon had a student play the song for him on his cellphone in violation of school rules. Neither of the coaches named in the song attended or testified at the hearing, and no evidence was presented at the hearing that the coaches themselves perceived the song as an actual threat or disruption.

At the very end of the hearing, one of the Committee members provided the following admonition to Bell: "I would say censor your material. . . . Because you are good [at rapping], but everybody doesn't really listen to that kind of stuff. So, if you want to get [] your message out to everybody, make it where everybody will listen to it. . . . You know what I'm saying? Censor that stuff. Don't put all those bad words in it. . . . The bad words ain't making it better. . . Sometimes you can make emotions with big words, not bad words. You know what I'm saying? . . . Big words, not bad words. Think about that when you write your next piece."[29]

The next day, Floyd sent Bell's mother a letter setting forth the Committee's decision to uphold the suspension already imposed on Bell, to place Bell in an alternative school for the remainder of the nine-week grading period, and to prohibit Bell from attending

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[29] The dissent is mistaken in asserting that one member of the Committee "explain[ed] there would have been no problem with the rap recording or its vulgar language if it had not included threats against school employees." It is true that one Committee member indicated that Bell should not have "put names" in the rap (noting that she does not use real names when she writes poetry), from which the dissent apparently derives its misinterpretation. However, that member subsequently admonished Bell to use "big words, not bad words" in his raps and to "censor that stuff," thus providing Bell poetic or artistic advice. That Committee member did not characterize the statements in Bell's rap as threatening.

any school functions during that time. The letter stated that the Committee had concluded that whether Bell's song constituted a "threat to school district officials was vague."[30] But the Committee did find that the song harassed and intimidated the coaches in violation of Itawamba School Board policy[31] and unspecified state law.

The School Board affirmed the Disciplinary Committee's decision on February 7, 2011, which was memorialized in a letter sent to Dora Bell from Floyd on February 11, 2011. In that letter, Floyd stated: "As you are aware, [the Board] determined that Taylor Bell did threaten, harass and intimidate school employees in violation of School Board policy and Mississippi State Law."[32] The Board did not assign any additional reasons for its decision.

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[30] Specifically, the letter stated: "Based on the testimony given at the due process hearing on January 26, 2011, the Discipline Committee determined that the issue of whether or not lyrics published by Taylor Bell constituted threats to school district teachers was vague; however, they determined that the publication of those lyrics did constitute harassment and intimidation of two school district teachers, which is a violation of School Board Policy and state law." The proceedings before the Committee were audio-recorded but were not transcribed; only a sound recording of it is in the record.

[31] The School District's "Discipline-Administrative Policy" prohibits "[h]arassment, intimidation, or threatening other students and/or teachers."

[32] Specifically, Floyd's letter stated: "As you are aware, on February 7, 2011, the Itawamba County Board of Education determined that Taylor Bell did threaten, harass and intimidate school employees in violation of School Board policy and Mississippi State Law. As a result, the recommendations of the disciplinary hearing were upheld by the Board of Education." The Board did not cite the state law to which it referred; nor has it done so in its litigation documents. Floyd's letter does not explain

C.

Taylor and Dora Bell filed this civil action under 42 U.S.C. § 1983 on February 24, 2011, in the United States District Court for the Northern District of Mississippi against the Itawamba County School Board, Superintendent McNeece (individually and in her official capacity), and Principal Wiygul (individually and in his official capacity), alleging that the defendants violated Taylor Bell's First Amendment right to freedom of speech by imposing school discipline on Bell for his off-campus composition, recording and Internet-posting of his rap song.[33] Bell sought nominal damages and injunctive relief ordering reinstatement of his school privileges, expungement from his school records of all references to the incident, and prevention of the defendants from enforcing the school disciplinary code against students for expression that takes place outside of the school or school-sponsored activities, as well as attorneys' fees and costs.

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the difference between the Committee's finding that the issue of whether Bell's lyrics constituted a threat was "vague" and the School Board's finding that Bell had "threatened, intimidated, and harassed" the teachers. The record is unclear regarding the exact evidence presented to the School Board. Based on the testimony of school officials at the preliminary-injunction hearing, the Board's decision apparently was based on the same audio-recording of Bell's song heard by the Disciplinary Committee.

[33] The complaint also alleged that defendants violated Dora Bell's Fourteenth Amendment substantive-due-process right to control her child's upbringing. As noted supra, the district court granted summary judgment for the defendants on this claim, and the Bells have not appealed that determination.

On March 10, 2011, the district court held a hearing on the preliminary-injunction motion. At the hearing, a number of different witnesses testified, including the two coaches named in the song. Rainey testified that he had not heard the song and felt it was "just a rap," not to be taken seriously, and that he felt that if he "let it go, it [would] probably just die down." However, he stated that the song had "affected" the way he "talk[ed] to kids," leading him to avoid interactions with students that might be interpreted as being inappropriate. For example, he indicated that he felt the song had affected his ability to act like a "parent figure" to students. He also testified that students had begun spending more time in the gym since the posting of the song, but he could not confirm this was a result of Bell's song. Rainey further testified that most of the talk amongst students has been about Bell's suspension and transfer to alternative school.

Wildmon testified that the song caused him to be more cautious around students and to avoid the appearance that he was behaving inappropriately toward them.[34] He further testified that students around him "seem[ed] to act normal" after the song was published to the Internet. Wildmon said that he took the lyrics "literally" and that he felt "scared" after hearing the song since "you never know in today's society . . . what somebody means, how they mean it." In this regard, Wildmon testified that, after hearing the song, he would not let his players leave basketball games until after he was in his vehicle. In addition, Wildmon denied ever texting "a girl, like No. 25, on the

[34] For example, Wildmon stated: "I tried to make sure, you know, if I'm teaching, and if I'm scanning the classroom, that I don't look in one area too long. I don't want to be accused of, you know, staring at a girl or anything of that matter."

basketball team," as referenced in the song's lyrics. Otherwise, there is no indication that either party questioned the coaches about the truth or falsity of the female students' allegations.

At the conclusion of the hearing, the district court denied the motion for the preliminary injunction as moot because Bell had only one day of alternative school remaining. Thereafter, following the parties' filing of cross-motions for summary judgment, the district court granted summary judgment in favor of the Defendants. The court concluded that, pursuant to *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the song's lyrics "in fact caused a material and/or substantial disruption at school and that it was reasonably foreseeable to school officials the song would cause such a disruption." Specifically, the court stated that Wildmon's and Rainey's testimony that the song Aadversely affected" their teaching styles constituted an Aactual disruption" to school activities. The court also concluded that it was Areasonably foreseeable" that the song, which Alevies charges of serious sexual misconduct against two teachers using vulgar and threatening language and . . . is published on Facebook.com to at least 1,300 'friends' . . . and the unlimited internet audience on YouTube.com, would cause a material and substantial disruption at school." The Bells timely appealed.

II.

We review a district court's grant of summary judgment de novo, applying the same standard as the district court. *See Mesa v. Prejean*, 543 F.3d 264, 269 (5th Cir. 2008). "[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). "When parties file cross-motions for summary judgment, 'we review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party.'" *Duval v. Northern Assur. Co. of Am.*, 722 F.3d 300, 303 (5th Cir. 2013) (quoting *Ford Moto Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001)).

III.

The principal issue presented by this case is whether a public high school violated the First Amendment by punishing a student for his off-campus speech, *viz.*, his rap song posted on the Internet that criticized two male coaches for their improper conduct toward minor female students. This case does not involve speech that took place on school property or during a school-approved event off campus. Nevertheless, the district court, interpreting *Tinker v. Des Moines Independent Community School District* as applying directly to students' off-campus speech, as well as their on-campus speech, held that the School Board had authority to regulate and punish Bell's speech because the evidence established that his rap song had "in fact" substantially disrupted the school's work and discipline and that it was "reasonably foreseeable" that the song would cause such a disruption. 859 F. Supp. 2d 834, 840 (N.D. Miss. 2012). We reverse the district court's application of *Tinker* as legally incorrect, and conclude that *Tinker* could not afford the School Board a defense in this case because the summary-judgment evidence and materials do not support the conclusion that a material and substantial

disruption at school actually occurred or reasonably could have been forecasted.

Contrary to the district court's conclusions, *id*. at 837-38, the Supreme Court's "student-speech" cases, including *Tinker*, do not address students' speech that occurs off campus and not at a school-approved event. The Court has not decided whether, or, if so, under what circumstances, a public school may regulate students' online, off-campus speech, and it is not necessary or appropriate for us to anticipate such a decision here. Even if *Tinker* were applicable to the instant case, the evidence does not support the conclusion, as required by *Tinker*, that Bell's Internet-posted song substantially disrupted the school's work and discipline or that school officials reasonably could have forecasted that it would do so. Moreover, we reject the School Board's alternative argument that the plainly rhetorical use of violent language contained in Bell's song falls within this court's narrow holding in *Ponce v. Socorro Independent School District*, 508 F.3d 765 (5th Cir. 2007), that student speech threatening a Columbine-style mass school shooting was not protected by the First Amendment. Furthermore, in light of the rap's factual context, its lyrics' conditional nature, and the reactions of its listeners, we likewise reject the argument that Bell's rap song was excepted from First Amendment protections because it constituted a "true threat."

A.

"That courts should not interfere with the day-to-day operations of schools is a platitudinous but eminently sound maxim which this court has reaffirmed on many occasions." *Shanley v. Northeast Indep. Sch. Dist*., 462 F.2d 960, 967 (5th Cir. 1972). Nevertheless,

this court "laid to rest" more than a half century ago "the notion that state authorities could subject students at public-supported educational institutions to whatever conditions the state wished." *See id*. (citing *Dixon v. Ala. State Bd. of Educ*., 294 F.2d 150 (5th Cir. 1961)). "And of paramount importance is the constitutional imperative that school boards abide constitutional precepts: 'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creaturesCBoards of Education not excepted.'" *Id*. (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Thus, A[t]he authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards," including the dictates of the First Amendment. *See Goss v. Lopez*, 419 U.S. 565, 575 (1975).

Because speech is often provocative and challenging, and may strike at prejudices and preconceptions and have profoundly unsettling effects as it presses for the acceptance of an idea or cause, the First Amendment protects speech against restriction or punishment by the government. *Cox v. Lousiana*, 379 U.S. 536 (1965); *see also Texas v. Johnson*, 491 U.S. 397, 408-10, 414 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46, 54-57 (1988); *Cohen v. California*, 403 U.S. 15 (1971). In *Tinker*, the Supreme Court considered whether the First Amendment's protections against government censorship apply to student speech inside public schools. The Court recognized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but also observed that those rights must be calibrated "in light of the special characteristics of the school environment." 393 U.S. at 506-07. To reconcile

these competing interests, the Court fashioned a rule that has become the touchstone for assessing the scope of students' on-campus First Amendment rights ever since: while on campus, a student is free to "express his opinions, even on controversial subjects, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id*. at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). However, speech by the student that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id*. at 513.

Therefore, under Tinker, school officials may prohibit student speech and expression upon showing "facts which might reasonably have led school authorities to forecast [that the proscribed speech would cause] substantial disruption of or material interference with school activities." *Id*. at 514. School officials "must be able to show that [their] action[s] [were] caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id*. at 509. It is a school's burden to prove that its suppression of student speech conforms with this governing standard.[35] *Id*. at 511-14; *see also Shanley*, 462 F.2d at

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[35] "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the

969 ("When the constitutionality of a school regulation is questioned, it is settled law that the burden of justifying the regulation falls upon the school board.").

This court has further elaborated on *Tinker*'s substantial-disruption standard. "Although school officials may prohibit speech based on a forecast that the prohibited speech will lead to a material disruption, the proscription cannot be based on the officials' mere expectation that the speech will cause such a disruption." *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 221 (5th Cir. 2009). Further, school officials "must base their decisions 'on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe.'" *Id*. at 221-22 (quoting *Butts v. Dallas Indep. Sch. Dist*., 436 F.2d 728, 731 (5th Cir. 1971)); *see also Butts*, 436 F.2d at 732 ("[T]here must be some inquiry, and establishment of substantial fact, to buttress the determination."); *Shanley*, 462 F.2d at 970 ("[T]he board cannot rely on *ipse dixit* to demonstrate the 'material and substantial' interference with school discipline.").

Since *Tinker*, the Supreme Court has recognized that, even if on-campus speech or speech at school-approved events is non-disruptive within the meaning of Tinker, school officials may restrict that speech in a limited set of circumstances: if it is lewd or vulgar, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), if it is school-sponsored and the restriction is

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school,' the prohibition cannot be sustained." *Id*. at 509 (citing *Burnside*, 363 F.2d at 749).

"reasonably related to legitimate pedagogical concerns," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988), or if it is reasonably viewed as promoting the use of illegal drugs, *Morse v. Frederick*, 551 U.S. 393, 403 (2007). However, in all of these cases, the speech at issue occurred on campus or at a school-approved event where the school's conduct rules expressly applied. Moreover, members of the Court have taken great pains to emphasize that these exceptions to the *Tinker* "substantial-disruption" test are narrowly confined and do not provide school officials with broad authority to invoke the "special characteristics of the school environment" in order to circumvent their burden of satisfying the *Tinker* test in factual scenarios that do not fit within the exceptions to *Tinker* established by *Fraser*, *Hazelwood*, and *Morse*. *See, e.g., Morse*, 551 U.S. at 422–23 (Alito, J., concurring) ("I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'") (internal citation omitted).

Contrary to the district court's conclusion, [36] the Supreme Court in *Tinker* did not hold that the "substantial-disruption" test applies to off-campus speech. Instead, when the Court stated that, "[a]

[36] The district court erroneously concluded that "the U.S. Supreme Court in *Tinker* specifically ruled that off-campus conduct causing material or substantial disruption at school can be regulated by the school." *See Bell*, 859 F. Supp.2d at 837–38.

student's rights . . . do not embrace merely the classroom hours" and that, "conduct by the student, in class or out of it, which . . . materially disrupts . . . is, of course, not immunized by the constitutional guarantee of freedom of speech[,]" *Tinker*, 393 U.S. at 512-13, the Court was simply indicating that the delicate balance between the protection of free speech rights and the regulation of student conduct extends to all facets of on-campus student speech and not just that occurring within the classroom walls. Accordingly, the Court further stated, "When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* (internal citation omitted). When read in context, the *Tinker* Court did not intend that its holding would allow a public school to regulate students' freedom of speech at home and off campus.[37] Rather, the Court

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[37] The dissent erroneously contends that "technological developments," especially the Internet, have "rendered the distinction [between on- and off-campus speech] obsolete." Although we certainly acknowledge that the Internet has yielded previously uncontemplated factual scenarios that pose difficult questions, it is not our place to anticipate that the Supreme Court will hold that the Internet has vitiated the distinction between on- and off-campus student speech, thus expanding the authority of school officials to regulate a student's speech when he or she is at home during non-school hours. *Accord Morse*, 551 U.S. at 424 (Alito, J., concurring) ("It is a dangerous fiction to pretend that parents simply delegate their authority-including their authority to determine what their children may say and hear-to public school authorities."); *Shanley*, 462 F.2d at 964 ("It should have come as a shock to the parents of five high school seniors . . . that

meant that the governing analysis would apply "in class or out of" the classroom while the student is on campus during authorized hours. The Court's subsequent student speech cases make this distinction clear. *See Hazelwood*, 484 U.S. at 266.[38]

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their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust that it will come as no shock whatsoever to the school board that their assumption of authority is an unconstitutional usurpation of the First Amendment."). Further, it is especially inappropriate for us to pronounce such a consequential rule in the present case, where the evidence does not support a conclusion that the speech has caused, or reasonably could have been forecasted to cause, a substantial disruption of the school's work or discipline.

[38] A number of circuit courts have dealt with the question of *Tinker*'s reach beyond the schoolyard. The Second, Fourth, and Eighth Circuits have concluded that *Tinker* applies to off-campus speech in certain circumstances. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (student disqualified from running for class secretary after posting a vulgar and misleading message about the supposed cancellation of an upcoming school event on a web log from home); *Kowalski v. Berkeley County Schs*., 652 F.3d 565 (4th Cir. 2011) (student suspended for creating and posting to a MySpace webpage that was largely dedicated to ridiculing a fellow student); *S.J.W. v. Lee's Summit R-7 Sch. Dist*., 696 F.3d 771 (8th Cir. 2012) (students suspended for creating website with offensive and racist comments discussing fights at their school and mocking black students, as well as sexually explicit and degrading comments about particular female classmates). These circuits have imposed their own unique threshold tests before applying *Tinker* to speech that originates off campus. For example, the Eighth Circuit requires that it be "reasonably foreseeable that the speech will reach the school community," *S.J.W*., 696 F.3d at 777, while the Fourth Circuit requires that the speech have a sufficient "nexus" to the school. *Kowalski*, 652 F.3d at 573.

In the instant case, the School Board may not assert *Tinker* as a defense because, even assuming *arguendo* that the *Tinker* "substantial-disruption" test could be

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This court, along with the Third Circuit, has left open the question of whether the *Tinker* "substantial-disruption" test can apply to off-campus speech. In *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist*., 650 F.3d 915, 926, 930 (3d Cir. 2011) (en banc), the Third Circuit assumed, without deciding, that *Tinker* applied to a student's creation of a parody MySpace profile mocking the school principal, but held that it was not reasonably foreseeable that the speech would create a substantial disruption. In a separate concurrence, five judges expressed their position that *Tinker* does not apply to off-campus speech and that "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id*. at 936 (Smith, C.J., concurring). In another Third Circuit en banc case decided the same day as *Snyder*, and also involving a principal parody profile, the school district did "not dispute the district court's finding that its punishment of [the student] was not appropriate under *Tinker." Layshock v. Hermitage Sch. Dist*., 650 F.3d 205, 216 (3d Cir. 2011) (en banc). The school district relied instead on *Fraser*. *Id*. But the court went on to note that *Fraser* did not allow the school "to punish [the student] for expressive conduct which occurred outside of the school context." *Id*. at 219. In *Porter v. Ascension Parish School Board*, this court similarly left open the question of whether Tinker applied to off-campus student speech. 393 F.3d 608, 615-16 n.22 (5th Cir. 2004) (student's sketch depicting violent siege on school was speech protected by the First Amendment and not "on-campus" speech subject to school regulation, where student had completed drawing in his home, stored it for two years, and never intended to bring it to campus, but rather stored it in closet where it remained until, by chance, it was unknowingly taken to school by his brother; but principal was not objectively unreasonable and therefore entitled to qualified immunity and plaintiff's claim against school officials in their official capacity was waived because plaintiff failed to brief the issue).

applied to a student's off-campus speech,[39] the summary-judgment evidence establishes that no

[39] The dissent erroneously contends that this court's decisions in *Sullivan v. Houston Independent School District*, 475 F.2d 1071 (5th Cir. 1973), and *Porter v. Ascension Parish School Board*, 393 F.3d 608, 615-16 n.22 (5th Cir. 2004), hold that *Tinker* applies to off-campus speech, such as Bell's. This is a patent misreading of those decisions. In *Sullivan*, the court did not apply the *Tinker* substantial-disruption test to assess whether school officials violated the First Amendment. The *Sullivan* court recognized that there is nothing per se unreasonable about requiring a high school student to submit written material to school authorities prior to distribution on campus or resulting in a presence on campus, and that it could not be seriously urged that the school's prior submission rule is unconstitutionally vague or overbroad. 475 F.2d at 1076 (citing *Shanley*, 462 F.2d at 960; *Pervis v. LaMarque Independent Sch. Dist.*, 466 F.2d 1054 (5th Cir. 1972)). Instead, the court held that the school principal had disciplined a student for failure to comply with the school's rules requiring prior submission to the school principal of all publications, not sponsored by the school, which were to be distributed on the campus or off campus in a manner calculated to result in their presence on the campus. *Id*. The student was disciplined for twice selling newspapers at the entrance of the school campus, to persons entering therein, without making prior submission of the papers, and for using profanity towards the principal ("the common Anglo-Saxon vulgarism for sexual intercourse") and in the presence of the principal's assistants (specifically, "I don't want to go to this goddamn school anyway"). *Id*. at 1074. Thus, notwithstanding the *Sullivan* court's references to *Tinker* in that decision, that opinion did not apply the *Tinker* substantial-disruption test to off-campus speech.

This court in *Porter* did not hold that the Tinker substantial-disruption test applies to off-campus speech. 393 F.3d at 615 n.22. The court concluded that the speech involved in *Porter—viz*., a drawing depicting school violence that was inadvertently taken to campus by the student's brother—constituted off-campus speech for which the *Tinker* substantial-disruption test did not apply. *Id*. at 615. The court found that the circumstances involved in Porter were "outside the scope" of those involved in other non-

substantial disruption ever occurred, nor does it "demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. Viewing the evidence in the light most favorable to the School Board, there was no commotion, boisterous conduct, interruption of classes, or any lack of order, discipline and decorum at the school, as a result of Bell's posting of his song on the Internet. *Cf. Shanley*, 462 F.2d at 970 ("Disruption in fact is an important element for evaluating the reasonableness of a regulation screening or punishing student expression."). Indeed, the School Board's

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Fifth Circuit cases which have held that in certain situations off-campus speech that is later brought on campus may be subject to the Tinker substantial-disruption analysis. *Id*. at 615 n.22. In *dicta*, the court acknowledged those other cases applying Tinker to certain categories of off-campus speech and noted that its "analysis today is not in conflict with this body of case law." *Id*. However, given the facts before it, the *Porter* court was not in a position to decide whether, and under what circumstances, *Tinker* applied to off-campus speech.

Thus, contrary to the dissent's assertion, the applicability of the Tinker substantial-disruption test to off-campus speech like Bell's remains an open question in this circuit. However, as explained herein, we need not resolve that consequential question because the School Board did not demonstrate that Bell's song caused or reasonably could have caused a substantial disruption. In so doing, we are guided by the "'older, wiser judicial counsel 'not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Pearson v. Callahan*, 555 U.S. 223, 241 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 388(2007) (Breyer, J., concurring); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)); *see also Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

inability to point to any evidence in the record of a disruption directly undermines its argument *and* the district court's conclusion that the summary-judgment evidence supports a finding that a substantial disruption occurred or reasonably could have been forecasted. At the preliminary injunction hearing, Wildmon explained that his students "seem[ed] to act normal" after the posting of the song, and Rainey testified that most of the talk amongst students had not been about Bell's song but rather about his suspension and transfer to alternative school. No evidence was offered that Bell or any other student listened to the song on campus, aside from the single instance when Wildmon had a student play the song for him on his cellphone. The only particularized evidence [40] of a purported disruption that the defendants or the district court identified as stemming from Bell's song was that Rainey and Wildmon have altered their teaching styles in order to ensure they are not perceived as engaging in inappropriate conduct with female students.[41] However, the teachers' alteration of their teaching styles in order to avoid accusations of

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[40] Defendants point to Rainey's claim that "since the song came out, students have started to mingle [in the gym]" as evidence of a substantial disruption. However, there is no evidence that the student's mingling was improper or anything but a coincidence, nor is there evidence that such student "mingling" could reasonably be considered a substantial or material disruption.

[41] At the preliminary-injunction hearing on March 10, 2011, Superintendent McNeece, when asked directly if she was aware of any disruption, could point only to the evidence that teachers had altered their teaching style in response to Bell's song, which both Wildmon and Rainey explained was an effort to avoid any appearance of impropriety with students. As explained herein, teachers' efforts to avoid the appearance of such improprieties does not constitute a "substantial disruption" of school work or discipline under the *Tinker* standard.

sexual harassment does not constitute the material and substantial disruption of school work or discipline that would justify the restriction of student speech under *Tinker*.

Furthermore, even if we were to credit the School Board's unsupported assertion that it indeed forecasted a disruption as a result of Bell's song,[42] the summary-judgment evidence nevertheless shows that there are no facts that "might reasonably have led" the School Board to make such a forecast. *Tinker*, 393 U.S. at 514. The summary-judgment evidence conclusively shows that Bell's song was composed, recorded, and posted to the Internet entirely off campus. School computers blocked Facebook and school policy prohibited possession of telephones, thus diminishing the likelihood that a student would access the song on campus. Moreover, as discussed at greater length *infra*, the violent lyrics contained in Bell's song were plainly rhetorical in nature, and could not reasonably be viewed as a genuine threat to the coaches, as underscored by the Disciplinary Committee's own determination that whether Bell's song constituted a threat was "vague."

As we have emphasized, the facts simply do not support a conclusion that Bell's song led to a substantial disruption of school operations *or* that school officials reasonably could have forecasted such a disruption. Nevertheless, in support of its argument that the School Board acted in accordance with *Tinker*,

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[42] Although it may not be dispositive, we observe that none of the school personnel even mentioned the term "disruption" at the January 26, 2011 Disciplinary Committee hearing; and there is no evidence reflecting that the School Board in its ruling on February 7, 2011 found that a disruption occurred or reasonably could have been forecasted as a result of Bell's song.

the dissent relies upon the School Board's policy of classifying threats, harassment, and intimidation of teachers as a "severe disruption."[43] Under the dissent's deferential view, certain categories of speech can be "inherently disruptive" within the meaning of *Tinker* so long as school officials categorize them as such by their own *ipse dixit* (such as the School Board's "Severe Disruption" policy), thus rendering unnecessary any meaningful inquiry into whether the speech *in fact* did, or reasonably could, cause a substantial disruption as required by *Tinker*. Contrary to the dissent's argument, the School Board cannot carry its burden of demonstrating a substantial disruption or a reasonable forecast of one simply by relying on its own policy or regulation. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *Barnette*, 319 U.S. at 637. "The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." *Goss*, 419 U.S. at 574. Moreover, *Tinker* held that school officials cannot circumvent their burden of showing that a substantial disruption occurred, or can be reasonably forecasted, by simply adopting a policy that categorizes certain speech as a severe or substantial disruption without any reasonable factual predicate that such speech would likely lead to substantial disruption of school

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[43] This policy lists sixteen different "offenses" under the heading "Severe Disruptions." We note that, by its very terms, the other "offenses" qualifying as "severe disruptions" under this policy suggest that the policy relates to on-campus conduct (e.g., "running in the hall," "unnecessary noise in the hall," "gambling or possession of gambling devices at school"), not to off-campus conduct, like Bell's.

work or discipline. *Tinker*, 393 U.S. at 504, 511 (holding that school officials could not adopt and enforce policy prohibiting students from wearing armbands without a showing that such regulation was necessary to avoid material or substantial disruption); *accord Shanley*, 462 F.2d at 970 (A[T]he board cannot rely on *ipse dixit* to demonstrate the 'material and substantial' interference with school discipline. Put another way, *Tinker* requires that presumably protected conduct by high school students cannot be prohibited by the school unless there are '. . . facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'") (quoting *Tinker*, 393 U.S. at 514).

B.

The School Board alternatively and erroneously attempts to invoke this court's decision in *Ponce v. Socorro Independent School District*, 508 F.3d 765 (5th Cir. 2007), in arguing that Bell's off-campus, but online, rap was not protected by the First Amendment. In *Ponce*, this court analogized to the Supreme Court's decision in *Morse* [44] and narrowly held that a student's

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[44] *In Morse*, a high school student unfurled a 14-foot banner bearing the phrase "BONG HiTS 4 JESUS" during a school-sanctioned and supervised event. 551 U.S. at 397. The principal confiscated the banner and suspended the student. *Id*. at 398. The student filed suit under 42 U.S.C. ' 1983 against the principal and the School Board, claiming that the principal's actions violated his First Amendment rights. *Id*. at 399.

The Morse decision resulted in a narrow holding: a public school may prohibit student speech at school or at a school-sponsored event during school hours that the school "reasonably view[s] as promoting illegal drug use." *Id*. at 408. Indeed, Justice Alito's concurrence stated that he joined the majority opinion "on

notebook which contained his plans to commit a coordinated "Columbine-style" shooting attack on his high school and other district schools was not protected by the First Amendment. *Id*. at 771 n.2. *Ponce* involved particularly egregious facts: a student brought to campus a notebook containing numerous violent and disturbing descriptions of campus violence evocative of the school shootings that have taken place across the country in recent years. We explained that we were following the lead of the Supreme Court in *Morse* in holding that such speech is not protected because it poses a direct and demonstrable threat of violence unique to the school environment. [45] Specifically, we observed: "If school administrators are permitted to prohibit student speech that advocates illegal drug use because 'illegal drug use presents a

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the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." *Id*. at 422 (Alito, J., with whom Justice Kennedy joins, concurring). Justice Alito also made clear that he joined the majority only insofar as "the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions" beyond those articulated in the Supreme Court's prior student speech cases. *Id*. at 423. As made strikingly clear by Justice Alito's concurrence, *Morse* therefore in no way expands school officials' authority to restrict student speech on social or political matters; rather, the decision held only that schools have the limited authority to restrict speech at school or a school-approved event that could be reasonably viewed as promoting illegal drug use.

[45] The court observed: "Such shootings exhibit the character that the concurring opinion [in *Morse*] identifies as particular to schools. . . . This environment makes it possible for a single armed student to cause massive harm to his or her fellow students with little restraint and perhaps even less forewarning."

grave and in many ways unique threat to the physical safety of students,' . . . then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole." *Id*. at 771-772 (quoting *Morse*, 551 U.S. at 425).

Reading Justice Alito's concurring opinion, in which Justice Kennedy joined, as controlling in *Morse*, we recognized that *Morse* holds only that "speech advocating a harm that is demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students arising from the school environment is unprotected." *Id*. at 770. However, we observed that "because this is a content-based regulation, the [Alito] concurring opinion is at pains to point out that the reasoning of the court cannot be extended to other kinds of regulations of content, for permitting such content-based regulation is indeed at 'the far reaches of what the First Amendment permits.'" *Id*. (quoting *Morse*,551 U.S. at 425 (Alito, J., concurring)). As a result, we recognized, consistent with Justice Alito's concurrence, that "*Tinker*'s focus on the result of speech rather than its content remains the prevailing norm." *Id*.

Ponce therefore narrowly extends *Morse* in holding that the *Tinker* analysis does not apply to speech brought to campus that "gravely and uniquely threatens violence, including massive deaths, to the school population as a whole." *Id*. at 772. At the same time, the *Ponce* opinion explicitly recognizes the continued applicability of the *Tinker* substantial-disruption test for most other types of on-campus speech. *Id*. at 770. Furthermore, *Ponce* also recognizes that, according to Justice Alito's controlling concurring opinion, *Morse*

does not expand schools' authority to restrict on-campus speech on social or political matters. *Id*. at 769-70.

Applying these principles to the instant case, Bell's song cannot be considered to fall within the narrow exception to *Tinker* recognized by this court in *Ponce*, thus depriving his speech of First Amendment protection. As an initial matter, *Ponce* did not involve student speech occurring entirely off-campus; rather, the student in *Ponce* brought his threatening diary to campus and showed its contents to a classmate. *Id*. at 766. More importantly, however, the *Ponce* decision explicitly pivoted on the particularized and unique threat of grave harm of mass school shootings posed by that student's private writings. *Id*. at 771. Indeed, the student's notebook graphically detailed the group's "plan to commit a '[C]olumbine shooting' attack" at the student's school, as well as other area schools. *Id*. In holding such speech unprotected by the First Amendment, the court in *Ponce* emphasized that its decision was based on the fact that "the speech in question . . . is not about violence aimed at specific persons, but of violence bearing the stamp of a well-known pattern of recent historic activity: mass, systematic school-shootings in the style that has become painfully familiar in the United States." *Id*. at 770-71. In sharp contrast, Bell's song contains violent imagery typical of the hyperbolic rap genre that is "aimed at specific persons," rather than "bearing the stamp of . . . mass, systematic school-shootings." *Id*. Furthermore, the song amounts only to a rhetorical threat—not a genuine one—and does not come close to the catastrophic facts threatened in *Ponce*, which Judge Jolly emphasized were evocative of a "Columbine" or "Jonesboro"-style school attack. *Id*. at 771. Indeed, Bell testified that he did not intend to threaten the two coaches with his rap song; rather, the song was

meant to be an artistic expression that reflected Bell's real-life experiences and to raise awareness of an important issue of concern that he felt would be ignored by school officials.[46] Itawamba school officials' own actions demonstrate that they did not consider Bell's song to portend violence by him personally, much less mass school shootings as dealt with in *Ponce*. 508 F.3d at 772. For example, the Disciplinary Committee could not even conclude whether Bell's song constituted a definite threat to school officials, and there is no evidence that school officials ever contacted law enforcement regarding Bell's song. In fact, after initially informing Bell that he was suspended pending the outcome of the disciplinary hearing, school officials did not require Bell to immediately vacate the school, and he remained in the school commons until his school bus arrived at day's end. Moreover, any purported threat contained in Bell's song was certainly a far cry from the "'terroristic

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[46] We note that Bell's rap song is speech on a matter of public concern. Speech involves matters of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Snyder v. Phelps*,131 S. Ct. 1207, 1216 (2011) (citation omitted). The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id*. (citation omitted). Superintendent McNeece's own testimony at the preliminary injunction hearing explicitly confirmed that the subject matter of Bell's song—male coaches' improper conduct towards female students—would be of "public importance." We need not address the district court's disparagement of student speech on matters of public concern, as compared to adult speech on matters of public concern, *Bell*, 859 F. Supp.2d at 841, because that was part of that court's erroneous interpretation and application of *Tinker* which we reject herein.

threat' to the safety and security of the students and the campus" that the school officials encountered in *Ponce*. *Id*. at 767. We therefore refuse to broadly extend the holding of *Ponce* by concluding that Bell's song is the equivalent of the extremely threatening notebook created and brought to school by the student in that case.

C.

The School Board's additional argument that Bell's rap song falls within the "true threat" exception to the First Amendment is likewise meritless. As explained *infra*, Bell's rap was not a plainspoken threat delivered directly, privately, or seriously to the coaches but, rather, was a form of music or art broadcast in a public media to critique the coaches' misconduct and also in furtherance of Bell's musical ambitions. Moreover, Bell's rap was not an unconditional threat that Bell himself would physically harm the coaches; at most, the song amounted to a conditional warning to them of possible harm from the female students' family members if they continued to harass the young women. Finally, as evidenced by the reactions of the listeners themselves, there was no reasonable or objective ground for the coaches to fear that Bell personally would harm them.

The protections that the First Amendment affords speech and expressive conduct are not absolute. *Virginia v. Black*, 538 U.S. 343, 358 (2003). The Supreme Court has long recognized that the government may regulate certain unprotected categories of expression consistent with the Constitution. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). One such category of unprotected speech is that which constitutes a "true threat." *Watts v. United*

States, 394 U.S. 705 (1969). "' True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359 (citing *Watts*, 394 U.S. at 708).

In *Watts*, the petitioner was convicted of violating a 1917 statute which prohibits a person from "knowingly and willfully" making "any threat to take the life of or to inflict bodily harm upon the President of the United States." *Id*. (*citing* 18 U.S.C. § 871(a)). As the *Watts* Court explained:

> The incident which led to petitioner's arrest occurred on August 27, 1966, during a public rally on the Washington Monument grounds. The crowd present broke up into small discussion groups and petitioner joined a gathering scheduled to discuss police brutality. Most of those in the group were quite young, either in their teens or early twenties. Petitioner, who himself was 18 years old, entered into the discussion after one member of the group suggested that the young people present should get more education before expressing their views. According to an investigator for the Army Counter Intelligence Corps who was present, petitioner responded: 'They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. 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 makeme kill my black brothers.' On the

> basis of this statement, the jury found that petitioner had committed a felony by knowingly and willfully threatening the President.

Id. at 705-06 (emphasis added).

On petition for writ of certiorari, the Supreme Court reversed, observing that "whatever the 'willfullness' requirement [of the statute] implies, the statute initially requires the Government to prove a true 'threat.'" Id. at 708. The Court held that the "kind of political hyperbole" deployed by the petitioner could not qualify as a "true threat" in light of the "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Id*. (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). In this regard, the Court observed that "[t]he language of the political arena, like the language used in labor disputes . . . is often vituperative, abusive, and inexact." *Id*. (citing *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58 (1966). The Court concluded: "We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id*.

Applying the factors identified as instructive by the Court in *Watts—i.e*., the context and manner of the speech, its conditional nature, and the listeners' reactions, it is clear that the rap song that Bell recorded in a professional studio and subsequently posted on the Internet in protest of what he perceived

as an injustice occurring at his high school did not constitute a "true threat."

First, with regard to context, it is important to consider—albeit not ultimately dispositive—that the purported "threats" were contained in a rap song, a musical genre that, like other art forms, has its own unique artistic conventions. [47] *See Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1078 (9th Cir. 2002) ("Indeed, context is critical in a true threats case and history can give meaning to the medium."). For example, hyperbolic and violent language is a commonly used narrative device in rap, which functions to convey emotion and meaning—not to make real threats of violence. *See, e.g.,* Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 22 (2007) ("Metaphor plays a critical role in rap music lyrics . . . . In rap music, metaphors not only express hope and positivity but also 'despair, stagnation, or destruction.'") (internal citation omitted). Of course, the use of violent rhetorical imagery in music is not exclusive to rap. Presumably, neither the School Board nor the dissent would believe that Johnny Cash literally "shot a man . . . just to watch him die." Nor would they likely conclude that the Dixie Chicks' hit song "Goodbye Earl" described the artists' own literal pre-meditated murder of a man using poisonous black-eyed peas, or that Bob Marley "shot the sheriff" but spared the deputy's life. Indeed, as songwriters of every genre, rap artists live through invented characters and explore roles and narrative voices, both

[47] *See* Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 20 (2007).

on and offstage.[48] In addition, the context-related evidence demonstrates that Bell, as an aspiring rap musician who has been writing and recording music since his early teens, publicized the song not only in an effort to raise awareness of the coaches' misconduct but also to attract the attention of record labels and potential fans.

Equally important to the context of Bell's rap is the fact that it was broadcast publicly over the Internet and not conveyed privately or directly to the coaches. Courts have recognized that statements communicated directly to the target are much more likely to constitute true threats than those, as here, communicated as part of a public protest.[49] *Compare Watts*,

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[48] In this regard, contrary to the dissent's argument, Bell's statement that his song reflected "real-life" experience, does not mean his lyrics are all literally true, rather than, in part, rhetorical and creative.

[49] In *Porter*, this circuit cited *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002), in analyzing the threshold issue of the "true threat" analysis, namely: whether the purported threat was "intentionally or knowingly *communicated* to either the object of the threat or a third person." 393 F.3d at 616-17. In *Doe*, the Eighth Circuit also listed five non-exhaustive factors relevant to the issue of how a reasonable person would receive an alleged threat. 306 F.3d at 623. One of those factors was "whether the person who made the alleged threat communicated it directly to the object of the threat." *Id*. The Eighth Circuit also considered the reactions of those who heard the threat, whether the threat was conditional, whether the speaker had a history of making threats against the object of the threat, and whether the object of the threat had reason to believe that the speaker had a violent tendency. *Id*. We observe that all of these factors weigh in favor of the conclusion that Bell's song was not a "true threat." For example, as explained *infra*, the warning in Bell's song was clearly conditional in nature, and

394 U.S. at 705-06 with *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996). The case law shows that "it makes a big difference" whether the purportedly threatening speech is "contained in a private communication—a face-to-face confrontation, a telephone call, a dead fish wrapped in newspaper—or is made during the course of public discourse. The reason for this distinction is obvious: Private speech is aimed only at its target. Public speech, by contrast, seeks to move public opinion and to encourage those of like mind." *Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1099 (9th Cir. 2002) (Kozinski, J. dissenting). Indeed, as the Sixth Circuit recently observed, such contextual cues are vital in assessing whether a reasonable listener would consider a statement a serious expression of an intent to cause harm: "A reasonable listener understands that a gangster growling 'I'd like to sew your mouth shut' to a recalcitrant debtor carries a different connotation from the impression left when a candidate uses those same words during a political debate. And a reasonable listener knows that the words 'I'll tear your head off' mean something different when uttered by a professional football player from when uttered by a serial killer." *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012). Moreover, the Supreme Court has cautioned that courts should be careful to keep in mind the "public" nature of purportedly threatening speech in assessing whether it falls outside the protections of the First Amendment. *See, e.g., N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27 (1982) ("Since respondents would impose liability on the

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there was no evidence Bell had violent tendencies or had ever threatened the coaches.

basis of a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment—we approach this suggested basis of liability with caution.").

Likewise, in the instant case, the overall context reveals that a reasonable listener would be able to distinguish genuine threats of perpetrating school violence, like those in *Ponce*, from the purely rhetorical use of violent language contained in the lyrics of an aspiring rap musician who publicly broadcast his song, rather than privately communicated it, in an effort to (i) raise awareness of an important issue of public concern, and (ii) attract the attention of listeners and record labels in furtherance of his musical ambitions.

Second, the purported "threats" contained in the song are conditional in nature, as demonstrated by both the lyrics themselves and the school officials' interpretation of them. The language referencing "capping" Wildmon is conditional by its very terms: "Middle fingers up *if* you want to cap that nigga" (emphasis added). Moreover, one of the Disciplinary Committee members agreed with Bell that the song's lyrics regarding putting a pistol down someone's mouth conveyed that "if [the teachers] don't stop what they're doing then a parent kinda is gonna do that, not really him [*i.e.*, Bell]."

Third and finally, the reactions of the listeners themselves undermine the notion that a reasonable listener would view the song as a threat. For example, the Facebook screen shot indicates that Bell's Facebook "friends" who commented on the song did not view it as a threat by Bell against the coaches but rather as the product of Bell's artistic aspirations (*e.g.*, "Hey, don't forget me when you're famous" and "Lol . . . Mane Im tellin you cuz . . . been tellin you since we

was little . . . keep fuckin with it man you got all the talent in the world . . .”). Moreover, the Disciplinary Committee could not even conclude whether Bell’s song constituted a definitive threat, instead finding the issue “vague,” and Coach Rainey himself testified that he viewed the song as “just a rap” rather than an actual threat. Even Coach Wildmon, who testified that he took the song “literally” and felt “scared,” did not indicate whether he actually feared Bell, rather than the possibility that one of the female students’ family members might harm him in light of the song’s revelations.

As the foregoing demonstrates, the overall factual context reveals that neither the coaches, nor school officials, could have reasonably interpreted Bell’s song as a serious expression of an intent to cause harm. Rather, we conclude that the violent language contained in the lyrics was clearly rhetorical in nature, and we therefore reject the argument that Bell’s song constituted a “true threat” of violence.[50]

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[50] Perhaps correctly realizing that the School Board cannot overcome the high hurdle of showing Bell’s song constituted a “true threat,” the dissent seeks to talismanically invoke the tragic history of mass school shootings in an effort to shield the School Board’s actions from any modicum of constitutional scrutiny. We reject the dissent’s overly deferential approach. Although the history of violence in schools may be a pertinent consideration in determining whether school officials acted reasonably, school officials cannot simply shirk constitutional dictates by pointing to a school tragedy each time a student sings, writes, or otherwise uses violent words or imagery outside of school.

Moreover, while conceding that Bell’s song addresses a matter of public concern, the dissent does not give due consideration to the consequences on social and political discourse of reflexively deeming Bell’s song a “true threat.” The genius of the First Amendment is its implicit recognition that the great diversity of

IV.

In conclusion, we do not decide whether the *Tinker* "substantial-disruption" test can be applied to a student's rap song that he composed, recorded and posted on the Internet while he was off campus during non-school hours. Rather, we decide only that, even assuming *arguendo* the School Board could invoke

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our democracy yields a corresponding diversity in the creative forms of social and political debate. *See, e.g., Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) ("Under our Constitution, esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.") (internal quotation and citation omitted); *Cohen v. California*, 403 U.S. 15, 25 (1971) (observing that "one man's vulgarity is another's lyric"). A cartoon can be as powerful as a pamphlet. S*ee Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988); *accord Brown*, 131 S. Ct. at 2733 ("Like the protected books, plays, and movies that preceded them, video games communicate ideas-and even social messages-through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)."). The most vulgar and hateful of words can be the only ones capable of conveying one's ideology. *See Snyder*, 131 S. Ct. at 1216-17. Within this same tradition, Bell accomplished his social critique of the coaches' harassment of female students by including vulgar and violent language in his off-campus rap recording. *Compare Watts*, 394 U.S. at 708 ("The language of the political arena, like the language used in labor disputes . . . is often vituperative, abusive, and inexact."). While some may prefer a socio-political landscape lacking such rhetoric, the First Amendment nevertheless protects it, and the narrow applicability of the "true threat" doctrine ensures that speech on such matters of public concern, even if vulgar or violent, is not chilled. *See id*. at 706 (holding that petitioner's statement at a public rally that, if drafted and given a rifle, he would shoot the President was political hyperbole and not a "true threat" and was, therefore, protected by the First Amendment).

Tinker in this case, it would not afford the School Board a defense for its violation of Bell's First Amendment rights because the evidence does not support a finding, as would be required by *Tinker*, that Bell's song either substantially disrupted the school's work or discipline or that the school officials reasonably could have forecasted such a disruption. With respect to the School Board's alternative argument, we conclude that Bell's song did not "gravely and uniquely threaten violence" to the school population such to justify discipline pursuant to this court's narrow holding in *Ponce* that student speech that threatened a Columbine-style attack on a school was not protected by the First Amendment. We also conclude that Bell's speech did not constitute a "true threat," as evidenced by, *inter alia*, its public broadcast as a rap song, its conditional nature, and the reactions of its listeners.

For these reasons, the district court's judgment is REVERSED IN PART, and judgment is RENDERED in favor of Taylor Bell against the School Board on his First Amendment claim. The case is REMANDED, and the district court is DIRECTED to award Bell nominal damages, court costs, appropriate attorneys' fees, and an injunction ordering the School Board to expunge all references to the incident at issue from Bell's school records. In all other respects, the judgment of the district court is AFFIRMED IN PART.

RHESA HAWKINS BARKSDALE, Circuit Judge, concurring in part and dissenting in part.

The majority's long-overdue opinion (oral argument was held over two years ago, on 3 December 2012), reviews cross-motions for summary judgment. I concur, of course, in the majority's holding that the substantive-due-process claim by Taylor Bell's mother is waived and that qualified immunity precludes liability against the superintendent and principal in their individual capacities, leaving at issue only Bell's First Amendment claim against the school board. *Maj. Opn*. at 2 n.1. I must dissent, however, from the majority's both vacating the summary judgment for the school board on that claim and rendering summary judgment for Bell on it. (Assuming *arguendo* the school board is not entitled to summary judgment, Bell is not entitled to it either.) Regarding the First Amendment claim, except for the intentionally published threats to, and harassment and intimidation of, two teachers, which the school board found justified disciplinary action against Bell, I will not take issue with the majority's categorizing at 30, in note 46, the miniscule balance of Bell's incredibly violent, vulgar, and profane rap recording as involving "a matter of public concern".

"With the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights." *Wynar v. Douglas Cnty. Sch. Dist*., 728 F.3d 1062, 1064 (9th Cir. 2013). In that regard, school administrators must be afforded wide latitude in proactively addressing language that reasonably could be interpreted as a threat, harassment,

or intimidation against members of the school community.

"Experience shows that schools can be places of special danger." *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring). For example, 11 days after oral argument in our court for this appeal on 3 December 2012, a 16-year-old entered Sandy Hook Elementary School, in Newtown, Connecticut, and shot and killed 20 school children and six staff members, including the principal, before killing himself. In the two years since the Sandy Hook shooting, in the United States there have been 93 school shootings (defined as instances of the discharge of a firearm on campus) and 40 major school shootings (defined as an incident where the shooter was linked to the school and at least one person was shot on campus), including the most recent incidents at Florida State University, where a former student opened fire on students in the library, and at Marysville-Pilchuck High School outside Seattle, Washington, where a student killed four fellow students, before killing himself. Greg Botelho, Faith Karimi, & Nick Valencia, *Gunman opens fire in Florida State University library; 3 wounded*, CNN, 21 Nov. 2014, available at http://www.cnn.com/2014/11/20/us/fsu-incident/; Faith Karimi & Joe Sutton, *4th Victim dies after shooting at high school cafeteria in Washington state*, CNN, 8 Nov. 2014, available at http://www.cnn.com/2014/11/08/us/washington-school-shooting/index.html; Matt Kreamer, *2 dead, 4 wounded in shooting at Marysville-Pilchuck High School*, The Seattle Times, 24 Oct. 2014, *available at* http://blogs.seattletimes.com/today/2014/10/shooting-reported-at-Marysville-pilchuck-high-school/; *School Shootings in America Since Sandy Hook*, We Are Everytown for Gun Safety (3 Dec. 2014), http://everytown.org/article/

schoolshootings/; *see also Spinning Statistics on School Shootings*, FactCheck.org (25 June 2014), http://www.factcheck.org/2014/06/spinning-statistics-on-school-shootings/. Tragically, this post-oral-argument school-related violence is consistent with the increasing school-related violence prior to the date of oral argument here. From 19 February 1997 (the day a 16-year old shot and killed a student and principal, and injured two others in Bethel, Alaska) to the date the school board found against Bell on 7 February 2011, there were 171 school shootings (including those in Pearl, Mississippi, Littleton, Colorado (Columbine), and Blacksburg, Virginia (Virginia Tech)). *Major School Shootings in the United States Since 1997*, Brady Campaign to Prevent Gun Violence (17 Dec. 2012), http://gunviolence.issuelab.org/resource/major_school_schootings_in_the_United_States_since_1997. For example, on 6 February 2011, the day before the school-board meeting concerning Bell, one student was killed and 11 others were injured during a shooting at Youngstown State University in Ohio. *Id*.

As evidence of this disturbing trend of school violence, each State in our circuit has passed legislation addressing such violence since the Sandy Hook shooting. *See* Nathan Koppel, *More Texas Schools Allow Armed Employees*, Wall Street Journal, 25 Aug. 2014, *available at* http://online.wsj.com/articles/more-texas-schools-allow-armed-employees-1408986620. Louisiana has passed legislation changing/expanding emergency preparedness drills; Mississippi and Texas have passed legislation allowing the addition of school police or security officers; and Texas has also passed legislation allowing certain personnel to carry firearms on school grounds, and authorizing state-funded school safety centers. *Id*. Symptomatic of how commonplace violence at schools has become, six States

"mandate active shooter drills for schools", designed to simulate mass shooting situations, while 24 States "requir[e] general school lockdown or safety drills". Dan Frosch, *'Active Shooter' Drills Spark Raft of Legal Complaints*, Wall Street Journal, 4 Sept. 2014, *available at* http://online.wsj.com/articles/active-shooter-drills-spark-raft-of-legal-complaints-1409760255.

Meanwhile, nearly all teenagers use the Internet, with the majority of them accessing it and social-networking websites through mobile devices. Amanda Lenhart, Presentation, PewResearch Internet Project, *Teens & Technology: Understanding the Digital Landscape* (25 Feb. 2014), http://www.pewinternet.org/2014/02/25/teens-technology-understanding-the-digital-landscape/ (explaining 95 percent of teenagers use the Internet and 74 percent of teenagers between 12 and 17 years old are mobile Internet users); *see also* Amanda Lenhart, Presentation PewResearch Internet Project, *It Ain't Heavy, It's My Smartphone: American Teens & The Infiltration Of Mobility Into Their Computing Lives* (14 June 2012), http://www.pewinternet.org/2012/06/14/it-aint-heavy-its-my-smartphone-american-teens-and-the-infiltration-of-mobility-into-their-computing-lives/(explaining, as of 2012, 80 percent of teenagers used social-networking websites). Commonly used social-media websites include Facebook (provides a litany of social services such as "news feed", personalized "profile" and instant-messaging), Twitter (allows users to "tweet" statements up to 140 characters, and view others' "tweets", in personalized feed), Instagram (allows users to post, and view others', pictures, in personalized feed), Snapchat (allows users to send personalized pictures to others while limiting time users may view an image), and Pinterest (allows users to post and group pictures or webpages to their profile). As a result

of this "near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable" for school officials to foresee a substantial disruption to the school environment. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 950 (3d Cir. 2011) (Fisher, J., dissenting).

"[A] page of history is worth a volume of logic". *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.); *see also* Oliver Wendell Holmes, Jr., The Common Law 5 (1881) ("The life of the law has not been logic: it has been experience."). In the light of such use of social media by students and the oft-repeated school violence before and after the school board's finding against Bell, school administrators must remain vigilant as they seek to prevent violence against students and faculty. As part of this vigilance, they must take seriously any statements by students resembling threats of violence, as well as intimidation and harassment by them. Long ago, Justice Jackson warned: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact". *Terminiello v. City of Chicago,* 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). That warning applies to the result-driven majority opinion.

Throughout its opinion, the majority attempts to camouflage Bell's threats, intimidation, and harassment under the guise of "rap music". For this red herring, in classifying Bell as an "aspiring rap musician", *e.g.*, at 3, 34, 35, and note 21 at 7, the majority hopes characterizations and euphemistic descriptions will distract from the patent seriousness of Bell's aggressive and dangerous comments. Whether Bell

was "rapping", singing country music, or reading poetry is immaterial; he threatened, intimidated, and harassed two teachers. At issue is the message, not the medium.

Regrettably, although the majority pays lip service to the increasing danger in schools, it then sanctions the threats, harassment, and intimidation in the rap recording, including by turning its back on the deference that must be accorded school administrators in dealing with such serious matters. Among other threatening, harassing, and intimidating statements, Bell's rap recording includes: "I'm going to hit you with my [R]ueger [sic]"(referring to a firearm manufactured by Sturm, Ruger & Co.), "going to get a pistol down your mouth /Boww" (or "Pow"), and "middle fingers up if you want to cap that nigga" ("cap" is slang for "shoot"). To hold, as the majority does, that these and similar statements in the rap recording are protected speech is beyond comprehension. With due deference, the majority's holding is absurd. This cannot be the law.

I.

A correct recitation of the underlying facts, from the summary-judgment record, is especially important for this appeal. The majority opinion fails in that regard. For example, it often states that Bell "testified", without specifying whether it was during the disciplinary-committee hearing (at which his informal comments were not under oath) or at the hearing on his request for a preliminary injunction. *E.g., Maj. Opn*. at 3, 8, 9, and in note 3 at 3.

Bell posted the rap recording on 5 January 2011 to his public Facebook page, using what appears to be a representation of a Native American as the rap

recording's cover image. (The Itawamba Agricultural High School mascot is a Native American.) A screenshot of Bell's Facebook profile, taken approximately 16 hours after he posted the rap recording, shows his profile, including the rap recording, was open to, and viewable by, the public. In other words, anyone could access and listen to the rap recording.

Additionally, although the majority claims at 7, in note 21, that there is no evidence identifying Bell's Facebook "friends", or whether any attended his school, when viewing a person's profile, Facebook shows ten randomly selected friends. In this instance, three of those friends were self-identified members of the Itawamba school district.

The following school day, on 6 January, Coach W. received a text message from his wife, asking about the rap recording; she had learned about it from a friend. The coach listened to the rap recording at school, using a student's cellular telephone, which had access to the Internet. The coach immediately reported the rap recording to the school's principal, Wiygul, who then informed McNeece, the school-district superintendent.

On 7 January, Wiygul, McNeece, and Floyd (the school-board attorney) questioned Bell about the rap recording and its accusations, after which Bell was sent home for the remainder of the day. Because of snow days, the school was closed through 13 January.

During his time away from school, and to give far wider dissemination of his rap recording, Bell created a finalized version of it (adding commentary and a picture slideshow), and uploaded it to YouTube, again making the rap recording available to the public.

Bell returned to school on 14 January, but was removed from class midday by the assistant principal and told he was suspended, pending a disciplinary-committee hearing (school officials permitted him to remain in the school commons until the school bus he rode arrived at the end of the day). By letter that same day to Bell's mother, the school-district superintendent (McNeece) informed her a hearing would be held on 19 January to consider disciplinary action for Bell's "alleged threatening intimidation and/or harassment of one or more school teachers". In the letter, McNeece explained Bell's suspension would continue until further notification, and informed his mother of the possible actions the school board could take.

In an 18 January telephone conversation with the school-board attorney, Bell's mother requested Bell's hearing be continued until 26 January. The school-board attorney re-set the hearing for the requested date.

The disciplinary-committee hearing was held 26 January. Although there is no transcript of the hearing, the recording of it is included in the summary-judgment record. The information contained in the disciplinary-committee-hearing recording more than justified the subsequent action taken by the school board. The disciplinary-committee-hearing recording is the critical evidence at hand, making it necessary to describe the contained information in great detail.

The hearing was facilitated by Floyd, the school-board attorney; three disciplinary-committee members were present, as well as the principal, Bell, his mother, and their attorney. The school-board attorney began by addressing the informal nature of the hearing. And, throughout the hearing, the school-board attorney

emphasized the issue before the committee was whether Bell threatened, harassed, and/or intimidated school personnel and whether he should be disciplined as a result. The school-board attorney explained that the allegations against the two coaches would be the subject of another proceeding. (The majority fails at 10, in note 25, to include this explanation in its discussion of Bell's attorney's attempting, at the disciplinary-committee hearing, to inject students' allegations against the coaches.)

Wiygul, the principal, stated: Coach W. came into his office, explaining "several kids" were talking about a rap recording Bell had posted on Facebook, which was derogatory toward him and another coach, and accused them of inappropriate conduct; the following morning, Bell was brought into a meeting and asked about his accusations, but would not talk about them; at that time, school officials decided it was best to send Bell home for the remainder of the day; and Bell came to school the next school day (which, due to snow, was the following Friday), but the assistant principal told him to leave as he was suspended pending a hearing.

After Wiygul spoke, the YouTube version of the rap recording was played at the hearing.

Bell and his mother then stated that he was not told of the suspension until Friday (14 January), when the assistant principal saw Bell and contacted McNeece, the school-district superintendent, asking her what to do about Bell's presence. According to them, McNeece first instructed the assistant principal that Bell could stay, but then instructed him to tell Bell to leave and not come back.

Bell's attorney then began asking who decided on the temporary suspension and the reason for that decision. Floyd, the school-board attorney, redirected the discussion, explaining the purpose of the hearing was to determine whether the suspension should be upheld, and whether the allegations that Bell threatened, harassed, and intimidated teachers were correct.

One of the committee members asked Bell if he had spoken to anyone at the school about the accusations he made in the rap recording. Bell explained he did not speak to anyone about those accusations, but instead made the rap recording because he knew people were "gonna listen to it, somebody's gonna listen to it". (Several times during the hearing Bell acknowledged he posted the rap recording to Facebook because he knew it would be viewed and heard by students. Moreover, he explained that at least 2,000 people contacted him about the rap recording in response to the Facebook and YouTube postings.)

Although Bell's attorney tried to begin discussing the misconduct of the coaches alleged in the rap recording, the school-board attorney again redirected the conversation to the purpose of the hearing, which was, as she explained, to discuss the "comments made . . . the 'you've f—ed with the wrong one / going to get a pistol down your mouth / POW' [because] those are threats to a teacher".

Bell responded by stating, "Well that ain't really what I said", and then provided what he described as the "original copy". (It is unclear from the disciplinary-committee-hearing recording, or other parts of the summary-judgment record, which copy of the rap item Bell provided. There are three written versions of the rap item in the record. The first was submitted as an

exhibit by the school board with its response in opposition to Bell's motion for a preliminary injunction and used the word "ruler", instead of "rueger [sic]", following "I'm going to hit you with my. . .". The other two versions were exhibits introduced at the preliminary-injunction hearing. The second version was submitted by Bell and used the word "rueger [sic]". The third version is hand-written excerpts, submitted by the school board. During the preliminary-injunction hearing, the school board stipulated to the accuracy of Bell's transcription. Finally, the "rueger [sic]" and "ruler" versions were both re-submitted as exhibits with the cross-motions for summary judgment. The "rueger [sic]" version was submitted with Bell's motion for summary judgment as an exhibit, and the "ruler" version was submitted with the school-board's motion.)

Bell explained he did not mean he was going to shoot anyone, but that he was only "foreshadowing something that might happen". Nevertheless, Bell acknowledged that "certain statements" were made to his mother that "'put a pistol down your mouth'[,] that is a direct threat". Floyd, the school-board attorney, clarified for the record, and the mother agreed, that no one at the hearing made those statements to Bell's mother. Rather, those statements were made "outside the school setting".

One of the committee members asked Bell why he had posted a new version of the rap recording on YouTube after school officials had approached him about his posting the rap recording on Facebook. Bell gave a few (and somewhat conflicting) explanations: the version he posted on Facebook was a raw copy, so he wanted a finalized version posted on YouTube; the Facebook version was posted for his friends and

"people locally" to hear, whereas the YouTube version was for music labels to hear; and he posted the YouTube version with a slideshow of pictures to help better explain what the rap recording was about because people had been asking him about it (the Facebook version only included a brief explanation of the backstory in the caption to the rap recording).

Near the end of the disciplinary-committee hearing, Bell explained again that: he put the rap recording on Facebook and YouTube knowing it was *open to public viewing*; part of his motivation was to "increase awareness of the situation"; and, although he did not think the coaches would hear the rap recording and did not intend the rap recording to be a threat, he knew students would listen to the rap recording, later stating "students all have Facebook".

Throughout the hearing, the school-board attorney and committee members were very considerate toward Bell and counseled him on what appropriate action he could have taken. (Amazingly, one member even told Bell that he "really can rap" and explained there would have been no problem with the rap recording or its vulgar language if it had not included threats against school employees. The majority claims at 12, in note 29, that this committee member did not characterize Bell's statements as "threatening", and only admonished Bell for his word choice, "thus providing Bell poetic or artistic advice". Given that the disciplinary committee found Bell harassed and intimidated the coaches, while finding it was vague whether he threatened them, this distinction by the majority is wide of the mark. It is consistent with the majority's going to any extreme to avoid the obvious: that Bell threatened, intimidated, and harassed two teachers.) At the close of the disciplinary-committee hearing, the

school-board attorney emphasized, and Bell's attorney did not contest, that by posting the rap recording to an *open* Facebook page, Bell knew anyone could hear the rap recording.

By 27 January letter to Bell's mother, the school-board attorney advised: the disciplinary committee had determined "the issue of whether or not lyrics published by Taylor Bell constituted threats to school district teachers was vague", but that the publication of the rap recording constituted harassment and intimidation of two teachers, in violation of school-board policy and state law; as a result, the disciplinary committee recommended Bell's seven-day suspension be upheld and that he be placed in the county's alternative school for the remainder of the nine-week grading period; Bell would not be "allowed to attend any school functions and [would] be subject to all rules imposed by the Alternative School"; and "[he would] be given time to make up any work missed while suspended or otherwise receive a 0, pursuant to Board policy".

By 1 February letter, the school-board attorney confirmed to Bell's attorney the content of their 31 January conversation, during which Bell's attorney had stated: Bell wished to appeal the disciplinary-committee's recommendation; and Bell and his mother were expected to appear before the board on 7 February without counsel, because their attorney was unable to attend due to a scheduling conflict. The letter advised that, despite the recommendation that Bell begin alternative school on 27 January, he had not attended any classes and explained these absences would add to the length of time before he would be allowed to return to a regular classroom.

The only document in the record from the 7 February school-board meeting is the minutes of that meeting. They state: "Chairman Tony Wallace entertained a motion by Clara Brown to accept the discipline recommendation of the discipline committee regarding student with MSIS #000252815 (I.A.H.S.) and finding that this student threatened, harassed and intimidated school employees. Wes Pitts seconded the motion. Motion Carried Unanimously." (Subsequently, at the 10 March preliminary-injunction hearing, the school-board attorney testified that, at the 7 February school-board meeting, the board listened to a recitation of Bell's rap item.

The majority at 13, note 32, states the "record is unclear regarding the exact evidence presented to the School Board", but that the "Board's decision apparently was based on the same audio-recording of Bell's song heard by the Disciplinary Committee". The record is not "unclear". During the preliminary injunction hearing, the school-district's attorney asked McNeece, the school-district superintendent, "[T]he two lyrics that I've read into the record and these witnesses have read into the record, were presented to the school board, correct?", to which McNeece replied, "That's correct." Portions of the rap item read into the record include: "[G]oing to get a pistol down your mouth" and "Middle fingers up, if you want to cap that nigga". Therefore, it is not unclear what the school board considered. Furthermore, at the beginning of the preliminary-injunction hearing, Bell's attorney submitted as evidence the transcription of the rap item. As discussed *supra*, at that hearing, the school board accepted this transcription as "the correct version".)

By 11 February letter to Bell's mother, the school-board attorney explained that, contrary to the earlier-described lesser findings of the disciplinary committee (Bell had harassed and intimidated two teachers; but, whether he had made a threat was "vague"), the school board had determined: "Bell did threaten, harass and intimidate school employees in violation of School Board policy and Mississippi State Law". (According to the written school policy, "[h]arassment, intimidation, or threatening other students and/or teachers" constitutes a "severe disruption".) Notwithstanding the school board's determining Bell had engaged in conduct even more serious than that found by the disciplinary committee, the school board upheld the recommendations of the disciplinary committee.

On 24 February, Bell and his mother filed this action, claiming the school board, superintendent, and principal, *inter alia*, violated Bell's First Amendment rights. Plaintiffs moved for a preliminary injunction on 2 March, seeking Bell's immediate reinstatement to his high school, including the reinstatement of "all privileges to which he was and may be entitled as if no disciplinary action had been imposed", and that all references to this incident be expunged from his school records.

For the earlier-referenced 10 March hearing on the preliminary-injunction request, Bell included four affidavits from students at his school, containing allegations against the coaches. (The affidavits were not considered by the district court during the preliminary-injunction hearing.)

At the hearing, the superintendent testified that she had attended the school-board meeting at which Bell's rap item was presented; and that there was a

foreseeable danger of substantial disruption at the school as a result of the rap recording.

Both coaches accused and threatened in the rap recording testified at the preliminary-injunction hearing; each explained the rap recording affected their work at the school. Coach R. testified that, subsequent to the publication of the rap recording, students began spending more time in the gym, despite teachers telling them to remain in classrooms; and Coach W. testified that he interpreted the words in the rap recording literally and was frightened. (The majority at 24–25, in note 41, disputes the nature of the testimony by claiming the only evidence of a substantial disruption was the coaches' alteration of their teaching styles "to avoid any appearance of impropriety", and, at 36, seeks to diminish the importance of the testimony by stating Coach W. "did not indicate whether he actually feared Bell, rather than the possibility that one of the female students' family members might harm him in light of the song's revelations". This is incorrect. For example, as the majority admits at 14–15, Coach W. testified that, in addition to being frightened by the rap recording, he did not allow the members of the school basketball team he coached to leave after games until he was in his vehicle. Moreover, Coach W.'s testimony provides valuable insight into how an objectively reasonable person would interpret the threats in the recording.) At the hearing, the district court refused to entertain questioning on whether the allegations against the two coaches were true. After finding Bell's last day of alternative school would be the next day, 11 March, the district court ruled the issue was moot and denied the preliminary injunction.

On cross-motions for summary judgment, the district court denied Bell's motion and granted defendants' (the school board, superintendent, and principal). In doing so, it ruled the rap recording constituted "harassment and intimidation of teachers and possible threats against teachers and threatened, harassed, and intimidated school employees". *Bell v. Itawamba Cnty. Sch. Bd.*, No. 1-11-CV-56, order at 9 (N.D. Miss. 15 Mar. 2012). The court also held the rap recording "in fact caused a material and/or substantial disruption at school and . . . it was reasonably foreseeable to school officials the song would cause such a disruption". *Id*. Moreover, the court held: (1) the individual defendants were entitled to qualified immunity; and (2) Bell's mother could not show a violation of her Fourteenth Amendment rights. *Id*. at 12.

II.

As discussed above, the majority affirms these last two holdings. I dissent only from its (1) vacating the summary judgment granted the school board on Bell's First Amendment claim and (2) rendering judgment for him on that claim. The judgment awarded the school board on the First Amendment claim should be affirmed. In the alternative, that claim should be remanded to district court for trial.

A summary judgment is reviewed *de novo*, applying the same standard as did the district court. *E.g., Feist v. La., Dep't of Justice, Office of the Att'y Gen*., 730 F.3d 450, 452 (5th Cir. 2013) (citation omitted). Summary judgment is proper when "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). "A

genuine dispute of fact exists when evidence is sufficient for a reasonable jury to return a verdict for the non-moving party, and a fact is material if it might affect the outcome of the suit." *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014) (internal citation and quotation marks omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In determining whether to grant summary judgment, the court, in its *de novo* review, views the evidence in the light most favorable to the nonmovant. *E.g., Dameware Dev., LLC v. Am. Gen. Life Ins. Co.*, 688 F.3d 203, 206–07 (5th Cir. 2012) (citation omitted). Consistent with that, when, as here, cross-motions for summary judgment are in play, "we review [*de novo*] each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party". *Cooley v. Hous. Auth. of Slidell*, 747 F.3d 295, 298 (5th Cir. 2014) (internal quotation marks omitted) (quoting *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001)). "Although on summary judgment the record is reviewed *de novo*, this court . . . will not consider evidence . . . not presented to the district court", but "we may affirm the . . . decision on any basis presented to the district court". *Am. Family Life Assur. Co. of Columbus v. Biles*, 714 F.3d 887, 896 (5th Cir. 2013) (citations and internal quotation marks omitted).

The summary-judgment record at hand includes, *inter alia*: (1) affidavits of four students regarding the coaches' supposed conduct; (2) screenshots of Bell's Facebook page; (3) a transcription of the rap item submitted by the school board ("ruler" version); (4) a transcription of the rap item submitted by Bell ("rueger [sic]" version); (5) the letter from the superintendent to Bell's mother informing the Bells of a hearing

before the disciplinary committee; (6) the digital recording of the rap recording; (7) the first screenshot of Bell's Facebook "wall"; (8) the second screenshot of Bell's Facebook "wall"; (9) the disciplinary-committee's findings; (10) the disciplinary-committee-hearing minutes and the all-important CD recording of that hearing; (11) the school-board attorney's letter to Bell's mother informing her of the disciplinary-committee's findings; (12) the school-board-hearing minutes; (13) the school-district discipline policy; (14) the school-board attorney's letter to Bell's mother informing her of the school-board's determination; and (15) the transcript of the preliminary-injunction hearing.

For obvious reasons, in analyzing school-board decisions, deference must be accorded the school-board's determinations. *Callahan v. Price*, 505 F.2d 83, 87 (5th Cir. 1974); *see also Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."), overruled on other grounds, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 967 (5th Cir. 1972) (citing cases) ("That courts should not interfere with the day-to-day operations of schools is a platitudinous but eminently sound maxim which this court has reaffirmed on many occasions.").

A.

It is well-established that students do not forfeit their First Amendment rights to freedom of speech and expression when they enter school. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The First Amendment does not, however,

guarantee students absolute rights to such freedoms. As Justice Oliver Wendell Holmes, Jr., wrote nearly a century ago: "[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919) (citation omitted). Bell's rap recording, through which the school board found he threatened, intimidated, and harassed two members of the faculty at his high school, was intentionally disseminated through Facebook and YouTube. Accordingly, on two bases (true threat and substantial disruption), the threatening, harassing, and intimidating portions of Bell's incredibly violent, vulgar, and profane rap recording do not enjoy the protection of the First Amendment.

1.

The school-board's decision should be upheld under the "true threat" analysis originally introduced in *Watts v. United States*, 394 U.S. 705 (1969). Although the First Amendment generally protects speech, "the government can proscribe a true threat of violence without offending the First Amendment". *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004). "[A] prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur'". *Virginia v. Black*, 538 U.S. 343, 360 (2003) (alteration in original) (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992)). "Speech is a true threat and therefore unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm." *Porter*, 393

F.3d at 616 (citation and internal quotation marks omitted). Moreover, intimidation is a form of true threat. *See Black*, 538 U.S. at 360 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.").

The true-threat analysis was further explained in *Doe v. Pulaski County Special School District*, which provided a two-step test: (1) whether the speaker "intentionally or knowingly communicated the statement in question to someone" including "a third party"; and (2) "whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm". 306 F.3d 616, 622, 624 (8th Cir. 2002) (en banc). Our court affirmatively cited *Doe* as an "illustrative application" of the true-threat test in the context of school speech. *Porter*, 393 F.3d at 616–18 (finding off-campus speech at issue not intentionally communicated to anyone). In our *de novo* review of the cross-motions for summary judgment, the question then becomes whether, pursuant to the standard set by Rule 56(a), each prong of the two-step test is satisfied.

a.

Regarding the first step, and contrary to the position taken by the majority, there is no genuine dispute that Bell intentionally and knowingly communicated the rap recording in a way that it would reach the school. Bell first posted the rap recording to his *open* Facebook account, accessible to anyone with a Facebook account, and not limited to his Facebook 1,380-member "friend" group. At the disciplinary-committee hearing, he stated he knew "students and stuff would hear it

because . . . students all have Facebook". And, Bell posted a revised version of the rap recording to YouTube, which offers unlimited access. When asked at the disciplinary committee hearing why he did not discuss his allegations with the school principal, he stated that such conversations would have no impact, but "[i]f I do the song, they're going to listen to it". It is undisputed that Bell intentionally targeted the rap recording to students and administrators alike, hoping the latter would take action after hearing the recording.

b.

The next question in this two-step analysis is whether a *reasonable* person would view the threatening speech as "an intent to cause a present or future threat". *Doe*, 306 F.3d at 622. This is an issue of law. *See generally id*. at 616–26 (rendering judgment as a matter of law, holding as objectively reasonable the determination that the threat constituted a "true threat").

As stated, there can be no question that an objectively reasonable person would interpret the rap recording as a true threat. When a student intentionally and publicly states that an educator will be "capped" (shot), have a pistol put down his mouth, and hit with a pistol, an objectively reasonable school administrator may interpret these words to constitute a true threat. "School administrators must be permitted to react quickly and decisively to address a threat of physical violence . . . without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance." *Ponce v. Socorro Indep. Sch. Dist*., 508 F.3d 765, 772 (5th Cir. 2007).

Supporting how an objectively reasonable person would view the comments, Coach W. testified at the preliminary-injunction hearing that he took the rap recording "literally", felt "scared", reported the rap recording to the principal immediately upon hearing it, and took extra safety measures after hearing the rap recording. Consistent with that testimony, Bell's expert witness in the field of rapping testified at the preliminary-injunction hearing that, if a rap item names an individual directly preceding a threat, "it would definitely be cause for conversation with the [rapper], absolutely". And, as discussed earlier, Bell's mother even received comments from community members (outside the school setting) who had heard the rap recording and believed the language about putting a pistol down someone's mouth would constitute a direct threat. After listening to the statements in the rap recording, the school board determined unanimously "that [Bell] did threaten, harass, and intimidate school employees". Therefore, the rap recording was understood, both subjectively by one of the coaches and objectively by the school board, to be a threat.

Bell implores this court to interpret his threats as simply artistic expression. The majority, likewise, contends at 33 and 35 that, because Bell's threats were embedded in some protected speech, his threats were at worst hyperbolic or metaphoric and that such speech does not constitute a true threat. But the nature of the speech and Bell's own admissions belie this contention. As discussed *supra*, in the written version of the rap recording relied upon by Bell, he threatened, *inter alia*, to "hit [a coach] with *my rueger* [sic]", referring, as noted *supra*, to the firearms manufacturer Sturm, Ruger & Co. (Emphasis added.) In the YouTube version, Bell also stated he was

writing about "real-life experience". By his own admission, then, not all of the rap recording was meant to be rhetorical; instead, Bell urges only the portions involving threats, harassment, and intimidation fit that category.

Regardless, under the true-threat analysis, whether Bell *intended* the rap recording to be taken as a threat is immaterial. *Porter*, 393 F.3d at 616. The same is true for whether he was capable of carrying out the threat. *Id*. at 616 n.25 (discussing *Doe*'s instruction to disregard subjective ability to carry out threat). The school board determined unanimously that the rap recording threatened, harassed, and intimidated the coaches. Accordingly, Bell was suspended for Offense 16 (threatening, harassing, and intimidating) of the severe-disruptions section of the school-district disciplinary policy, and in violation of state law. (Two potential state-law examples, among many, are Mississippi Code Annotated § 37-11-21 (making it a misdemeanor to abuse teachers) and § 97-45-17 (making it a felony to post messages through electronic media for the purpose of causing an injury to another).)

Incredibly, the majority seems to believe that making such threats in a rap recording obscures the fact that Bell's words could reasonably be considered to place two members of the school's faculty in danger, and that taking disciplinary action against him for such conduct violates his First Amendment rights. But, again, "rapping" has nothing to do with this; a student who speaks the words Bell spoke, regardless of the manner of speech, threatens teachers. The majority at 10–11, and in note 27, urges that, by Bell's stating he was writing about real-life, he was referring to his personal experiences at school regarding the allegations about the coaches, and that his "real-life"

statement should not be construed to imply a serious intent to carry out the threats in his recording. Again, the public-school system "relies necessarily upon the discretion and judgment of school administrators and school board members". *Wood*, 420 U.S. at 326. Therefore, as noted *supra*, "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion". *Id*.; *see also Morse*, 551 U.S. at 425 (Alito, J., concurring) ("[D]ue to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence".).

The majority at 34, in note 49, emphasizes that, based on numerous factors such as the claimed indirect and allegedly conditional nature of the threat, and the claimed lack of evidence demonstrating a violent predisposition, Bell's speech could not have been considered a true threat as a matter of law. The question is not which interpretation is more reasonable; rather, it is whether an objectively reasonable person could interpret the speech as a true threat. (Along that line, and as the summary-judgment evidence demonstrates, Coach W., the school board, and other members in the community who contacted Bell's mother understood the speech to be a threat.)

The majority at 37, in note 50, accuses this dissent of failing to give "due consideration to the consequences on social and political discourse" by this dissent's labeling Bell's speech a "true threat". The majority equates Bell's threats to other forms of pure political speech and, relying on the facts of *Watts*, claims Bell's speech could not have reasonably been interpreted as a true threat. (At 33–34, in an absurd

metaphor, the majority claims that no reasonable person would conclude performers murdered, or intended to murder, the characters in their well-known songs based on their lyrics. Needless to say, those songs involved fictional characters, not real-life educators during an extremely tragic period of school violence in this Nation's history. This comparison by the majority conveys an attitude that not only ignores this tragic period but also reflects an almost callous indifference toward it.)

Further, the majority glosses over the stark differences between this case and *Watts*. In *Watts*, at a Vietnam War protest rally, the speaker made, for effect, hyperbolic "threats" against the President, stating, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. Here, unlike in *Watts*, and according to his rap recording, Bell knew these coaches, and interacted with, and had access to, them as a student.

Additionally, Bell did not speak abstractly; rather, he advocated their being killed with a specific brand of gun, and in a specific way. Bell's access to the coaches, and the specificity with which he threatened, intimidated, and harassed them, mandate an outcome different from that reached by the majority. As discussed, the First Amendment must give way in the face of speech reasonably interpreted as imminent threats of danger.

Finally, this court should be even more reluctant to overrule the judgment of school officials in the light of the above-described, widespread gun violence throughout our Nation. Combining Bell's intentional communication of the rap recording toward students and administrators with the school board's objective determination that Bell threatened, harassed, and

intimidated two teachers, there is no genuine dispute that Bell's threats satisfy the true-threat test and, therefore, are unprotected speech.

2.

In the alternative, and pursuant to the *Tinker* "substantial-disruption" test, the school-board's decision did not violate Bell's First Amendment rights. In general, our court applies the *Tinke*r analysis to "school regulations directed at specific student viewpoints". Porter, 393 F.3d at 615; *see also Wynar*, 728 F.3d at 1069 ("[W]hen faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 982–83 (11th Cir. 2007) (analyzing threats of violence to individual teachers under *Tinker*). *Tinker* allows a school board to discipline a student for speech that either causes a substantial disruption or *is reasonably forecast to cause one*. 393 U.S. at 514. In that regard, as discussed, judicial review is necessarily deferential: "School administrators must be permitted to react quickly and decisively to address a threat of physical violence . . . without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance". *Ponce*, 508 F.3d at 772.

The majority contends the rap recording is "off-campus" speech, noting throughout its recitation of the facts that, *inter alia*, Bell composed, recorded, and uploaded the recording off-campus. Even assuming the "on-campus/off-campus" distinction remains relevant today (it does not, as discussed *infra*), Bell's intent for the speech to reach members of the

community (admitted by Bell at the disciplinary-committee hearing and recognized by the majority at 4), evinced by his posting the recording publicly to Facebook and YouTube, makes Bell's speech the functional equivalent of on-campus speech. Treating it otherwise is a classic, and forbidden, elevation of form over substance.

Notwithstanding its *assuming* the *Tinker* test applies in this instance, the majority claims at 22–23, in notes 37 and 38, that our precedent only leaves open the possibility of applying *Tinker* to off-campus speech. But, contrary to the majority's understanding, this is not an open issue: our court has applied Tinker to off-campus speech when, as in this instance, the speech reached the school. In a post-*Tinker* decision, *Sullivan v. Houston Independent School District*, our court held that, where a student sold vulgar newspapers off-campus, defendant's "conduct . . . outweigh[ed] his claim of First Amendment protection". 475 F.2d 1071, 1075 (5th Cir. 1973) ("This case arises from the unauthorized distribution of an underground newspaper *near a high school campus*, and presents the now-familiar clash between claims of First Amendment protection on the one hand and the interests of school boards in maintaining an atmosphere in the public schools conducive to learning, on the other." (emphasis added)). Our court reasoned: "In the years since *Tinker* was decided courts have refused to accord constitutional protection to the actions of students who blatantly and deliberately flout school regulations and defy school authorities", proceeding to cite numerous cases applying *Tinker* to similar speech. *Id*. at 1076. Although the court was careful to emphasize the reasonable responses of the school and the unhelpful conduct by defendant in the face of such responses, the court also emphasized defendant's "conduct [could]

hardly be characterized as the pristine, passive acts of protest 'akin to pure speech' involved in *Tinker*". *Id*. (citation omitted).

Likewise, the contrast here could not be greater. Bell's rap recording is so far removed from the armbands worn in *Tinker*, protesting the war in Vietnam, that his seeking protection under the First Amendment, based on the test in *Tinker*, borders on being frivolous. Consistent with Justice Black's warning in *Tinker*, the majority's allowing Bell to threaten, intimidate, and harass two teachers, by holding the comments are protected speech, signals a "revolutionary era of permissiveness in this country fostered by the judiciary". *Tinker*, 393 U.S. at 518 (Black, J., dissenting).

Further, our court's decision in 2004 in *Porter* supports this conclusion. The Porter court, in noting other circuits' application of *Tinker* to off-campus activities, interpreted *Sullivan* as applying *Tinker* to off-campus speech. 393 F.3d at 615 n.22, 619 n.40 (stating "a number of courts have applied the test in *Tinker* when analyzing off-campus speech brought onto the school campus", citing *Sullivan*).

The majority at 23, in note 39, accuses this dissent of "patent[ly] misreading" *Sullivan* and *Porter*. In a footnote devoid of any relevant legal analysis, the majority not only intentionally ignores *Sullivan*'s reliance on *Tinker* in reaching its conclusion, but implies the court made an *ad hoc* decision. By determining the school's prior-approval regulation was constitutional, the Sullivan court concluded that Tinker applies to off-campus speech; the court could not have reached its conclusion without applying Tinker to the off-campus speech. 475 F.2d at 1076–77. The majority's assertions that our court has not

previously applied Tinker to off-campus speech is an egregious misrepresentation of our precedent.

Furthermore, the majority at 27–30 erroneously reads *Ponce* as limiting the application of *Tinker* in the school context to Columbine-like situations. *Ponce* is only one of our court's decisions applying *Tinker*. The distinction espoused by the majority ignores the paramount consideration that any threat, harassment, and intimidation of a teacher in a school environment must be taken seriously. Limiting an administrator's ability to act on threats in only Columbine-like, mass-shooting circumstances is a recipe for disaster.

But, even assuming our court has not previously applied *Tinker* to off-campus speech, in the light of the facts underlying this appeal, technological developments, as discussed *supra*, have rendered the distinction obsolete. The pervasive and omnipresent nature of the Internet, in many respects, has obfuscated the "on-campus/off-campus" distinction read into *Tinker* by some courts. *Accord Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220–21 (3d Cir. 2011) (Jordan, J., concurring) ("For better or worse, wireless internet access, smart phones, tablet computers, [and] social networking . . . give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools."). With students having instant access to the Internet anywhere, drawing such an arbitrary distinction both tortures logic and ignores history.

Skirting the issue, the majority at 22–23, in note 37, advocates that, despite rapidly changing technology, school administrators are powerless to act absent specific Supreme Court guidance. Once again, this flies in the face of the absolute necessity for school

officials to act promptly to protect their students and teachers against threats, harassment, and intimidation. To keep pace with technological developments, "speech" made over the Internet (whether through an on-campus or off-campus computer) that is intentionally directed at the school cannot be ignored based solely on the original source. The majority disagrees, citing *Morse*, 551 U.S. at 424 (Alito, J., concurring), for the proposition that "[i]t is a dangerous fiction to pretend that parents simply delegate their authority–including their authority to determine what their children may say and hear–to public school authorities", and *Shanley*, 462 F.2d at 964, for the proposition that a school board's unreasonable "assumption of authority is an unconstitutional usurpation of the First Amendment". Obviously, these general principles do not conflict with the issue at hand.

Here, Bell targeted his rap recording at the school by posting it on Facebook and YouTube, *admittedly knowing* students, and admittedly hoping administrators, would listen to it. The majority states at 25 that the school's prohibition of student cell phones on-campus made it unlikely the recording would be heard on-campus. This assertion is not supported by the summary-judgment record. For example, in one instance, the rap recording reached the school through a student cell phone. Although Bell stated at the disciplinary-committee hearing that he never encouraged anyone at school to listen to the rap recording, he also stated he knew students would listen to it, and that part of his motivation was to "increase awareness of the situation". Therefore, *Tinker* applies. The majority's merely assuming that it does apply detracts from the very important considerations at play in this appeal.

Under *Tinker*, "school officials may regulate student speech when they can demonstrate that such speech would substantially interfere with the work of the school or impinge upon the rights of other students". *Porter*, 393 F.3d at 615 (citation and quotation marks omitted). This standard can be satisfied by either showing a disruption has occurred, or by showing "demonstrable factors that would give rise to any reasonable forecast by the school administration of 'substantial and material' disruption". *Shanley*, 462 F.2d at 974 (citation omitted).

Taking the school board's decision into account, and the deference we must accord it, the issue to be decided is whether a genuine dispute of material fact exists for whether the school board acted reasonably in finding Bell's rap recording constituted an ongoing, or reasonably foreseeable, substantial disruption. Because the school district's written policy embraces the *Tinker* analysis, this question boils down to whether the school board acted reasonably in determining the rap recording was a substantial disruption because it threatened, harassed, and intimidated two teachers. There is no genuine dispute of material fact; the school board acted reasonably.

The school-district's Discipline – Administrative Policy lists the offense "Harassment, intimidation, or threatening other students and/or teachers" as a "severe disruption". That policy establishes conduct that the school board considers sufficient to satisfy *Tinker*'s substantial-disruption test. Along that line, the superintendent testified at the preliminary-injunction hearing that her initial decision to suspend Bell stemmed from her belief the rap recording constituted a danger of a substantial disruption at the

school. In that regard, threats against, and harassment and intimidation of, teachers are inherently disruptive. Finally, as Bell admitted, and the majority recognizes at 11, even assuming *arguendo* Bell's speech was not an imminent threat, the speech reflected the possibility of future violence by others. This, alone, resolves the issue of whether it was reasonably foreseeable to disrupt the school.

Relying on language in *Shanley* stating school boards cannot rely on *ipse dixit* to demonstrate material and substantial interference with school discipline, the majority makes several logical missteps. It asserts at 23 that this dissent's *Tinker* analysis relies too heavily on the school board's interpretation that "threatening, intimidating and harassing" speech constitutes a "severe disruption". Again, regarding teachers, what else could such speech constitute? Under the majority's understanding of *Tinker*, a student could say anything so long as he set it to melody or rhyme. Once again, the majority refuses to acknowledge reality.

As the majority notes at 26–27, *Shanley* also states: "*Tinker* requires that presumably protected conduct by high school students cannot be prohibited by the school unless there are 'facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . .'" 462 F.2d at 970 (citing *Tinker*, 393 U.S. at 514). As stated, threats against, and intimidation and harassment of, teachers by their very nature reasonably "forecast substantial disruption", regardless of whether an actual disruption occurs. Finally, the majority intentionally limits its discussion to the "threatening" aspects of Bell's speech, ignoring its "intimidating" and "harassing" aspects. Perhaps it does so because the broader terms of "intimidation"

and "harassment" necessarily require less strenuous proof. In short, the majority confuses *ipse dixit* with reality.

Further examination of the rap recording demonstrates this. In addition to the above-discussed threats, intimidation, and harassment in the recording, Bell, for example, refers to the teachers as "perverts". He even derides the size of the breasts of the wife of one of the teachers ("his wife ain't got no titties"). Those harassing comments alone forecast a substantial disruption to school discipline.

The majority at 26, in note 43, claims the school board's disciplinary policy embraces the majority's contention that the school may only discipline a student for speech originating physically on-campus because other listed "offenses" relate to on-campus conduct. This assertion is factually and logically incorrect. First, in addition to activities that commonly occur on-campus, the policy lists several prohibited "off-campus" activities, *e.g.*, behavior on a school bus, which likely occurs off school grounds. Second, under this rationale, Bell would be immune from disciplinary action were he to present the rap recording, with its extensive threatening, harassing, and intimidating portions, on television, over the radio, or in a newspaper. As *Sullivan* makes clear, speech conveyed through the latter media may be restricted. *E.g.*, 475 F.2d at 1076. Finally, this understanding ignores the nature of such comments; even if they are made "off-campus", the danger and disruptiveness of the comments do not cease to have effect the moment after being made. Rather, they remain linked to the speaker, and as the speaker comes closer to the subject (such as when the student attends school), the danger becomes more present and the likelihood of disruption

increases. Therefore, the majority's attempt to limit the school board's policy as applying only to activities physically occurring on school grounds runs counter to the policy's express language and purpose.

After temporarily suspending Bell and holding two hearings, school officials considered the rap recording substantially disruptive. And, as noted, the school board upheld the recommendation of the disciplinary committee, after the board found Bell's rap recording constituted a threat, harassment, and intimidation. In doing so, the school board also reasonably forecast further substantial disruption to the school's mission and school administrators' responsibility to protect students and faculty. (Significantly, the disciplinary-committee hearing and school-board meeting more than satisfied Bell's due-process rights. *See Harris ex rel. Harris v. Pontotoc Cnty. Sch. Dist.*, 635 F.3d 685, 691–92 (5th Cir. 2011) (explaining alternative education program does not violate Fourteenth Amendment and, for temporary suspensions, only "an *informal* give-and-take-between student and disciplinarian" is required) (emphasis added).)

Citing A.M. *ex rel. McAllum v. Cash*, 585 F.3d 214, 221 (5th Cir. 2009) for the proposition that school officials "must base their decisions on fact, not intuition", the majority at 19 intimates that the school board disciplined Bell based on the "mere expectation" of disruption. The summary-judgment record shows otherwise. For example, Bell's mother testified that members of the community believed the language in the rap recording was threatening; Bell admitted the possibility of violence against the coaches, stating he was "foreshadowing something that might happen"; and, most importantly, Coach W. testified that he would not let members of the basketball team leave

the gymnasium until he was in his vehicle, which demonstrates an *actual* disruption occurred.

Seeking shelter under the First Amendment, Bell makes two meritless claims: his rap recording is merely hyperbole and, therefore, protected speech; and, as a corollary, the school board acted unreasonably.

First, Bell's claim that the rap recording is not threatening, harassing, or intimidating is immaterial. Under *Tinker*, a school may take action so long as the speech is reasonably forecast to cause a material and substantial disruption. *Shanley*, 462 F.2d at 974–75. Here, as discussed *supra*, it is reasonable to conclude that a material-and-substantial disruption could occur as a result of the statements against the coaches. Possible fact-based substantial disruptions range, for example, from the coaches' inability to properly teach, resulting from students' loss of respect for the coach, to acts of violence carried out against the coaches.

Second, Bell's assertion that the school-board determination was unreasonable is, itself, unreasonable as a matter of law. *E.g., Burnham v. Ianni*, 119 F.3d 668, 679 (8th Cir. 1997). To find Bell's claim meritorious would require holding no objectively reasonable person could interpret language in Bell's rap recording as threatening, intimidating, or harassing. Not only does such a conclusion defy common sense, but it also goes against the undisputed evidence, in particular Coach W.'s statement that the language frightened him.

The majority attempts to bolster its untenable position by claiming at 2 that the school board did not demonstrate the rap recording "caused a substantial disruption of school work or discipline, or that school officials forecasted or reasonably could have forecasted

such a disruption". *See also Maj. Opn.* at 23–25 & nn.38 & 41. The school board is not required to engage in a "substantial disruption" analysis commensurate with that undertaken by courts assessing speech infringement under *Tinker*; rather, the school board is required to show "demonstrable factors" that would give rise to any reasonable forecast of a substantial disruption. *E.g., LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *see also, e.g., D.F. v. Bd. of Educ. of Syosset Cent. Sch. Dist.*, 180 F. App'x 232 (2d Cir. 2006) (affirming, without supplementation, the district court's conclusion that *Tinker* supported the school board's suspension of a student after finding he had "threatened use and/or contemplated use of a weapon in violation of the Code of Conduct").

In sum, *Tinker*-based judicial decisions assessing substantial-disruption speech review the "totality of the relevant facts", *LaVine*, 257 F.3d at 989; "*Tinker* does not prescribe a uniform, 'one size fits all' analysis. The [c]ourt must consider the content and context of the speech, and the nature of the school's response", *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007). "We look not only to [the student's] actions, but to all of the circumstances confronting the school officials that might reasonably portend disruption". *LaVine*, 257 F.3d at 989 (citation omitted).

Generally, *Tinker* provides school administrators may discipline a student for speech that materially and substantially interferes "with the requirements of appropriate discipline in the operation of the school". 393 U.S. at 513 (citation and internal quotation marks omitted). Other courts have provided additional factors for evaluating the substantiality of a potential disruption. Relevant facts and circumstances may include: whether the infringement arose from a "desire

to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"; whether the speech identifies an educator "by name, school, or location"; whether a "reasonable person could take its content seriously"; whether "the record clearly demonstrates that" anyone took the speech seriously; how the speech reached the school; and whether the speech "was purposely designed by [the student] to come onto the campus". *Snyder*, 650 F.3d at 926, 929, 951 (Smith J., concurring). Additional factors include: whether the speech "directly pertained to events at" the school; the student's "intent in" engaging in the speech; whether the speech was misleading; the nature and seriousness of the penalty levied on the student; and any in-school disturbances, including administrative disturbances involving the speaker brought about "because of the need to manage" concerns over the speech. *Doninger v. Niehoff*, 527 F.3d 41, 50–52 (2d Cir. 2008).

The totality of the relevant facts are addressed through the lens of the bedrock principle that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts", and with the understanding that "*Tinker* does not require certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption". *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267—68 (1988) (citation and internal quotation marks omitted); *LaVine*, 257 F.3d at 989; *see also Lowery*, 497 F.3d at 596 ("School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.").

Here, Bell presented a transcription of the recording containing the threats and references to guns, and he admitted at the disciplinary-committee hearing that he posted the recording to public websites on the Internet, intending the language to reach both the school community and the public at large. Therefore, not only does the summary-judgment record support the school board's finding the recording threatened, intimidated, and harassed two coaches, but this conclusion stems from Bell's own submissions to, and admissions before, the disciplinary committee.

The majority also contends at 7, in note 21, that there is no evidence indicating how many of Bell's friends listened to the posted recording. This is irrelevant. Bell admits, and the majority recognizes at 4, that Bell intended the speech to reach the school community, which it did. The majority further contends at 7, in note 21, that the Facebook comments undermine this dissent's claim that the school board could have forecasted reasonably a substantial disruption. The majority's logic is flawed; although potentially representative of how some would interpret the recording, simply because one segment of the population views speech one way does not make another understanding objectively unreasonable. This red herring by the majority undermines its position—the only issue of consequence is whether the school board acted *reasonably* in viewing Bell's speech as "threatening, intimidating, or harassing", *not* which interpretation is "more reasonable".

Further, the majority's claim ignores that, pursuant to school-district policy, threatening, harassing, and intimidating teachers is a subset of conduct constituting "severe disruptions". It also fails to recognize that, by finding Bell threatened, harassed, and intimidated

the two coaches, the school board implicitly found Bell caused a severe disruption. Given the content of the rap recording, Coach W.'s reaction and communication with school authorities, Bell's claim that he was speaking about real life, the dissemination of the rap recording with the knowledge students would access it, and the access by at least one student in the presence of Coach W., there is no genuine dispute for whether the school board acted reasonably; it did.

B.

Before this court for *de novo* review are cross-motions for summary judgment. As discussed *supra*, each motion must be reviewed independently. Assuming *arguendo* a genuine dispute of material fact exists regarding the school board's summary-judgment motion, then a genuine dispute of material fact also exists regarding Bell's summary-judgment motion.

The key factor for reviewing the school-board's motion is the understandable, and well-established, deference that must be accorded its decision. It goes without saying that no such deference is accorded the First Amendment claim in Bell's summary-judgment motion. The deference accorded the school board is incorporated in its reliance on true threats and substantial disruption as the independent bases for its decision.

Accordingly, assuming *arguendo* a genuine dispute of material fact exists regarding that decision by the school board, summary judgment cannot be rendered for Bell on his First Amendment claim. Instead, that claim must be remanded to district court for trial. In other words, assuming *arguendo* the majority is correct in vacating the summary judgment awarded the school board on Bell's First Amendment claim, the

majority errs, nevertheless, in rendering summary judgment for Bell on that claim.

III.

For the foregoing reasons, for Bell's First Amendment claim, I dissent from the majority's both vacating the summary judgment for the school board and rendering summary judgment for Bell. Instead, the district court's judgment should be affirmed on all issues. In the alternative, assuming arguendo the school board is not entitled to summary judgment against Bell's First Amendment claim, the majority cannot render summary judgment for Bell on that claim; it must be remanded to district court for trial.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI EASTERN DIVISION

Civil Action No. 1:11CV00056-NBB-DAS

TAYLOR BELL and DORA BELL,
Individually and as Mother of Taylor Bell,

Plaintiffs,

vs.

ITAWAMBA COUNTY SCHOOL BOARD; TERESA MCNEECE, Superintendent of Education for Itawamba County, Individually and in her official capacity; TRAE WIYGUL, principal of Itawamba Agricultural High School, Individually and in his official capacity,

Defendants.

MEMORANDUM OPINION

These matters come before the court upon the parties' cross-motions for summary judgment. After due consideration of the motions and the responses filed thereto, the court is prepared to rule.

I. FACTUAL BACKGROUND

In August 2001, while a senior at Itawamba Agricultural School, Taylor Bell composed, sang, and recorded a rap song which he published for over 1,300 "friends" on Facebook.com and for an unlimited audience on YouTube.com. In clearly vulgar language,

the rap song criticizes two coaches at school – Coach Wildmon and Coach Rainey – by alleging that both of them had improper contact with female students. The last two verses include the phrases:(1) "looking down girls' shirts / drool running down your mouth / messing with wrong one / going to get a pistol down your mouth" and (2) "middle fingers up if you can't stand that nigga / middle fingers up if you want to cap that nigga."[1]

After the school became aware of the song, Taylor Bell was taken out of class on January 7, 2011 and met with Principal Trae Wiygul, District Superintendent Teresa McNeese, and the school board attorney who accused him of making threats and false allegations. Taylor Bell denied making threats but confirmed that the allegations of improper contact with female students were true. After the meeting, Principal Wiygul drove Taylor Bell to a friend's house rather than allowing him to attend his remaining classes for the day.

The school cancelled classes until Friday, January 14, 2011 due to inclement weather. On that Friday Mr. Bell returned to school. After his last class that day, the assistant principal's office called for Taylor Bell and told him he would be suspended indefinitely pending a hearing.

The Disciplinary Committee of the Itawamba County School Board held a hearing on January 26, 2011 after providing notice to Taylor Bell and his mother Dora Bell via letter. Taylor Bell attended the hearing with his mother and his own counsel. The

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[1] For purposes of clarity, there are no allegations of racism in relation to the use of the term "nigga" throughout the subject song.

Committee concluded that Taylor's conduct of writing and recording the song and publishing the song on Facebook.com and YouTube.com constituted "harassment and intimidation of teachers and possible threats against teachers." The Committee decided to suspend Taylor Bell for seven days and to transfer him to an alternative school for the five weeks remaining of the nine-week school period.

On February 7, 2011 the Itawamba County School Board held a hearing on Taylor Bell's appeal of the Disciplinary Committee's findings and punishment. The school board upheld the punishment and affirmed that Taylor Bell "threatened, harassed, and intimidated school employees" with the publication of his song.

One week later on February 14, 2011 Dora Bell filed her Complaint on behalf of her son Taylor Bell and herself. Count 1 alleges that Taylor Bell's punishment violated his First Amendment right to free speech. Count 2 alleges that his punishment violated Dora Bell's parenting rights guaranteed by the Fourteenth Amendment Due Process Clause. Count 3 alleges that Taylor Bell's speech was entitled to heightened protection as speech on a matter of public concern. Count 4 alleges that Taylor's punishment for exercising his right to free speech violated Mississippi law.

On March 2, 2011 the plaintiffs filed a motion for preliminary injunction seeking to require the Itawamba School Board to allow Taylor Bell to return from the alternative school before the required five week period expired pursuant to his punishment. This court held a hearing on March 10, 2011. On March 14, 2011 the court entered an Order denying the motion for preliminary injunction as moot since the plaintiff's time in

alternative school was set to expire on March 11, 2011 – one day after the hearing.

By Order of May 9, 2011 the court instructed the parties to file cross motions for summary judgment within 90 days. The motions for summary judgment have been fully briefed since August 2011. Neither party argued Count 3 as a separate count, but rather as part and parcel to the free speech claim. Furthermore, since the briefs do not discuss the alleged violation of Mississippi laws protecting free speech, the court considers Count 4 as abandoned. Accordingly, at issue are Counts 1 and 2.

The Order of May 9, 2011 also concluded that: "Having conducted a case management conference and having discussed the case with the parties, it appears there are no factual issues and that this case should be resolved by summary judgment." The issues remaining are matters of law which will be resolved by applying the law to the undisputed facts.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment should be entered only if "[t]here is no genuine issue as to any material fact *and* . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added). The primary focus for the court in ruling upon a motion for summary judgment is usually whether there is at least one issue of material fact warranting a trial. In this matter, however, the parties have agreed that there are no remaining issues of fact. Thus, it falls upon the court to determine which party is entitled to judgment "as a matter law."

B. First Amendment Claim

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). However, the constitutional rights of students in public school "are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. N. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Though free speech rights are available to teachers and students in public schools, such rights must be "applied in light of the special circumstances of the school environment." *Tinker*, 393 U.S. at 506.

Pursuant to the U.S. Supreme Court's decision in *Tinker*, "conduct by a student, *in class or out of it* which for any reason . . . *materially disrupts classwork or involves substantial disorder* or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 506 (emphasis added).

The Fifth Circuit in *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004) held that a student's sketch depicting a violent siege at school could not be regulated by the school because it was drawn at home and not on campus, kept in his closet for two years, and only made it to school unintentionally when his younger brother took it to school. However, the Court did not rule in *Porter* that off-campus speech by students cannot be regulated by the school. Rather, the Court specifically observed that its analysis was not in conflict with other courts having applied *Tinker* to off-campus speech because "the fact that Adam's drawing was composed off-campus and remained off-campus for two years until it was unintentionally taken to school by his younger brother

takes the present case outside the scope of these precedents." *Porter*, 393 F.3d at 615 n. 22.

In any event, as emphasized above, the U.S. Supreme Court in *Tinker* specifically ruled that off-campus conduct causing material or substantial disruption at school can be regulated by the school. The Fifth Circuit in *Porter* appears to have added a requirement that the speech be intended to reach school. In this case, Taylor Bell clearly intended to publish to the public the content of the song as evidenced by his posting of the song on Facebook.com with at least 1,300 "friends," many of whom were fellow students, and to an unlimited, world-wide audience on YouTube.com. Accordingly, the *Tinker* standard applies to Taylor Bell's song without regard to whether it was written, produced, and published outside of school.

Importantly, courts have held that the *Tinker* material or substantial disruption standard can also apply to allow regulation of student speech when the disruption is reasonably foreseeable.

In *Wisniewski v. Board of Education of Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007), a student was suspended after instant messaging on the internet at home a picture displaying a drawing of a pistol firing a bullet at a person's head, above which were dots of blood, and beneath was the word "kill" followed by the name of the student's English teacher. The student was not on school property and only sent the images to his friends.

The Second Circuit used the *Tinker* substantial disruption standard rather than the "true threat"

standard enunciated in *Watts*[2], concluding that school officials had more authority over students' speech than the government had over the adult plaintiff in *Watts*. *Wisniewski*, 494 F.3d at 38.

The Second Circuit in *Wisniewski* concluded:

> We are in agreement . . . that, on the undisputed facts, it was *reasonably foreseeable* that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot. The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of Aaron's classmates, during a three-week circulation period, made this risk at least *foreseeable* to a reasonable person, if not inevitable. And there can be no doubt that the icon, once made known to the teacher and other school officials, would *foreseeably* create a risk of substantial disruption within the school environment.

Wisniewski, 494 F.3d at 39-40 (emphasis added).

In *Boim v. Fulton County School District*, the Eleventh Circuit held that violent student speech was not protected after concluding it "clearly caused and was reasonably likely to further cause a material and

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[2] In *Watts v. United States*, 394 U.S. 705, 707 (1969), the U.S. Supreme Court held that the defendant's alleged statement that he would refuse induction into armed forces and 'if they ever make me carry a rifle the first man I want in my sights is L.B.J.' did not amount to a "true threat" against the life of the President of the United States. Rather, the statement was held to be hyperbole and was protected free speech.

substantial disruption" at the school. 494 F.3d 978, 983 (11th Cir. 2007).

The student in *Boim* wrote a story about a dream she allegedly had of shooting her teacher. The student wrote the story in her notebook and gave the notebook to another student while at school. Her teacher, who may have been the target of the story, gained possession of the story while in class and discussed it with a school administrator shortly after school. On the next day, the teacher brought the story to the administrator who then consulted the school's police officer. The school pulled the student from class and called her parents. At the meeting, the student denied the story was serious and her parents supported her. The school sent the student home. The principal continued the investigation out of concerns of prior violence in other schools such as Columbine. During this investigation, the teacher was shown the narrative and said he felt threatened. The school suspended the student for ten days and then expelled her. The district superintendent, however, overturned the expulsion but upheld the suspension.

The Eleventh Circuit in *Boim* observed that there is "no First Amendment right allowing a student to knowingly make comments, whether oral or written, that reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day." *Boim*, 494 F.3d at 984. Though the Court referenced only on-campus speech, the ultimate conclusion of the court is equally applicable to off-campus student speech as explicitly recognized in *Tinker*. The Eleventh Circuit concluded:

> Rachel's first-person narrative could reasonably be construed as a threat of physical violence against her sixth period math teacher. That Rachel does not appear to have purposely disseminated the narrative is immaterial in this context. By taking the narrative to school and failing to exercise strict control over the notebook in which it was written, Rachel increased the likelihood to the point of certainty that the narrative would be seen by others, whether by other students or a teacher. Consequently, Rachel created an appreciable risk of disrupting [her school] in a way, regrettably, is not a mater of mere speculation or paranoia.

Boim, 494 F.3d at 985.

Thus, in *Boim*, the substantial or material disruption was that the content of the student's speech reached the school to at least one other student, and ultimately to the threatened teacher and school officials. There was no evidence cited by the Court in *Boim* of any further disruption at school - *e.g.*, panic among students or teachers, calls by parents, closing of school, etc.

Another example where reasonably foreseeable substantial or material disruption was found to render student speech unprotected can be seen in *D.J.M. ex rel D.M. v. Hannibal Public School District No. 60*, 647 F.3d 754 (8th Cir. 2011). This case involved a high school student who communicated threats against fellow students to a friend via internet instant messaging. The Court held that such speech was not protected either under the *Watts* "true threat" analysis

or *Tinker*'s material or substantial disruption analysis, given the ease with which such electronic communication could be forwarded.

Having considered the standards discussed above, the primary questions at hand are (1) whether Taylor Bell's song caused or tended to cause a material and/or substantial disruption at school or (2) whether it was reasonably foreseeable to school officials that the song would cause a material and/or substantial disruption at school. The language used by Bell is set forth below in a footnote.[3]

In addition to the many vulgar verses insulting the coaches and one of their wives as well as specific allegations of improper conduct towards female students, the two most threatening lyrics are: (1) "looking down girls' shirts / drool running down your mouth / messing with wrong one / going to get a pistol down your mouth" and (2) "middle fingers up if you

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[3] As set out in the defendants' brief, Taylor Bell's song contained lyrics stating that Coach Wildmon is a "dirty ass nigger," is "fucking with the whites and now fucking with the blacks," is a "pussy nigger," is "fucking with the students he just had a baby," and is "fucking around cause his wife ain't got no titties." The song also states that Coach Wildmon tells female students they "are sexy" and the reason that the singer (Taylor Bell) quit the basketball team is because Coach Wildmon "is a pervert."

Regarding the other coach, the song states that Coach Rainey is another "Bobby Hill" (an Itawamba assistant football coach who was arrested and accused of sending sexually explicit material to a minor via text message in 2009), that he is a "pervert," that he is "fucking with juveniles," that he came to football practice "high," that he is 30 years old and is "fucking with students at the school," and that Taylor Bell is going to "hit ya with my ruler."

can't stand that nigga / middle fingers up if you want to cap that nigga."

The court agrees with the respective findings of the Disciplinary Committee and the Itawamba School Board that the song – especially with regard to the two threatening lyrics quoted above – constitutes "harassment and intimidation of teachers and possible threats against teachers" and "threatened, harassed, and intimidated school employees."

The court further concludes that the subject lyrics in fact caused a material and/or substantial disruption at school and that it was reasonably foreseeable to school officials the song would cause such a disruption.

In terms of actual disruption, it is undisputed that Coach Wildmon heard of the song from a text message from his wife while he was at school. When Coach Wildmon asked the three seniors who were sitting near him at that time whether they had heard the song, they replied that they had and one of them allowed him to listen to the song on the student's cellular phone. Coach Wildmon was angered and complained to the principal. He testified at the preliminary injunction hearing that his teaching style had been adversely affected after knowledge of the song had spread because he perceived that students were wary of him. Coach Wildmon also testified that he felt threatened by the references to killing him in the song. Similarly, Coach Rainey testified that his teaching style has also been adversely affected out of fear students suspect him of inappropriate behavior.

In terms of foreseeable material or substantial disruption, it is reasonably foreseeable that a public high school student's song (1) that levies charges of serious sexual misconduct against two teachers using

vulgar and threatening language and (2) is published on Facebook.com to at least 1,300 "friends," many of whom are fellow students, and the unlimited internet audience on YouTube.com, would cause a material and substantial disruption at school.

Public school students have free speech rights under the First Amendment, but not to the same extent as adults. Students' free speech rights are tempered by the school's legitimate interest in maintaining order. As observed by the U.S. Supreme Court in *Tinker*, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." 393 U.S. at 507. Moreover, under *Tinker*, student speech may be prohibited if it causes a material and/or substantial disruption at school, or it is reasonably foreseeable that the speech will cause such a disruption.

The court finds that Taylor Bell's song caused a material and/or substantial disruption and it was reasonably foreseeable that such a disruption would occur. The song is not protected by the First Amendment, and the school did not err in punishing Bell for publishing it to the public. Therefore, Taylor Bell's claim that his First Amendment rights were violated by the school should be dismissed with prejudice.

With regard to Taylor Bell's argument that his speech should received heightened protection as commenting on matters of public concern, the court concludes that the plaintiff failed to demonstrate as a matter of law that such heightened protection overrides the well-established *Tinker* test in matters of public school student speech as opposed to adults.

Accordingly, to the extend that this argument was meant to constitute a separate count as referenced in Count 3 of the Complaint, the court concludes that the claim should be dismissed with prejudice.

Finally, the court concludes that the individual defendants are entitled to qualified immunity given that the plaintiffs have failed to demonstrate that all reasonable officials in their position would have believed that Taylor Bell's song was clearly protected by the First Amendment. However, since the court has granted summary judgment on Taylor Bell's free speech claim, the issue of qualified immunity is rendered moot.

B. Dora Bell's Fourteenth Amendment Due Process Claim

Dora Bell, Taylor Bell's mother, asserts a claim that the defendants violated her Fourteenth Amendment due process rights to determine how to best raise, nurture, discipline, and educate her child.

The Due Process Clause of the Fourteenth Amendment "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). However, "there may be circumstances in which school authorities, in order to maintain order and a proper educational atmosphere in the exercise of police power, may impose standards of conduct on students that differ from those approved by some parents." *Gruenke v. Seip*, 225 F.3d 20, 304 (3d. Cir. 2000). Should the school policies conflict with the parents' liberty interest, the policies may only prevail if they are "tied to a compelling interest." *Id*. at 305.

Dora Bell has not demonstrated through clear authority that the temporary five-week transfer to alternative school or the seven-day suspension were not tied to the school's compelling interest of a legitimate maintenance of school order.

Regarding notice, it is undisputed that Dora Bell received notice of the first hearing before the Disciplinary Committee via letter, that the hearing was moved to accommodate her schedule, and that she attended the hearing. She also received notice of the appeal hearing before the Itawamba School Board and attended that hearing.

As to the temporary five-week transfer to an alternative school, it was made clear in *Nevares v. San Marcos Consolidated Independent School District* that a transfer to an alternative school with stricter discipline does not deny the student's access to a free public education and therefore does not violate a federal protected property or liberty interest. 111 F.3d 25, 26 (5th Cir. 1997).

With respect to the seven-day suspension, since the suspension was for less than ten days, Taylor Bell was only entitled to ""be given oral or written notice of the charges against him and, if he denies them, an explanation fo the evidence the authorities have and opportunity to present his side of the story." *Harris v. Pontotoc County School District*, 635 F.3d 685 (5th Cir. 2011) (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975)). There is no particular delay or formality required, but there must have been at least "an informal give-and-take between student and disciplinarian." *Goss*, 419 U.S. at 582. In this case, both Taylor Bell and his mother were given oral and written notice of the charges against him. Taylor Bell was given two hearings during which he had the

opportunity to give his side of the story while represented by counsel.

III. CONCLUSION

For the reasons discussed above, the court concludes that the plaintiffs' motion for summary judgment should be denied. The court concludes further that the defendants' motion for summary judgment should be granted and that all of the plaintiffs' claims should be dismissed with prejudice. A Final Judgment shall issue forthwith,

THIS DAY of March 14, 2012.

/s/ Neal Biggers
NEAL BIGGERS
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-60264

TAYLOR BELL; DORA BELL, individually and as mother of Taylor Bell,

Plaintiffs–Appellants

vs.

ITAWAMBA COUNTY SCHOOL BOARD; TERESA MCNEECE, Superintendent of Education for Itawamba County, Individually and in her official capacity; TRAE WIYGUL, principal of Itawamba Agricultural High School, Individually and in his official capacity,

Defendants–Appellees

Appeals from the United States District Court for the Northern District of Mississippi, Aberdeen

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ON PETITION FOR REHEARING EN BANC
(Opinion December 12, 2014, 5 Cir., 2014, 774 F.3d 280)

Before STEWART, Chief Judge, JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action. 1:11CV56-D-D

TAYLOR BELL, DORA BELL, individually and as mother of Taylor Bell

Plaintiffs

v.

ITAWAMBA COUNTY SCHOOL BOARD, TERESA MCNEECE, Superintendent of Education for Itawamba County, Individually and in her official capacity TRAE WIYGUL, principal of Itawamba Agricultural High School, Individually and in his official capacity

Defendants

AFFIDAVIT OF DESERAE SHUMPERT

STATE OF MISSISSIPPI
COUNTY OF ITAWAMBA

Personally appeared before me, a Notary Public in and for the State of Mississippi, the within named, DESERAE SHUMPERT, who, having been first duly sworn, says as follows:

1. My name is Deserae Shumpert and I am a sixteen (16) years old student at Itawamba Agricultural High School in Itawamba County, Mississippi.
2. Michael Wildmon and Chris Rainey are teachers and athletic coaches at Itawamba Agricultural High School.
3. I was in the gym at Itawamba Agricultural High School this school year with Renisha Morris, a fellow female student at Itawamba, and I heard coach Wildmon tell Renisha that she had a "big butt" and that he would date her if she were older.
4. Additionally, on another day last school semester, T was with Renisha Morris, and Coach Wildmon inappropriately looked down her shirt.
5. On another school day last semester, Coach Rainey rubbed my ears while at school without my permission and I had to tell him to stop touching my ears.
6. In December of 2010, Taylor Bell and other female students at Itawamba were at
7. As of March 16, 2011, no school officials at Itawamba Agricultural High School have asked me or talked to me about Coach Wildmon or Rainey's conduct towards me or Renisha Morris.
8. Further Afian saith not.

/s/ Deserae Shumpert
DESERAE SHUMPERT

SWORN TO AND SUBSCRIBED before me this 16th day of March, 2011.

/s/ Karen N. Winter
NOTARY PUBLIC

[SEAL]

My Commission Expires:
9-25-2013

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action. 1:11CV56-D-D

TAYLOR BELL, DORA BELL, individually
and as mother of Taylor Bell

Plaintiffs

v.

ITAWAMBA COUNTY SCHOOL BOARD, TERESA MCNEECE,
Superintendent of Education for Itawamba County,
Individually and in her official capacity TRAE
WIYGUL, principal of Itawamba Agricultural High
School, Individually and in his official capacity

Defendants

AFFIDAVIT OF RENISHA MORRIS

STATE OF MISSISSIPPI
COUNTY OF ITAWAMBA

Personally appeared before me, a Notary Public in and for the State of Mississippi, the within named, RENISHA MORRIS, who, having been first duly sworn, says as follows:

1. My name is Renisha Morris and I am a seventeen (17) years old student at Itawamba Agricultural High School in Itawamba County, Mississippi.

2. Michael Wildmon is a teacher and athletic coach at Itawamba Agricultural High School.

3. While at Itawamba Agricultural High School this year, Coach Wildmon told me I had a "big butt" and that he would date me if I were older.
4. Coach Wildmon also told me I was one of the cutest black female students at Itawamba Agricultural High School.
5. Last school semester, coach Wildmon inappropriately looked down my shirt.
6. In December of 2010, I was at a friend's house with Taylor Bell and other female students at Itawamba. At this friend's house, I told Taylor about Coach Wildmon's statement's to me about my "butt", dating me, and how I was the cutest black female at Itawamba. I also told Taylor about Coach Wildmon inappropriately touching me.
7. As of March 16, 2011, no school officials at Itawamba Agricultural High School have asked me or talked to me about Coach Wildmon's conduct towards me.
8. Further Affiant saith not.

/s/ Renisha Morris
RENISHA MORRIS

SWORN TO AND SUBSCRIBED before me this 31st day of March, 2011.

/s/ Karen N. Winter
NOTARY PUBLIC

[SEAL]

My Commission Expires:
9-25-2013

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action. 1:11CV56-D-D

TAYLOR BELL, DORA BELL, individually
and as mother of Taylor Bell

Plaintiffs

v.

ITAWAMBA COUNTY SCHOOL BOARD, TERESA MCNEECE, Superintendent of Education for Itawamba County, Individually and in her official capacity TRAE WIYGUL, principal of Itawamba Agricultural High School, Individually and in his official capacity

Defendants

AFFIDAVIT OF KEYAUNA GASTON

STATE OF MISSISSIPPI
COUNTY OF ITAWAMBA

Personally appeared before me, a Notary Public in and for the State of Mississippi, the within named KEYALINA GASTON, who, having been first duly sworn, says as follows:

1. My name is Keyauna Gaston and I am a seventeen (17) years old student at Itawamba Agricultural High School in Itawamba County, Mississippi.

2. Chris Rainey is a teacher and athletic coach at Itawamba Agricultural High School.

3. Last school semester at Itawamba, I was in the gym at Itawamba Agricultural High School and Coach Rainey was standing to my side. As he stood there, he told me "damn baby, you are sexy."

4. In December of 2010, I was in the lunch room at Itawamba with Taylor Bell during school hours. While with him, we started talking about the inappropriate acts he had heard about coach Rainey and coach Michael Wildmon committed towards female students. I then told Taylor about coach Rainey's statement to me that I was "sexy."

5. As of March 16, 2011, no officials at Itawamba Agricultural High School have asked me or talked to me about Coach Rainey's statement to me.

6. Further Affiant saith not.

/s/ Keyauna Gaston
KEYAUNA GASTON

SWORN TO AND SUBSCRIBED before me this 31st day of March, 2011.

/s/ Karen N. Winter
NOTARY PUBLIC

[SEAL]

My Commission Expires:
9-25-2013

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action. 1:11CV56-D-D

TAYLOR BELL, DORA BELL, individually
and as mother of Taylor Bell

Plaintiffs

v.

ITAWAMBA COUNTY SCHOOL BOARD, TERESA MCNEECE,
Superintendent of Education for Itawamba County,
Individually and in her official capacity TRAE
WIYGUL, principal of Itawamba Agricultural High
School, Individually and in his official capacity

Defendants

AFFIDAVIT OF SHANTIQUA SHUMPERT

STATE OF MISSISSIPPI
COUNTY OF ITAWAMBA

Personally appeared before me, a Notary Public in and for the State of Mississippi. the within named, SHANTIQUA SHUMPERT, who, having been first duly sworn, says as follows:

1. My name is Shantiqua Shumpert and I am a sixteen (16) years old student at Itawamba Agricultural High School in Itawamba County, Mississippi.

2. Chris Rainey is a teacher and athletic coach at Itawamba Agricultural High School.

3. While at Itawamba Agricultural High School during last school semester, Coach Rainey told me if I would not have "messed" with some nasty people, then he would turn me back "straight" from being "gay."

4. Taylor Bell came to me in December 2010 and asked me about Coach Rainey. I then told him about the inappropriate statement coach Rainey made to me.

5. As of March 16, 2011, no school officials at ltawamba Agricultural High School have talked to me or asked me about the conduct of Coach Rainey.

6. Further Affiant saith not.

/s/ Shantiqua Shumpert
SHANTIQUA SHUMPERT

SWORN TO AND SUBSCRIBED before me this 31st day of March, 2011.

/s/ Karen N. Winter
NOTARY PUBLIC

[SEAL]

My Commission Expires:
9-25-2013

RECORD EXCERPT INDEX

/s/Benjamin E. Griffith, MSB #5026
Attorney of Record for Itawamba County
Mississippi Bar No. 5026
Griffith Law Firm
Post Office Box 2248
Oxford, MS 38655
Phone: (662) 238-7727
Email: ben@glawms

Record Excerpt 1

G. That the student be expelled from the schools governed by the Board of Education for one calendar year.

H. That the student be expelled from the schools governed by the Board of Education permanently.

The hearing will be conducted in a relatively informal manner, under the chairmanship of the attorney for the school board or her designee. No persons will be admitted to the hearing except members of the hearing panel, the principal involved, the student and the student's parents, the attorney for the student and the student's parents, and the attorney for the board. Additionally, witnesses may be called. The witnesses will be sequestered from the hearing and no witness shall be permitted to hear the testimony of any other witness, except that the student and the student's parents may both testify and be present throughout the entire testimony. The purpose of the hearing will be to determine whether or not the student in fact committed the acts or engaged in the conduct which precipitated the suspension and, if it is determined that the student did engage in some or all of these acts or conduct, whether or not the acts or conduct violate existing laws or regulations of the school.

In the event that it is determined that the student engaged in conduct or committed acts which violated existing laws or school regulations, the hearing committee must then determine, in light of all the circumstances, to recommend what action would best serve the interests of the student and the school and is most conducive to promotion of the educational process. The limits of possible actions are those outlined earlier as set forth in the notice. The student may not be charged at the hearing with any conduct except that conduct which is described in the foregoing notices, nor can the student's conduct be found to violate any laws or regulations except those set out in the notices. The charges made against the student must be first substantiated by competent testimony and, if those charges are thus substantiated, you will be granted the opportunity to offer any other evidence reasonably relevant and material to the issues before the board, which you deem appropriate. Strict rules of evidence will not apply and instead the hearing committee will endeavor to determine the true facts through testimony or statements of witnesses having personal knowledge of the matters about which they testify, reasonably limited to facts which are relevant and material to the issues. Any witnesses present at the hearing who are called to substantiate the charges made against the student may be examined by counsel or other representative of the schools, and may be cross-examined by counsel for the pupil or the pupil's parents or, if they are not represented by counsel, then such cross-examination may be conducted by one of them (the student or one of the pupil's parents). Witnesses presented on behalf of the pupil may be directly examined in the same manner and cross-examined by counsel or other representative of the schools.

P-1

If you fail to attend the hearing without requesting a postponement, the hearing committee will make its findings and recommend what action would best serve the interests of the student and the school and is most conducive to the promotion of the educational process as detailed above based upon the evidence presented in your absence.

Sincerely,

Teresa McNeece by MHF

Teresa McNeece
Superintendent of Education

TM/mhf

Record Excerpt 2

ITAWAMBA COUNTY SCHOOL DISTRICT
605 South Cummings Street
Fulton, Mississippi 38843

Teresa McNeece
Superintendent of Education

Telephone: (662) 862-2159
Facsimile: (662) 862-4713

January 21, 2011

Ms. Dora Bell
49 Mattox Springs Rd.
Fulton, MS 38843

Re: Due process hearing for Taylor Bell

Dear Ms. Bell:

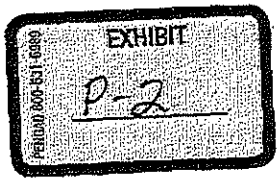
This letter will confirm our telephone conversation on January 18, 2011, wherein you and I discussed your letter which was dated and received by facsimile on January 18, 2011. In that letter you requested a continuance of Taylor's hearing until Wednesday, January 26, 2011. I informed you that we would like to have the hearing as soon as possible because Taylor will continue to be suspended at least until the hearing is held. You stated that you would call me back about a day earlier than Wednesday, January 26, 2011. However, I have not been contacted by you since that date. I am scheduled to be in meeting in Jackson on Monday and Tuesday of next week. Therefore, I am setting the hearing date for Wednesday, January 26, 2011, at 10:00 a.m.in the Office of the Superintendent of Education, 605 South Cummings St., Fulton, MS 38843.

If you have any questions, please feel free to call me or Mrs. McNeece.

Sincerely,

Michele H. Floyd

Michele H. Floyd



Record Excerpt 3

ITAWAMBA COUNTY SCHOOL DISTRICT
605 South Cummings Street
Fulton, Mississippi 38843

Teresa McNeece
Superintendent of Education

Telephone: (662) 862-2159
Facsimile: (662) 862-4713

January 27, 2011

Ms. Dora Bell
49 Mattox Springs Rd.
Fulton, MS 38843

Re: Recommended Discipline for Taylor Bell

Dear Ms. Bell:

Based on the testimony given at the due process hearing on January 26, 2011, the Discipline Committee determined that the issue of whether or not lyrics published by Taylor Bell constituted threats to school district teachers was vague; however, they determined that the publication of those lyrics did constitute harassment and intimidation of two school district teachers, which is a violation of School Board Policy and state law. As a result of these findings, the Committee will recommend in writing to the Itawamba County Board of Education the following:

> That Taylor Bell's seven day out-of-school suspension be upheld. That beginning January 27, 2011, Taylor will be placed in the Itawamba County Alternative School for the remainder of the current nine-week grading period. While in Alternative School, Taylor will not be allowed to attend any school functions and will be subject to all rules imposed by the Alternative School. Lastly, Taylor will be given time to make up any work missed while suspended or otherwise receive a 0, pursuant to Board policy.

The Board of Education will act on this recommendation at its meeting on February 7, 2011, which will convene at 6:30 p.m. at the Office of the Superintendent of Education, 605 South Cummings St., Fulton, MS 38843. The Board of Education can accept the recommendation of the Committee or take any of the actions specified in the previous letter. If you desire to address the Board of Education at this meeting, please call me or Mrs. Teresa McNeece so that you may be added to the agenda.

Sincerely,

Michele H. Floyd
School Board Attorney

cc: Michael Nanney, Alternative School Director
Trea Wiygul, Principal of IAHS

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Record Excerpt 4

ITAWAMBA COUNTY SCHOOL DISTRICT
605 South Cummings Street
Fulton, Mississippi 38843

Teresa McNeece
Superintendent of Education

Telephone: (662) 862-2159
Facsimile: (662) 862-4713

February 11, 2011

Ms. Dora Bell
49 Mattox Springs Rd.
Fulton, MS 38843

Re: Taylor Bell

Dear Ms. Bell:

As you are aware, on February 7, 2011, the Itawamba County Board of Education determined that Taylor Bell did threaten, harass and intimidate school employees in violation of School Board policy and Mississippi State Law. As a result, the recommendations of the disciplinary hearing were upheld by the Board of Education. Those recommendations are as follows:

> That Taylor Bell's seven day out-of-school suspension be upheld. That beginning January 27, 2011, Taylor will be placed in the Itawamba County Alternative School for the remainder of the current nine-week grading period. While in Alternative School, Taylor will not be allowed to attend any school functions and will be subject to all rules imposed by the Alternative School. Lastly, Taylor will be given time to make up any work missed while suspended or otherwise receive a 0, pursuant to Board policy.

If you have any questions, please feel free to contact me.

Sincerely,

Michele H. Floyd
School Board Attorney

cc: Trae Wiygul, Principal of Itawamba Agricultural High School
Michael Nanney, Alternative School Director

P-4

Record Excerpt 5

Verse 1

Let me tell you a little story about these Itawamba coaches / dirty ass niggas like some fucking coacha roaches/ started fucking with the white and know they fucking with the blacks / that pussy ass nigga Wildemon got me turned up the the fucking max/

Fucking with the students and he just had a baby / ever since I met that cracker I knew that he was crazy / always talking shit cause he know I'm from daw-city / the reason he fucking around cause his wife ain't got no tidies /

This niggha telling students that they sexy, betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack / Quit the basketball team / the coach a pervert / can't stand the truth so to you these lyrics going to hurt

Verse 2

What the hell was they thinking when they hired Mr. Rainy/ dreadlock Bobby Hill the second / He the same see / Talking about you could have went pro to the NFL / Now you just another pervert coach, fat as hell / Talking about you gangsta / drive your mama's PT Cruiser / Run up on T-Bizzle / I'm going to hit you with my rueger

Think you got some game / cuz you fucking with some juveniles / you know this shit the truth so don't you try to hide it now / Rubbing on the black girls ears in the gym / white hoes, change your voice when you talk to them / I'm a dope runner, spot a junkie a mile away / came to football practice high / remember that day / I do / to me you a fool / 30 years old fucking with students at the school

Hahahah / You's a lame / and it's a dam shame / instead you was lame / eat shit, the whole school got a ring mutherfucker

Verse 3

Heard you textin number 25 / you want to get it on / white dude, guess you got a thing for them yellow bones / looking down girls shirts / drool running down your mouth / you fucking with the wrong one / going to get a pistol down your mouth / Boww

OMG / Took some girls in the locker room in PE / Cut off the lights / you motherfucking freak / Fucking with the youngins / because your pimpin game weak / How he get the head coach / I don't really fucking know / But I still got a lot of love for my nigga Joe / And my nigga Makavelli / and my nigga codie / Wildemon talk shit bitch don't even know me

Middle fingers up if you hate that nigga / Middle fingers up if you can't stand that nigga / middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga

Record Excerpt 6

Student: Taylor Bell **MSIS #:** _____ **Date of Hearing:** January 26, 2010

School: Itawamba Agricultural High School **Offense/Findings:** harassment and intimidation of teachers and possible threats against teachers

Hearing Committee Members:
Jamie Dill, Principal of Mantachie Attendance Center
Ginger Mitchell, Social Worker
Shaka Shumpert, Teacher at Itawamba Attendance Center

Facilitator:
Michele H. Floyd, School Board Attorney

Persons present for entire hearing in addition to Hearing Committee and Facilitator:

Tylor Bell, Student
Dora Bell, Mother of student
Scott Colom, Attorney for student

Additional witnesses called:
Trae Wiygul, Principal of Itawamba Agricultural High School

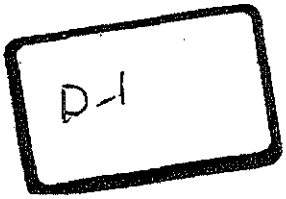
Synopsis of facts:

Taylor wrote, sang and published via the internet (Facebook and YouTube) a rap song which specifically named Coach Wildmon and Coach Raney. The lyrics say things such as Wildmon is f...in with whites and blacks, f...in with students and he just had a baby, f...in around cause his wife ain't got no titties, that Wildmon tells students they are sexy and the reason that Taylor quit the basketball team is bacause Wildmon is a pervert. The lyrics go on to say that Raney is another Bobby Hill, is a pervert, that he is f...ing with juveniles, that Raney came to football practice high, and that he is 30 years old and is f...ing with students at the school.

The last verse does not state if it is Raney or Wildmon that is being discussed but does say at the end that the head coach is a pervert which infers that he is discussing Wildmon again. This last verse says kissing number 25 (Taylor denied that it says kissing), looking down girl's shirts, f.. with the wrong one and get a pistol down your throat - pow, put some girls in the locker room and turned off the lights and said middle fingers up if you want to cap him.

Taylor is a senior.

Recommendation:
That Taylor Bell's seven day out-of-school suspension be upheld. That beginning January 27, 2011, Taylor will be placed in the Itawamba County Alternative School for the remainder of the current nine-week grading period. While in Alternative School, Taylor will not be allowed to



Record Excerpt 7

Regular Meeting
February 7, 2011

Attorney Daniel Tucker, representing Tremont PTO, addressed the Board about the busing issue from Banner to Franklin County, Alabama. Mr. Tucker understands that an AG request has been made.

Chairman Tony Wallace entertained a motion by Wes Pitts to go into closed session for student discipline and personnel matters. Harold Martin seconded the motion. Motion Carried Unanimously.

Chairman Tony Wallace entertained a motion by Wes Pitts to go into executive session for student discipline and personnel matters. Harold Martin seconded the motion. Motion Carried Unanimously. Three separate executive sessions were conducted. Present in the first session regarding student discipline were: Supt. McNeece, Michele Floyd, Tony Wallace, Clara Brown, Harold Martin, Wes Pitts, Tammy Palmer, I.A.H.S. student with MSIS #000252815, and Trae Wiygul. Present in the second session regarding a student matter were: Supt. McNeece, Michele Floyd, Tony Wallace, Clara Brown, Harold Martin, Wes Pitts, Tammy Palmer, Millie Wood (SPED Director), Sabrina Wigginton (parent), and Ms. Ricky Cox (grandmother). No action was taken regarding this issue. Present in the third session regarding the superintendent evaluation were: Michele Floyd, Tony Wallace, Clara Brown, Harold Martin, Wes Pitts, and Tammy Palmer.

Chairman Tony Wallace entertained a motion by Wes Pitts to come out of executive session. Harold Martin seconded the motion. Motion Carried Unanimously.

Chairman Tony Wallace entertained a motion by Clara Brown to accept the discipline recommendation of the Discipline Committee regarding student with MSIS #000252815 (I.A.H.S.) and finding that this student threatened, harrassed and intimidated school employees. Wes Pitts seconded the motion. Motion Carried Unanimously.

Chairman Tony Wallace entertained a motion by Harold Martin to approve a three percent (3%) raise for Supt. McNeece retroactive to January 1, 2011. Tammy Palmer seconded the motion. Motion Carried Unanimously.

Supt. McNeece shared a letter with the Board regarding Mantachie Attendance Center's football team and coaches.

Supt. McNeece shared a letter with the Board commending Mantachie Attendance Center's basketball team and coach.

Supt. McNeece shared a letter on behalf of the Food Pantry West thanking the Board for allowing them to use a facility at Mantachie Attendance Center.

Supt. McNeece advised the Board of a Dropout Prevention Summit being held on Feb. 25 in Tupelo.

Supt. McNeece reminded the Board of the MSBA Conference on February 21 - 23 in Jackson.

Supt. McNeece reminded the Board of the bid opening date on Feb. 8 for the Vo-Tech roof repair.

The Board discussed scheduling board visits.

D-2

Record Excerpt 8

The Colom Law Firm, L.L.C.

200 6th STREET NORTH, SUITE 505
COLUMBUS, MS 39701-3917

MAILING ADDRESSES:
POST OFFICE BOX 700
COLUMBUS, MS 39703-0700
TELEPHONE: (662) 327-0903
FACSIMILE: (662) 329-4812
WEBSITE: www.colom.com

191 PEACHTREE STREET
SUITE 3500
ATLANTA, GA 30303
TELEPHONE: (404) 522-5500
FACSIMILE: (404) 525-5555

...UR O. COLOM*
...ARLES T. BRANT**†
SCOTT W. COLOM*§

OF COUNSEL:
ELIZABETH UNGER CARLYLE*†

ADMITTED IN:
MISSISSIPPI* TEXAS¥
GEORGIA* MISSOURI‡
‡WISCONSIN

Writer's e-mail:
kwinter@colom.com

March 9, 2011

VIA FACSIMILE - (662) 843-8153

Benjamin E. Griffith, Esq.
Griffith & Griffith
123 South Court Street
P.O. Box 1680
Cleveland, MS 38732

Re: *Bell v. Itawamba County School Board, et al.*

Dear Mr. Griffith:

We will present the following witnesses for testimony tomorrow:

Taylor Bell
Dora Bell
Brad Franklin - rap expert
Michelle Floyd
Trae Wiygul

The following are witnesses that may testify tomorrow:

Renisha Morris - student from Itawamba County School
Shantiqua Shumpert - student from Itawamba County School
Deserae Shumpert - student from Itawamba County School

We will have a audio copy of the song to present to the court.

I hope your surgery goes well.

Sincerely,

The Colom Law Firm, LLC

Scott W. Colom

SWC/knw

D-3

Record Excerpt 9

Record Excerpt 10

Descriptor Term: DISCIPLINE--ADMINISTRATIVE POLICY-Page 4	Descriptor Code: JD-1	Issued Date: 1-18-11
	Rescinds: JD-1	Issued: 4-2-01

SEVERE DISRUPTIONS

Offense	Consequences
1. Open defiance of a teacher.	1. Discipline ladder Steps II - VI
2. Profanity, or vulgarity (to include acts, gestures, or symbols directed at another person)	2. Steps II - VI
3. Possession of tobacco or tobacco-related products at school or on buses.	3. Steps I - V
4. Smoking at or in the immediate vicinity of school or on buses.	4. Steps II - V
5. Use, sale, transfer, or possession of drugs, alcohol or drug paraphernalia or any psychoactive substance on or near school grounds or on buses. (See JCDAC)	5. Steps VII - IX
6. Defacing or otherwise injuring property that belongs to the school district.	6. Steps II - VII (to include restitution for damage)
7. Fighting at school, on the way to or from school, or at school activities.	7. Steps I - VII
8. Use or possession of weapons. (As defined in JCDAG & GBRN)	8. Steps V - IX
9. Use or possession of fireworks.	9. Steps II - IX
10. Disruptive behavior in the cafeteria, on the campus, on buses, or other school activities.	10. Steps II - VI (Also Refer to Bus Policy)
11. Stealing.	11. Steps III - VI
12. Cutting classes.	12. Steps II - VII

D-5

Descriptor Term: DISCIPLINE- - ADMINISTRATIVE POLICY - PAGE 5	Descriptor Code: JD-1	Issued Date: 1-18-11
	Rescinds: JD-1	Issued: 4-2-01

Offense (continued)	Consequences (continued)
13. Truancy.	13. Steps II, III, V - VII
14. Leaving campus without authorization.	14. Steps II - VII
15. Gambling or possession of gambling devices at school.	15. Steps III - VI
16. Harassment, intimidation, or threatening other students and/or teachers.	16. Steps II - IX
17. Continued disobedience.	17. Steps I - VI
18. Running in the hall.	18. Steps I - VI
19. Unnecessary noise in the hall.	19. Steps I - VI
20. Other behaviors as designated by the principal	20. Steps I - VI
21. Use, transfer, or possession of a firearm on school property or at any school related activity.	21. Step IX

Page 5 of 5

D-5

Record Excerpt 11

ITAWAMBA COUNTY SCHOOL DISTRICT
605 South Cummings Street
Fulton, Mississippi 38843

Teresa McNeece
Superintendent of Education

Michele H. Floyd
School Board Attorney

Telephone: (662) 862-2159
Facsimile: (662) 862-4713

February 1, 2011

Scott W. Colom, Esq.
The Colom Law Firm
P. O. Box 866
Columbus, MS 39703

VIA FACSIMILE
662-329-4832

Re: Taylor Bell

Dear Mr. Colom:

This letter will confirm our telephone conversation yesterday wherein you informed me that Taylor Bell wishes to appeal the recommendation of the disciplinary committee. My understanding is that you cannot be present on February 7 or February 21, 2011. Therefore, Taylor and his mother are going to appear before the Board of Education on February 7, 2011, without counsel.

In our telephone conversation, you also stated that Taylor was concerned that an assignment to Alternative School would prohibit him from graduating on track. I want to assure you again that this is not the case. In fact, many of the students leave Alternative School doing better academically than when they arrived because there is more one-on-one instruction and more time dedicated to class work. Also, as we discussed, what does concern me is that Taylor has not been to school since being notified of the recommendation on Wednesday of last week that he could begin in the Alternative School on that following Thursday. This means that to-date Taylor has accumulated three absences that appear to be unexcused. If these absences are in fact unexcused, Taylor will not be able to make up the work he missed on those days. Furthermore, Taylor's recommendation to the Alternative School is a day-for-day assignment. If the Board approves an assignment to Alternative School, his absences will just add to the length of time before he is allowed to return to the regular classroom.

Lastly, you asked me if Taylor had removed the song/video from the internet. I checked the YouTube address for the song/video, and it is no longer there. I appreciate your assistance with getting that removed.

If you have any questions, please feel free to contact me.

Sincerely,

Michele H. Floyd

D-6

Record Excerpt 12

Calendar for January 2011 (United States)

January

Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1
2	3	4	5	6	7	8
9	10	11	12	13	14 Mailed hearing letter	15
16	17 Martin Luther	18 Received cert. reg. called D. Bell	19 original hearing date	20	21 sent letter to D. Bell	22
23	24	25	26 Hearing called atty	27 Called atty mailed letter to D. Bell	28	29
30	31 atty called wanting Appeal					

Phases of the moon: 4: 12: 19: 26:

Holidays and Observances: 1: New Year's Day, 17: Martin Luther King Day

Calendar generated on www.timeanddate.com/calendar

7 days suspended before hearing - but would have been 2 if held on the 19th

13 days out since hearing

D-7

Record Excerpt 13

Calendar for February 2011 (United States)

February

Sun	Mon	Tue	Wed	Thu	Fri	Sat
		1 Letter faxed to atty	2	3	4	5
6	7 Bd meet.	8	9	10 snow day	11 letter mailed to Bell	12
13	14	15 Call from atty - coming back to school	16 Returned to school Alternative	17	18	19
20	21	22	23	24	25	26
27	28					

Phases of the moon: 2:● 11:◐ 18:○ 24:◑

Holidays and Observances: 14: Valentine's Day, 21: Presidents' Day

Calendar generated on www.timeanddate.com/calendar

D-8

Record Excerpt 14

I + a Coaches
Fukn whites + black
Wildmon ? w/ students + just had baby
Fukn around cause wife ain't got no titties
Telling students they are sexy
Coach pervert - reason quit

Rorey Bobby Hill
pervert
Fukn w/ guy.
rubbin on black girls in gym
dope runner so I can spot a junkie
Come to FB practice high
30 years old + fukn w/ students at the schoo

Kissing # 25
looken down girls shirt
Wildmon Fukn w/ wears I gonna get a piece
down your mouth - pow
Put some girls in lockroom during PE +
turned off lights
Head Coach — pervert

D-9

Record Excerpt 15

Taylor Bell - Windows Internet Explorer

http://www.facebook.com/home.php?l/profile.php?id=100000339439902&ck=wall

Favorites | Taylor Bell

Page | Safety | Tools

Donna Francis

Bradley Ray Dickens
Hawarden Agricultural High

Delisha Harris Cowley

Family

Jmall Curry
Brother

Duke Gothattas Whitfield
Brother

Tony Ramrod
Brother

Tianna Renee'
Sister

Shukeitria La'hila Cox
Sister

Yolanda Cowley
Cousin (female)

Share Profile
Report/Block This Person

16 hours ago

Taylor Bell
an unfinished track without hook or dj hosting juss sum good ole str8 drop!!! and I dare for anybody to say that this isnh AIENT THA TRUTH!!! PLAY WIT IT _TBizzle lmao

P.S. Kouches (lmao)
Length: 8:40

16 hours ago · Share

10 people like this.

Chase Jarrell My Nigga Goin Hard In tha Mutha Fuckin Paint! Cam Newton that bitch Bruhh!!
15 hours ago · 3 people

Taylor Bell yew already know brUh bruh...PLAY WIT IDT!!!!! LOL
15 hours ago

Tabitha Parker Hey, don't forget me when you're famous. :)
15 hours ago

Taylor Bell HAHAha :) I won't!!! remember ur part of my family RITE??? LMAO
15 hours ago · 1 person

Chase Jarrell Lol.. Mane Im tellin you cuz.. been tellin you since we was little.. keep fuckin with it man you got all the talent in the world BruHH BruHH!!
15 hours ago · 1 person

Taylor Bell thanks mane.....I JUST NEED A BIG BREAK THROUGH...no wut I mean??
15 hours ago

Chase Jarrell I Hear Ya Cousin!
15 hours ago

Brittany Barnes Donngg Taylor.. Yew straight up KILT that!! I was CRACKING straight UP!
15 hours ago

Taylor Bell u know me thats how I do...SPEAK DA TROOTH LOL
15 hours ago

Brittany Barnes Hella yeah!
14 hours ago

Darrio Green Ok
14 hours ago via Facebook Mobile · 1 person

Taylor Bell lol @Darrio is that a gud ok or bad ok hahaha!!!
14 hours ago

Joe Read Haha nice man..
14 hours ago

D-12

Chat (18)

Done | Internet | Protected Mode: Off | 100%

Windows Live... | Inbox - Micro... | Banner PROD ... | Taylor Bell - ... | Oracle Develo... | PaperFlow 7.3... | FacebookWall... | 2:18 PM

Record Excerpt 16

taylor bell · Jan 30, 2011
HEY mr. Oswalt...well as you know I am in a little situation right now..but all im asking that you please not give up on me....in todays society a high school diploma is almost a neccesity to survive...i apologize if i affended you in any way...and no!! lol nobody made me do this im just informing you this on my own..im doing my best to get back in school i want to be able to walk across that stage come may...in the time being if there is any way i can stay up to date on some of my things just let me know
sincerely, taylor bell

Captain Oswalt · Jan 31, 2011
Taylor, you are far too bright for me to ever give up on you. I am glad you realize the value of completing your high school requirements. I can also assure you that I have not changed my opinion of you as a result of your current situation. As for school work, if you have a copy of The War of the Worlds, begin reading it. Upon your return, we will get the quizzes taken. We are also working on the rough draft. If you completed your notecards, you are not too far behind.

I look forward to your return,
Capt. O.

taylor bell · Jan 31, 2011
thanks mr O. hope to see you soon...

Captain Oswalt · Feb 1, 2011
You too, Taylor. Take care. If you need me, please let me know.

Message

Attach

Attach...

Reply

D-13

Record Excerpt 17

Record Excerpt 18

A. It depends on the context.
Q. I know it depends on the context. Tell me the context that it depends on.
A. If we're talking about teachers or we're talking about folks who deal with 16-, 17- and 18-year-olds, who listen to hip-hop music every day, I probably would think twice before I took that literally.
Q. If we are talking about teachers in a public school, taking the entire context that has preceded these two filthy remarks, would you agree with me that if you were one of those two public officials, public teachers, that were referred to in those lyrics that you would reasonably believe that could be referring to me when he says, "Put a pistol in your mouth and cap him"?
A. If the name precedes it, yes, then it would definitely be cause for a conversation with the young man, absolutely.
MR. GRIFFITH: No further questions, Your Honor.
THE COURT: All right. Any redirect?
MR. SCOTT COLOM: Yes, sir.
THE COURT: In line with the cross, you may proceed.
MR. SCOTT COLOM: Your Honor, I'm just going to refer back to those lyrics and put in some context for it.
Doesn't appear that the lyrics I have are big enough for this scanner. Could I -- may I approach and give the witness the lyrics?

A. I was.
Q. Did the school board members ask any questions of Mr. Bell about the song disrupting other students?
A. I think they made comments of him as to the fact that those threats contained in that song, did he not feel that that would be a disruption of the school process; and why he did not go through the proper channels in reporting that instead of -- if those things were actually happening -- actually making that song on the internet.
Q. Was there any evidence put forth at this hearing about students being disruptive? Again, just a basic line of questioning. Was there any evidence that the coaches heard the song on campus and weren't able to work; or that teachers heard about the song on campus and weren't able to teach; or that students heard about the song and disrupted class? Was there any evidence of that before you?
A. That's a very long question. Do you want me to dissect it in part?
Q. No. I can you break it down, if you want.
A. Please.
Q. Was there any evidence --
A. The answer to some of it is yes, and the answer to some of it is no.
Q. Was there any evidence put forth at the hearing of a student complaining to a teacher about this song?

school officials, if they might reasonably portend disruption from student expression, based on threats, may do so?

MR. SCOTT COLOM: Your Honor, that's a leading question.

MR. GRIFFITH: I'm asking whether it was consistent or not.

THE COURT: Overruled.

BY MR. GRIFFITH:

Q. You may elaborate on it.

THE COURT: It is a leading question, but I'm going to allow it.

BY MR. GRIFFITH:

Q. Very briefly. Would it be consistent with the action taken by the disciplinary committee and, subsequently, when the appeal was heard and action was taken by the school board that the question before both bodies was whether school officials might reasonably portend disruption from a student expression by Taylor Bell?

A. Yes. Disruption was discussed.

MR. GRIFFITH: Your Honor, no further questions. Oh, I do move the introduction of Exhibit D9, Your Honor.

THE COURT: Very well.

(EXHIBIT D9 MARKED)

MR. SCOTT COLOM: Your Honor, I'm not quite -- we haven't gotten copies of any of this; and, so, I'm trying to

little bit before Christmas. I had some studio time set up, and I had no idea what I was going to write about. I usually try to schedule my studio time for the end of the week, so that leaves me time during the week to write.

The Thursday before I went to the studio, I was over at one of my friends' house, which is a girl. And there were several girls over there.

Q. Well, let me stop you there. So you went -- you got some information, decided to make a song. Tell us about recording the song.

A. Can you repeat the question one more time?

Q. Right. I don't want to -- let's not talk about what made -- what inspired the song.

A. Uh-huh (yes).

Q. Let's just get to where you made the song. Where was the location?

A. Oh, okay. The -- I recorded the song at a local recording studio called Get Real Entertainment records. I just did it -- I set up the time and went over there and recorded it.

Q. Did you use any resources from Itawamba school to make the songs?

A. No, sir.

Q. And this was not at Itawamba's facilities?

A. No, sir.

Q. Now, after you made the song, what, if anything, did you

just described.

THE COURT: Very well.

MR. GRIFFITH: And I'd ask that that be marked as an exhibit and introduced.

THE COURT: Okay.

(EXHIBIT D11 MARKED.)

MR. GRIFFITH: May I approach the witness, Your Honor?

THE COURT: You may.

CROSS-EXAMINATION

BY MR. GRIFFITH:

Q. Mr. Bell -- and by the way, it's good to meet you this afternoon.

A. Nice to meet you.

Q. I'm handing you what purports to be a copy of your Facebook, first page, what we call the front page. Do you see that?

A. Yes, sir.

Q. Can you identify it as the true, authentic, correct, first page of your Facebook account?

A. Yes, sir.

Q. Okay.

MR. SCOTT COLOM: May I approach?

BY MR. GRIFFITH:

Q. Do you see on that the emblem for the Itawamba County

Schools?

A. No, sir. That's not the emblem for the Itawamba County Schools.

MR. GRIFFITH: May I approach the witness, Your Honor?

THE COURT: Okay.

MR. GRIFFITH: First, I'd like to have this marked as an exhibit and introduced.

(EXHIBIT D12 MARKED FOR IDENTIFICATION.)

BY MR. GRIFFITH:

Q. Mr. Bell, I'm handing you Exhibit D12. I direct your attention, specifically, to what appears to be an Indian headdress at the top. Do you see that?

A. Yes, sir, I do.

Q. What is that, Mr. Bell?

A. That is an Indian.

Q. What is that in reference to the school that you've attended?

A. That is a school mascot.

Q. What is that in reference to the football uniform that you used to wear? Did you have it on your helmet?

A. Yes. Yes, sir.

Q. Basketball uniforms, did they have it as well?

A. Yes. They've got it spelled across.

Q. Yes, sir. You've just told me that you didn't use the

Q. Mr. Bell, the words that you included in your artistic endeavor, the song, were, "Middle fingers up, if you want to cap that nigger." Didn't you write those words?

A. Yes, sir.

Q. And you intended to write those words, didn't you?

A. Yes, sir.

Q. And when you wrote the words "going to get a pistol down your mouth," you intended to communicate that, didn't you?

A. Yes, sir.

Q. And you intended to communicate the idea of shooting someone, didn't you?

A. Repeat the question.

Q. You intended to communicate the idea of shooting someone, didn't you? Regardless of who did it, you intended that, didn't you?

A. Yes, sir.

Q. You thought about it, you typed it in, you entered it on your Facebook account; and you were proud of it, weren't you?

A. Umm, I cannot say that I was proud of it.

Q. Were you angry at someone when you did that?

A. No, sir, I was not angry.

Q. Did you do that as a matter of artistic flair?

A. I just -- no, sir. I just did the song because I'm an artist; and, you know, I mean -- when I did that song, you know, it wasn't to -- to me, trying to be proud of myself. You

TERESA McNEECE,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRIFFITH:

Q. Would you state your full name and your position for Judge Biggers, please?

A. Teresa McNeece, T-e-r-e-s-a, M-c-N-e-e-c-e. I'm the Superintendent of Education for the Itawamba County School District.

Q. Very briefly, what are your duties and responsibilities as they relate to student discipline and student actions, such as what you've heard here today?

A. Yes, sir. My job, that is guided by state board policy and local board policy, is to provide safe and orderly schools for not only our students but our employees as well.

Q. When did you first become aware of the song that is Mr. Bell's public domain song; that he published on Facebook and You Tube?

A. I believe it was Thursday, January 6th or so. Mr. Wiygul first told me about it when he was at my office, and then one of the coaches came to me and personally spoke to me about it. So it was on that Thursday afternoon, I believe.

Q. Thereafter, what did you do, Ms. McNeece?

A. Of course, at that time, Taylor had already been dismissed for the day. So I told Ms. Floyd, the school board attorney,

and Mr. Wiygul to meet me at the vocational center first thing Friday morning because he was a student there for his first two periods of class. So they met me down there, and that's where we first questioned Taylor about the song.

Q. What information did Mr. Taylor give you, Ms. McNeece, regarding the claims and allegations in the song?

A. Of course, my first concern was, were those allegations true.

Q. Yes.

A. You know, it was very important to us, as a school district, that if we had some inappropriate conduct going on, we wanted to know what it was and if it was, in fact, true. So I asked Taylor, you know, "Are these things true?" You know, I'm a literal person. When I hear f'ing, I think f'ing.

And he said, "No," you know. "Ms. McNeece, that's not what I meant." You know, "I meant that they were messing with kids." And I said, "Well, those are pretty serious allegations that you're making against our employees."

Q. What happened after that, Ms. McNeece, that directly involved you in your position as superintendent?

A. As I said, we talked to him further about it and, you know, asked him for names. "Please, give us names of the students who these things are supposedly happening to." And at that time, he would not give us anything.

The only thing we knew of was the No. 25 that was

Q. After that, Ms. McNeece, what occurred?
A. I told Mr. Wiygul to talk to -- call Taylor's mom and tell her that we were suspending him for the rest of the day. We felt like we needed to look at this more seriously to see whether or not there was any truth to the allegations.
Q. Proceedings were then held before a disciplinary committee, correct?
A. Yes, sir.
Q. You did not actually attend those proceedings, yourself, did you?
A. No, sir, I did not.
Q. Mr. Wiygul did?
A. Yes, sir.
Q. After that, there was an appeal to the school board, the full school board?
A. Yes, sir.
Q. All right. You did attend that?
A. Yes, sir, I was there.
Q. And the lyrics, specifically the two lyrics that I've read into the record and these witnesses have read into the record, were presented to the school board, correct?
A. That's correct.
Q. After that, from your perception, as superintendent of the school system, what was the likely foreseeable effect of those threats?

MR. WILBUR COLOM: Your Honor, first off, it's so leading. He's calling it a threat.

THE COURT: Well, objection overruled.

MR. GRIFFITH: Your Honor, I'm trying to move things along. I'm trying to beat a ten-minute deadline, too.

THE COURT: All right.

BY MR. GRIFFITH:

Q. Ms. McNeece?

A. My job -- my duty, as superintendent, is to be proactive and to foresee if there could be a possible disruption or danger at our schools. So instead of being reactive, we have to be proactive about how we handle this type situation. We felt at that time that was the response we needed to have.

Q. State whether or not -- my last question to you -- there was such a danger of a substantial disruption at the Itawamba schools by virtue of this, quote, song, close quote?

A. Our foreseeable look at it was, yes, it could be.

MR. GRIFFITH: No further questions, Your Honor.

THE COURT: All right. You did that in six minutes, Mr. Griffith.

MR. WILBUR COLOM: Your Honor, I'm going to try to be fast, too.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. WILBUR COLOM:

that would concern you, wouldn't it?

A. It would be difficult to look down a girl's skirt. I think it said girl's shirt. Did it not?

Q. Shirt. Excuse me. Shirt?

A. Yes, that would be.

Q. And that would be something of importance at a public school and something important to the public; would it not?

A. Absolutely, if it was happening at our school.

Q. You said that you were concerned about disruption. But is it in fact true that there was no disruption at the school? Isn't that true?

A. As I said, it is my position to make sure that I am proactive to maybe foresee that there could be a disruption.

Q. So -- but there was none that you know of?

A. I believe the coach who was named in that song -- it did have a disruptive effect on his ability to perform his job. Yes, I do believe there was a disruption there.

Q. He was the cne who was concerned about being slandered?

A. Yes, sir.

Q. But if it's true, it's not a disruption; it's just a fact, isn't it?

A. Your opinion or my opinion?

MR. GRIFFITH: Objection, Your Honor.

BY MR. SCOTT COLOM:

Q. But if it is true, it's not a disruption; it's a service,

isn't it?

A. It would still be a disruption if it's true.

Q. If it's true, isn't it not his duty to make it known?

A. It's not -- it's the parents of that child; it's the -- those children themselves that concern me; that if that was happening, why hadn't Mr. Wiygul not been told? Why had I not been told? Why did we find out about it through Taylor's song?

Q. All right. But if you know of wrongdoing going on, it's your duty to disclose it, isn't it?

A. Yes. Yes, you're right. You're right about that.

MR. WILBUR COLOM: All right. Thank you.

THE COURT: All right.

MR. GRIFFITH: No further questions of this witness, Your Honor.

THE COURT: Okay. You can step down.

(WHEREUPON, THE WITNESS WAS EXCUSED FROM THE WITNESS STAND.)

THE COURT: Who do you call next?

MR. CARR: Your Honor, Mike Carr for the defendants. At this time, we call Coach Chris Rainey to the stand.

THE COURT: Okay. Have you been here all day, Mr. Carr?

MR. CARR: I have. I've been sitting right there.

THE COURT: All right. Well --

MR. GRIFFITH: Your Honor, he's just not been as obnoxious as me.

THE WITNESS: Chris Rainey, C-h-r-i-s, R-a-i-n-e-y.

THE COURTROOM DEPUTY: Thank you.

MR. CARR: May I proceed, Your Honor?

THE COURT: You may.

CHRIS RAINEY,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CARR:

Q. Mr. Rainey, my name is Mike Carr. I'm an attorney for Itawamba High School. We've met before, haven't we?

A. Yes.

Q. And you know what issues we're here on today, that is, is the song; is that right?

A. Yes.

Q. And have you ever heard this song?

A. No, sir, I haven't.

Q. Okay. Well, how did this song come to your attention?

A. I got a call from Maquel Miller, and he told me.

Q. From who?

A. Maquel Miller.

Q. Who is that?

A. He's a quarterback for us.

Q. So he's a high school student?

A. Yes.

Q. And he told you about it?

A. Yes.
Q. Okay. Do you know how he heard it?
A. I think he was tagged on Facebook, maybe.
Q. Okay. But you're not sure?
A. No, sir.
Q. So he provided you with information about this song and said that it existed; is that right?
A. Yes, sir.
Q. What did you do next?
A. Well, he told me -- I asked him, I said, "Why did you check about it?" He said, "It's pretty bad. You need to go on there." And, so, when I got to school tomorrow, then the next day, then Coach Wildmon had told me about it.
Q. Okay. Now, you are -- what do you coach?
A. Football, basketball, track assistant.
Q. Did you ever read the lyrics to this song?
A. No, sir.
Q. Why have you stayed away from it? Is that fair, to say you've stayed away from watching the video or listening to the lyrics in this song?
A. Yeah, pretty much.
Q. Why did you do this?
A. I just kind of looked at it as just a rap; and, you know, if you let it go, it will probably just die down.
Q. But it hasn't gone away, has it?

A. No, sir, it hasn't.

Q. Now, do you know if other students, other than Mr. Miller -- you said that was his name, Miller?

A. Yes.

Q. Have other students heard, other than him?

A. Yes, I think so.

Q. All right. I'm going to ask you -- you teach at the school every day, right?

A. Yes, sir.

Q. And you're an athletic coach, right?

A. Yes.

Q. And you have constant interaction with students?

A. Yes.

Q. Have you noticed any type of effect at the school that this song has had?

A. Well --

MR. WILBUR COLOM: Your Honor, I would object. Again, Your Honor, this is stuff not presented at the hearing. And we -- what was presented at the disciplinary hearing had nothing to do with --

THE COURT: All right. You may have a continuing objection.

MR. CARR: Thank you, Your Honor. May I proceed?

BY MR. CARR:

Q. Again, how has it affected the school, if any?

A. Well, it has affected me by the way I, you know, talk to kids now.

Q. Okay. And what do you do different now that you weren't doing before this song came out?

A. Well, you kind of watch what you do now. And the thing is, when you're a coach, you're not just a coach. It's not, like, about Xs and Os. You've kind of got to get close to the kids and let them trust you. And, you know, that's the way you can relate to them. And I don't feel like I can do that now.

Q. When you say "get close to the kids," do you mean physically touching them?

A. No. Sometimes you're a parent figure to a kid, maybe a father figure or a mother figure. And they come to you for, you know, sometimes that crutch. And I don't feel like I can -- sometimes I feel like that's getting in the way now since this song.

Q. How, specifically, has it affected your coaching duties?

A. Well, I do assistant track, like I said; and I have boys and girl sprinters. And sometimes I tell the boys to go and work with the girls. You know, I tell them what to do; and they go and work with them, rather than being hands-on and working with them myself some.

Q. Okay. So it's changed the way that you coach?

A. Yes.

MR. CARR: Now -- Court's indulgence just for a

moment.

(AFTER OFF-THE-RECORD COMMENTS, THE PROCEEDING CONTINUED).

BY MR. CARR:

Q. When you're teaching, you work in the gym sometimes; is that right?

A. I'm in the gym four periods a day.

Q. Okay. And there's a chorus group of students that have class or a classroom in the gym area; is that right?

A. Right.

Q. Okay. Have you noticed a difference in their activity between before the song came out and after the song came out?

A. Well, they started coming in the gym a little more.

Q. They started coming in the gym more?

A. They just, you know, mingling with other kids that are already in the gym.

Q. Why is that?

A. I don't know. You know, it was -- and we got to where we kind of noticed that, and we kind of tell them to stay in the area. And I think Mr. Wiygul went to one of the teachers and told her, "Just keep your kids in the classroom and kind of work from there."

Q. Is it because they think something's going on in the gym now that this song came out?

A. That could be possible.

MR. CARR: No further questions, Your Honor.

BY MR. CARR:

Q. And the reason why he was put out of school was because of what?

A. The threats made in the song.

MR. CARR: No further questions, Your Honor.

THE COURT: Okay. You may step down.

(WHEREUPON, THE WITNESS WAS EXCUSED FROM THE WITNESS STAND.)

THE COURT: You may call your last witness.

MR. CARR: Your Honor, I call my last witness, Coach Michael Wildmon.

(THE WITNESS IS SWORN)

THE COURTROOM DEPUTY: Have a seat, please.

(WHEREUPON, THE WITNESS ENTERED THE WITNESS STAND.)

MR. CARR: I also ask that Coach Wildmon's wife be allowed in the courtroom. Is she still here?

(OFF-THE-RECORD DISCUSSION.)

THE COURTROOM DEPUTY: State your name clearly and spell it for the record.

THE WITNESS: Michael Wildmon, M-i-c-h-a-e-l, W-i-l-d-m-o-n.

MR. CARR: Thank you.

May I proceed, Your Honor?

THE COURT: Yes, sir.

MICHAEL WILDMON,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CARR:

Q. Mr. Wildmon, my name's Mike Carr. We met earlier today. Is that right?

A. Yes, sir.

Q. You are an employee of the Itawamba County School District, and you work at Itawamba Agricultural High School?

A. Yes, sir.

Q. All right. What position do you hold right now?

A. A teacher and basketball coach.

Q. All right. How long have you worked there?

A. This is my second year.

Q. Now, you're familiar with the issue we're here on today; is that right?

A. Yes, sir.

Q. And that is "the song"; that's what we call it here in the courtroom?

A. Yes, sir.

Q. How did you first -- how did you first hear it?

A. I was On my break at school, my planning period; and I received a text message from my wife. A friend of ours had seen it on one of the students' Facebook pages.

Q. So a friend of yours had seen it on a student's Facebook page, told your wife, who told you?

A. Yes, sir.

Q. And then after you received that text message, what did you do?
A. I asked -- there were three seniors sitting beside me, and I asked them if they knew anything about it. And they said yes. And one of them got their phone and let me listen to it.
Q. Okay. So it was just accessible right there, and you were able to listen to it within several minutes of you getting that text message?
A. Yes.
Q. So after you listened to it, how did it make you feel?
A. I was angry at first. And, then, you know, the more I thought about it, you know, he -- the accusations were a felony. I mean, that was my life. And I got up and went straight to Mr. Wiygul, the principal.
Q. Does it say your name in that song?
A. Yes, it does.
Q. Do you know if it says it more than once?
A. I believe it says it twice. But I haven't listened to it in so long, I don't remember for sure.
Q. When you heard that song, you said you went to your principal; is that right?
A. Yes, sir.
Q. And told him about it?
A. Yes, sir.
Q. Then I just want to ask you generally -- because I only

have a few minutes here, Coach. And again, what do you coach?
A. Basketball and cross country, both boys.
Q. All right. I'm going to kind of open it up to you then. How has it affected the school, if at all, in your opinion, as a teacher?
A. I mean, that's while I'm teaching now or anything that I do, I'm having to think, you know, Is this kid going to think that I'm doing this, or, Is somebody going to see me do this thing and think it's something inappropriate? You know, it's constantly in the back of my mind, you know, what am I doing.
Q. What about parents? Have any of them approached you about this, or are you concerned about parents?
A. I had one parent who contacted me and told me that she had heard about it, but she did not believe it was true.
MR. WILBUR COLOM: I object, Your Honor. It's hearsay.
THE COURT: Objection sustained.
MR. CARR: Thank you.
BY MR. CARR:
Q. Has the language that Taylor Bell chose to put in his song affected the way that you teach at all?
A. I tried to make sure, you know, if I'm teaching, and if I'm scanning the classroom, that I don't look in one area too long. I don't want to be accused of, you know, staring at a girl or anything of that matter.

Q. Have you ever texted a girl, like No. 25, on the basketball team?
A. No, sir.
Q. Okay. You said how it affected you in the classroom. Has it affected the way that you interact with students when you're coaching?
A. I mean, even with the boys now, you know, their practice, I would try not to grab them by their arms. I would try to make sure I had their jersey or whatever to put them into position. I just wouldn't, you know, move them like I had been. You know, I didn't want anything to be taken --
Q. Do you know, if at all, that it's affected the operation of the school in general?
A. I teach Driver's Ed, so a lot of times I'm gone. So the kids that I have in the car, no. I mean, they seem to act normal.
Q. Okay. And then finally, Coach, when you heard that song that referenced your name and your wife and used that phrase about capping you and putting a pistol down your throat, how did you take it?
A. I mean, I took it literally. After ball games when we would get clean, I would get those kids; and I wouldn't let them leave until I was in my truck. I mean, I didn't know how to take it. I mean, you never know in today's society, you know, what somebody means, how they mean it. And I mean, I was

scared.

MR. CARR: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. WILBUR COLOM:

Q. It's true that you did not testify at the disciplinary hearing, nor before the school board?

A. That's true.

Q. And the day you heard about it, you have a student pull out a cell phone; is that correct?

A. Yes.

Q. Now, you know, having a cell phone is actually against school policy, isn't it?

A. Yes, sir.

Q. And, so, you had a student violate school policy?

THE WITNESS: Can I explain?

THE COURT: Sure.

THE WITNESS: He was coming back from basketball practice. Seniors have senior leave, and he had got back early. And since he, technically, wasn't in school -- I asked because it was talked about my name, accusing me of something.

BY MR. WILBUR COLOM:

Q. But you were on school property?

A. Yes, sir.

Q. And you had him play the song?

A. Yes.

CERTIFICATE OF SERVICE

I hereby certify that twenty (20) true and correct copies of Defendant-Appellee Itawamba County School Board's **Record Excerpts of Appellees** were served on the Clerk of the United States Court of Appeals by electronic case filing and by First Class United States Mail, and on the following by electronic case filing and by First Class United States Mail:

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THIS, the 22nd day of April, 2015.

/s/ Benjamin E. Griffith
Benjamin E. Griffin

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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April 22, 2015

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No. 12-60264 Taylor Bell, et al v. Itawamba County School Board, et al
USDC No. 1:11-CV-56

Dear Mr. Griffith,

The following pertains to your record excerpts electronically filed on 4/22/2015.

1. Please make the following correction within 5 days from the date on this notice:

- Document has not been tabbed as required, see 5TH Cir. R.30.1.7(c). The paper copies of record excerpts filed with the court must contain actual physical tabs that extend beyond the edge of the document to facilitate easy identification and review of tabbed documents.

2. Once you have prepared your sufficient record excerpts, you must email it to: **Dawn_Victoriano@ca5.uscourts.gov** for review. If the record excerpts are in compliance, you will receive a notice of docket activity advising you that the sufficient record excerpts have been filed.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Dawn D. Victoriano, Deputy Clerk
504-310-7717

cc: Mr. Michael Stephen Carr
Mr. Scott Winston Colom
Mr. Wilbur O. Colom
Ms. Michele H. Floyd
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