No. 12-60264

IN THE

United States Court of Appeals for the Fifth Circuit

TAYLOR BELL,

Appellee,

v.

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

Appellants.

On Appeal from the Memorandum Opinion of the United States District Court for the Northern District of Mississippi dated March 15, 2012
Docket No. 1:11-cv-00056

BRIEF FOR *AMICUS CURIAE*
Student Press Law Center
Filed in Support of Appellee, Seeking Reversal

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June 13, 2012

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus, the Student Press Law Center, is an IRS 501(c)(3) non-profit corporation incorporated under the laws of the District of Columbia with offices in Arlington, Virginia. The Center does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. The corporation is operated by a 15-member volunteer Board of Directors.

CERTIFICATE OF INTERESTED PERSONS

In addition to the interested persons named in the parties' respective Statements, *Amicus* discloses that the following entities have an interest in this matter:

(1) The Student Press Law Center

(2) Scott Sternberg, Counsel to the Student Press Law Center

(3) Frank D. LoMonte, Executive Director, Student Press Law Center

(4) Adam Goldstein, Attorney Advocate, Student Press Law Center

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IDENTITY OF THE *AMICUS CURIAE* STATEMENT OF INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Student Press Law Center (the "SPLC") is a non-profit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. The SPLC provides free legal information and educational materials for student journalists, and its legal staff jointly authors the widely used media-law reference textbook, *Law of the Student Press*, now in its third edition.

Because of the heavy censorship of on-campus student journalism, students are increasingly taking their speech off campus to address issues important to their lives outside of school-supervised publications. The SPLC consequently has special concern for maintaining the safety of non-school-funded websites as places where young journalists can call public attention to problems in their schools without fear of government censorship.

Pursuant to FED. R. APP. P. 29(a), this Brief is being filed without a motion seeking leave of Court, because the Appellants and the Appellees have consented to its filing.

I. INTRODUCTION

The speech in this case is, undeniably, distasteful. It is the type of distasteful speech that provokes courts to make bad law in their quest to make sure that a perceived wrongdoer does not escape punishment, and that is exactly what happened in the Court below. This Court is writing precedent not just for Taylor Bell, but for all of the speakers who will follow him, including those engaging in *bona fide* journalistic, editorial or whistleblowing speech. Whatever this Court may think of Taylor Bell, those speakers must be able to confidently speak out on matters of public import knowing that they will not be punished just because their speech provokes a strong reaction. As a result of the District Court's overbroad ruling, those speakers can no longer have such confidence.

What Taylor Bell contends that he did in this case – and at summary judgment, his account must be accepted as true – is to attempt to engage the public's attention on a matter of grave concern, the sexual harassment of schoolchildren by educators. Bell undeniably chose a very poor way of making his point, using coarse language and imagery that undermined the impact of his message. But what if the next Taylor Bell actually witnesses sexual misconduct by school employees and goes before the local Board of Education to call public attention to the wrongdoing? That speaker must be certain that his urgent message can safely be delivered without reprisal, or else the message may go unsaid. Under

the District Court's view of the law, however, speech can be punishable as disruptive *even if* it is 100 percent truthful and calls attention to a matter of vital public concern. This cannot be the law.

To be sure, most school administrators are honest people who would not abuse their authority to silence whistleblowing. But the First Amendment does not exist to protect us against the majority of well-meaning government officials. It exists to protect us – and particularly the most vulnerable among us – from overreaching by that minority of government actors who, left unchecked, would misuse their positions to silence criticism. The District Court's ruling strips away that protection.

The Supreme Court has *never* said that schools may extend their disciplinary authority to entirely off-campus behavior based on the way in which people might react to the behavior on campus. To the contrary, the Court reaffirmed as recently as 2007 that off-campus and on-campus speech are to be judged under two different legal standards, and that speech which would be punishable when uttered at school would be constitutionally protected when uttered away from school.

The speech in which Bell engaged in this case was crude and offensive, but ample non-school remedies exist for such speech. If his parents disapproved of Bell's use of their computers and Internet service to produce the video, then the decision to punish was theirs (just as, if Bell had used the school's computers and

Internet service, the decision to punish would be the school's). If the video would be taken by a reasonable viewer to assert factual falsehoods about Coaches Wildmon and Rainey, it could also have been actionable through the civil justice system as defamatory. If the video would reasonably be interpreted as imminently threatening violence, then it was also punishable through the criminal justice system.

Parental discipline, civil remedies and criminal enforcement are the appropriate responses when a child engages in injury-causing conduct off school premises and outside of school-supervised functions. A public school is part of the government, and the government may not punish a citizen for the content or viewpoint of speech absent a narrow few exceptions. However unpleasant we find this particular speech, a school does not have plenary authority over the lives of its students every waking moment of every day no matter where they may be, and most certainly not over the viewpoints they express.

To be clear, *Amici*'s interest in this case is not about the "right" to call coaches insulting names. *Amici's* concern is that the District Court gravely misstated the law in ways that – if not emphatically set right by this Court – will result in open season on student whistleblowers, journalists and editorial commentators who (quote-unquote) "disrupt" school by truthfully exposing the wrongdoing of school employees.

II. LEGAL DISCUSSION AND ARGUMENT

A. The District Court Erred in Treating Off-Campus Speech as Legally Indistinguishable From On-Campus Speech

1. The Supreme Court Did Not Address Off-Campus Speech in *Tinker*

The District Court erred in relying on an out-of-context fragment from *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (*see* Slip Op. at 4) to suggest that the limitations on free expression recognized in *Tinker* apply with equal force off campus. *See* Slip Op. at *7 (saying that on-campus standards limiting students' First Amendment rights are "equally applicable to off-campus student speech as explicitly recognized in *Tinker*."). This interpretation stands *Tinker* – including the very passage on which the Court purports to rely – completely on its head.

In context, the *Tinker* passage cited at Page 4 of the District Court's opinion is not a *withdrawal* of rights, but rather, an *affirmative grant* of rights. The *Tinker* Court began by reciting what had happened in the plaintiffs' schools when they showed up wearing antiwar armbands: "There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises." *Tinker*, 393 U.S. at 508. Tracing the history of campus "academic freedom" cases, the Court then found that the *Tinker* children's speech was constitutionally protected no matter where on campus it occurred:

> The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. 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. ... But conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – 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 512-13.

The passage relied upon by the District Court was the Supreme Court's effort to say that there is no diminished level of freedom of expression in the non-classroom areas of the school building where the purportedly disruptive reactions occurred in that case. It most certainly cannot be read as withdrawing First Amendment rights during students' off-hours when they are away from the classroom, cafeteria and playing field.

Tinker of course did not involve off-campus speech at all – the students were ordered to remove their armbands while at school, not to refrain from wearing them at all times. Had the Supreme Court believed it was making a rule extending

to the students' off-hours – had the school's prohibition applied around-the-clock to the wearing of armbands on personal time – there is no telling how the Court might have calibrated the "material and substantial disruption" test. But there is no reason to believe that the Court would have afforded the school equivalent authority to ban the wearing of armbands on students' personal time, on the grounds that classmates might see the armbands on Saturday and retaliate while at school on Monday. Nor would such a directive conceivably be upheld as constitutional today.

In short, it simply is untenable to do what the District Court did – to remake a case that affirmatively granted students First Amendment rights while in the corridors and lunchrooms into a case that affirmatively withdrew students' First Amendment rights while at home.

2. The Supreme Court Has Expressly Recognized Heightened Protection for Students' Off-Campus Speech

Scores of post-*Tinker* rulings – including those of the Supreme Court – have accepted as a given that speech outside the "schoolhouse gate" is afforded greater protection than that foisted upon a captive school audience. The District Court erred in finding that off-campus speech is to be afforded no greater First Amendment dignity than speech in the middle of the cafeteria during school.

The *Tinker* Court held that, within the "schoolhouse gate," school officials may restrict student speech only if such speech "materially and substantially

disrupts the work and discipline of the school." 393 U.S. at 513. The Court emphasized that in analyzing students' First Amendment rights, the government's enhanced disciplinary powers at school were to be considered in "light of the special characteristics of the school environment." *Id.* at 506.

Nowhere did the Court suggest that such powers extended beyond the schoolhouse gate, nor has the Court made any such suggestion in the 42 years since. In fact, the Court has been careful to limit intrusions on students' rights to conduct taking place on school property, at school functions, or while engaged in school-affiliated activity. *See, e.g., Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002) ("*Tinker* acknowledges what common sense tells us: a much broader 'plainly legitimate' area of speech can be regulated at school than outside school.").

In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 261 (1988), the Supreme Court held that a principal could remove stories from a school-sponsored student newspaper when the censorship was "reasonably related to legitimate pedagogical concerns[.]" Nevertheless, the Court recognized that, although the school could censor on-campus speech in a curricular setting that is contrary to its educational mission, "[it] could not censor similar speech outside the school." *Id.* at 266.

In *Morse v. Frederick*, 127 S.Ct. 2618 (2007), the Court held that a school could punish a student who, at a school-sanctioned event during school hours, stood directly across from the school grounds and displayed a banner interpreted as promoting drug use. *Morse*, 127 S. Ct. at 2625. Writing for the majority, Chief Justice Roberts expressly rejected the argument that it "[wa]s not a school speech case," noting that (unlike in this case) the events "occurred during normal school hours" at a school-sanctioned and school-supervised gathering. *Id.* at 2624. While the speaker was physically off school grounds, the Court took pains to limit its holding to speech at a school event. Citing *Bethel Area Sch. Dist. v. Fraser*, 478 U.S. 675 (1986), which upheld the punishment of Mathew Fraser for "lewd" remarks made in front of a school assembly, the Court expressly recognized that speech off campus is entitled to greater First Amendment dignity: "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* at 405.

Just as the Supreme Court has never equated off-campus speech with on-campus speech – and has strongly suggested the converse – numerous lower court rulings following *Tinker* recognize more robust protection for off-campus speech, even where the speech is about the school and is capable of reaching school or actually does so. For instance, in *Thomas v. Bd. of Educ., Granville Central Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979), the Second Circuit held that *Tinker*'s limits on

freedom of expression were "wholly out of place" in the context of an "underground" humor magazine that students produced on their own time and with their own money, even though – just as in this case – the magazine was about the school and was brought onto campus by a reader: "[B]ecause school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id.* at 1050. *See also Bystrom v. Fridley High Sch.*, 822 F.2d 747 (8th Cir. 1987) (recognizing higher quantum of protection for students' off-campus expression than *Tinker* provides for on-campus expression).

The principle recognized in *Thomas* – that the limits on students' First Amendment rights during the school day are tolerated only because students reclaim the full benefit of the Constitution when they leave campus – applies with equal force here:

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. .... Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.

Id. at 1052.

3. Off-Campus Speech is Entitled to Greater Protection Than On-Campus Speech.

The facts of this case amply establish why off-campus speech – even off-campus speech that is made accessible on the Internet – is qualitatively different from on-campus speech. The District Court erred in failing to recognize any distinction.

When a student speaks on campus, that student's speech is thrust upon a captive viewing audience that is compelled by law to attend. A student who is enraged by a swastika on the T-shirt of the classmate seated in front of him has no choice but to look at it. Because it is understandable that young listeners who are forced to view highly inflammatory speech might lash out, *Tinker* lowers the First Amendment bar while students are on campus during the school day, so that speech the government could never punish in the "real world" becomes punishable to protect the "captive audience" within the confines of school.

When a student speaks off campus, the facts are materially different. Off campus, students engage in all manner of expressive activity: Campaigning for a candidate, proselytizing for a religious denomination, marching in a parade. As with these activities, a YouTube video is not forced on captive viewers. The speech must be affirmatively sought out. Viewers who are offended can instantly look away. The potential audience is not limited to school listeners. It includes (among others) policymakers and the news media. It is one thing to say that a school may

interfere with a student's communication with fellow students, but it is quite another to say that the school may interfere with a student's ability to communicate with the general public.

In this case, the speech reached the coaches while on campus only because Coach Wildmon *asked* a student to access the video via cellular phone during school hours and show it to him. (Slip Op. at 9.) Indeed, nothing in the decision below indicates that *any* student ever watched the video on school grounds – nor did Wildmon learn about the video because his students were behaving disruptively in response to it (he learned about it from his wife). This is categorically different from Bell dancing down the hallway during school singing the song aloud. The law must recognize that difference by applying a more protective legal standard to off-campus speech.

While this case involves speech in the form of a YouTube video, giving schools control over off-campus speech does not stop there. In the year 2012, *any* off-campus speech could foreseeably reach school. A student hunting enthusiast who wears a National Rifle Association T-shirt to a political rally on a Saturday will undoubtedly show up in multiple YouTube videos, Facebook photos and online news broadcasts so that his T-shirt is viewable by classmates and school personnel. Is that student's gun-rights T-shirt subject to regulation as on-campus speech because of the student's certain knowledge that the speech will be viewable

at school? To equate off-campus speech with on-campus speech because of its potential to reach the school completely substitutes school authority for the child-rearing authority of the family.

The Court below took no note of the emerging split of authority in the circuits over schools' ability to punish students for the views they express in their off-campus speech. The reality is that no circuit has said that speech critical of school personnel – as opposed to speech threatening students – is punishable under an unmodified application of *Tinker*, and the one circuit to confront that question directly (the Third) strongly indicated that it is not.

Two circuits (the Fourth[1] and the Eighth[2]) have permitted schools to impose punishment on off-campus, online speech under the "material and substantial disruption" standard coined in *Tinker*. Two circuits (the Third[3] and the Second[4])

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[1] *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011) (rejecting First Amendment challenge to punishment of "cyberbullying" page on social networking site that included photos of a particular student whom the creators accused of having a venereal disease).

[2] *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754 (8th Cir. 2011) (upholding school's discipline of student who made multiple references in online "chat" with schoolmates to obtaining guns and killing particular individuals at school).

[3] *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (*en banc*) (overturning school's punishment of parody MySpace page crudely ridiculing a middle-school principal and expressing skepticism, without deciding, whether *Tinker* is the proper legal standard for assessing school authority over off-campus online speech).

have hesitated to apply an unmodified *Tinker* standard to make off-campus speech punishable.

What is notable about this evolving body of precedent is that the courts that have permitted *Tinker*-based discipline of off-campus speech have done so to protect vulnerable students against attack. Those that have refrained from legitimizing *Tinker*-based discipline have done so where the speech ridiculed school officials, not students.

This is a common-sense distinction. School employees occupy positions of public trust. As such, they are expected to absorb even harsh and at times unfair criticism, so as to leave the essential "breathing space" for citizens to freely discuss the performance of their public servants.

Rather than taking note of this emerging body of online-speech precedent, the Court below relied on a handful of cases – one of which was not even a case about off-campus speech at all – that are so factually dissimilar to this case that, by inference, they actually support the opposite outcome.

(continued...)

[4] *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011) (expressing uncertainty whether *Tinker* legal standard applies to student's speech on an online blog created off campus on personal time, and dismissing student's First Amendment challenge to disciplinary sanction on qualified immunity grounds because of the unsettled state of the law).

The whistleblowing aspect of this speech decisively removes it from the realm of other cases in which courts have "bent the rules" of the First Amendment and permitted schools to punish off-campus speech. *Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007) involved the cartoon image of a particular teacher being shot in the head, which a student transmitted to multiple classmates via instant messaging. The student did not purport in that case to be expressing any substantive message – he simply insisted that the threat implied by the caricature was a joke. The same is true of the other two cases on which the District Court relied, *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (involving a graphic fantasy written in a student's notebook about shooting and killing a particular teacher during school) and *D.J.M.*, *supra* (involving a social networking page that cruelly attacked and ridiculed a named classmate).[5] What these other circuits' cases all have in common – and what differentiates them from this case – is that there was no evidence that the speech was meant to call public attention to wrongdoing by school employees or that it had any other redeeming value.

[5] The *Boim* case is additionally off-point because it involved on-campus and not off-campus speech; the student physically brought the notebook with the violent story into the classroom.

Were this Circuit to accept the District Court's rationale without substantial modification, the Fifth Circuit would be alone in staking out the extreme and dangerous position that speech critical of government officials is equally punishable without regard to when and where it is said. The Court should not make that leap, because – as described in Section C, *infra* – narrower grounds exist to dispose of this case without undermining essential First Amendment freedoms.

B. Speech Truthfully Exposing School Wrongdoing Cannot be Punishably "Disruptive"

The most worrisome aspect of the District Court's ruling – one that begs for correction by this Court – is that the Court evidenced no concern for whether the underlying message was truthful. This patently was error. It sends the intolerable message that schools may ban and punish even well-founded reports of employee misconduct.

There is a world of difference between baselessly accusing school personnel of wrongdoing on one hand, and voicing a good-faith belief that wrongdoing occurred on the other hand. At summary judgment, the Court was obligated to credit Bell's testimony that he had been told by multiple students that the coaches behaved in an inappropriately flirtatious way. *See Sanders v. English*, 950 F.2d 1152, 1154-55 (5th Cir. 1992) ("All reasonable inferences which can be drawn from the facts must be construed to support [the non-movant's] theory of the case,

and any genuine dispute of fact must be resolved, for purposes of the summary judgment motion, in [the non-movant's] favor.").

The form that Bell's "whistleblowing" took was unconventional. It was not the most effective choice of methods, to be sure, nor would it be the optimal one that a school might teach in a civics course. But the First Amendment does not protect just the speakers who use mainstream methods – it protects the flag-burner and the "F--- the draft" jacket-wearer as well as the editorial writer.[6] Nor does speech lose First Amendment protection merely because it is presented in a highly offensive manner, as the Supreme Court made plain last term in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011).

Decisive to Supreme Court's ruling in *Snyder* – that the government may not punish highly inflammatory anti-gay hate speech by picketers outside military funerals – was that the speech addressed a matter of public concern (*i.e.*, the issue of whether homosexuality should be tolerated). Even though the picketers' speech – like Bell's speech here – did not fit polite society's expectation of what a civil discourse on public issues should look like, the Court looked beyond the coarse words and inartful presentation to the essence of the speakers' message:

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[6] Apropos, *The Seattle Times* recently published an opinion column in the form of a rap video, *available at* http://seattletimes.nwsource.com/html/editorialsopinionpages/2018389866_blue-scholars-prometheus-brown-seattle-shootings.html

> [S]peech on matters of public concern ... is at the heart of the First Amendment's protection. ... The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. ... That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. ... Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Snyder, 131 S.Ct. at 1215 (internal quotes and citations omitted).

Just as the *Snyder* protesters' distasteful speech was afforded special First Amendment dignity because it addressed a matter of public concern, so too should the Court below have recognized a distinction between, *e.g.*, the type of speech in *Wisniewski* (a joking expression of personal dislike for a teacher) versus the speech here (a plea to stop the sexual harassment of female students). To afford no consideration to the public-concern content of the speech was plainly inconsistent with the Supreme Court's directive in *Snyder*.

The bulk of the "disruption" on which the District Court rested its determination (Slip op. at *9) was the testimony of the two targeted coaches that they "altered [their] teaching style" in response to the song, believing that their conduct toward female students was being scrutinized. But causing an employee to "alter his teaching style" can be a *positive* change, for which the student deserves thanks, if the employee's "style" is to ogle and proposition students. If the coaches behaved more cautiously with female students so as to dispel suspicion of inappropriate behavior, that change in "style" not only is non-disruptive, but

undoubtedly is consistent with the anti-harassment training that schools themselves regularly give their employees.

The inquiry into whether Bell had a good-faith factual basis for his accusations – an inquiry that the District Court failed to perform – also should have informed the Court's consideration of Bell's choice of tone and words. Many among us would be provoked to use profane and even violent language if we believed that an adult was endangering the safety of a child. Words are nothing without context.

On remand, the District Court should be directed to reconsider Bell's speech in light of *Snyder* and in light of the matters of public concern that, however inelegantly, Bell attempted to air.

C. Narrower Grounds Exist to Avoid an Unnecessary Ruling on a Difficult and Unsettled Constitutional Question

It was unnecessary for the Court below to make a sweeping pronouncement about the First Amendment status of all off-campus speech, because this particular speech implicates pre-existing exceptions to the First Amendment that may be decisive. The threshold inquiry that the District Court overlooked is whether portions of Bell's video were unprotected speech because they were threatening or defamatory, and if so, whether it was the threatening and/or defamatory content that actually motivated his suspension.

The government may punish the content of speech if it constitutes a "true threat." *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536 (2003). Speech is a "true threat" and therefore unprotected under the Constitution if an "ordinary reasonable recipient who is familiar with [the context] would interpret" it as a serious expression of an intent to cause a present or future harm. *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009). Similarly, speech that is defamatory may be sanctioned notwithstanding the First Amendment. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *Beauharnais v. Illinois*, 343 U.S. 250, 254–55 (1952).[7]

If it is determined that Bell's speech constituted a true threat, or that it was defamatory, then Bell has no grounds for complaint under the First Amendment.[8] The Court below should be directed to conduct this threshold analysis, which may dispose of Bell's First Amendment claims without need to make new law in an unsettled area without the benefit of Supreme Court guidance.

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[7] Indeed, these factors were raised in, and could have been decisive of, the *Kowalski* case (where the speech, asserting that an identified student had a venereal disease, was likely actionable either as an invasion of privacy or as defamation) and the *D.J.M.* case (where the speech was deemed by the court to be reasonably construed as a "true threat").

[8] A student who is punished for the content of off-campus speech still may have an actionable due process claim regardless of the content of the speech, if school regulations did not afford fair notice that off-campus speech would be punishable. *Amici* do not understand Bell to be making such a claim in this case.

III. SUMMARY AND CONCLUSION

In a February 15, 2011, address to students at George Washington University about the importance of Internet freedom as a force for democratization throughout the world, Secretary of State Hillary Clinton spoke approvingly of "children in Syria who used Facebook to reveal abuse by their teachers."[9] The very same online speech lauded as emblematic of the liberating power of the Internet in one of the Arab world's most oppressive backwaters is, under the District Court's ruling, subject to government punishment today in the Northern District of Mississippi.

Courts understandably empathize with school administrators who are called upon to perform a sensitive and difficult job. But no matter how much we sympathize with the school administrators in this case, we must be mindful that government officials can and do use punitive authority over speech illegitimately for image-control purposes.[10] Because students have almost entirely lost the ability

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[9] "Internet Rights and Wrongs: Choices & Challenges in a Networked World," Address of Secretary of State Clinton at George Washington University, Feb. 15, 2011, *available at* http://www.state.gov/secretary/rm/2011/02/156619.htm.

[10] *See, e.g.*, Steve Esack, *Dieruff student says Allentown administrators tried to quash her blunt talk*, THE MORNING CALL, April 9, 2012 (assistant principal demanded to pre-approve student school board delegate's future speeches, after speech drew attention to school's disciplinary problems and substandard teaching); *Editor files grievance after Ill. school censors pro-discipline editorial*, Student Press Law Center *News Flash*, March 9, 2012 (newspaper confiscated because principal objected to editorial calling for stricter enforcement of school disciplinary

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to speak freely while on school grounds during school time, it is essential that they have some safe space within which they may discuss the shortcomings of school programs and employees without fear.

Tinker spoke of "the special characteristics of the school environment." One of these "special characteristics" is that students are impressionable and, while at school, unable to escape speech that is thrust upon them. But another of these special characteristics is that school is a place to inculcate respect for the fundamental freedoms on which American society is built. And it is precisely because students *are* a captive audience for the best hours of their day that, when they leave school and school-affiliated events behind, they turn back into American citizens again. If we tell students that off-campus speech that may provoke discussion at school can bring expulsion, then we are teaching these

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codes), *available at* http://www.splc.org/news/newsflash.asp?id=2346&year=2012; *Va. adviser removed after students criticize school conditions*, Student Press Law Center *News Flash*, August 16, 2011 (newspapers confiscated and faculty adviser removed in retaliation for students' publication of public records accurately depicting unsafe and unsanitary conditions in antiquated school facilities), *available at* http://www.splc.org/news/newsflash.asp?id=2264; *Editor of Ind. student paper asks school officials to return confiscated issues*, Student Press Law Center *News Flash*, February 17, 2010 (newspapers confiscated because of principal's opposition to student's editorial regarding removal of football coach), *available at* http://www.splc.org/news/newsflash.asp?id=2030&year=2010.

young people – most of whom are old enough to drive a car, many of whom are old enough to marry, and some of whom are old enough to vote, or to fight and die for their country – that free speech is too dangerous for them, and that it must be parceled out stingily by the same government that the students wish to criticize. Nothing could "disrupt the educational mission" more.

Schools are prone to argue (as did the school in *Boim*, *supra*) that they need boundless punitive authority to protect against Columbine-style attacks. This is not just false, it is a distasteful exploitation of a singularly tragic event. This Court should reject any such notion out of hand.

A school can always *investigate* speech that portends violence. An investigation, by itself, carries no First Amendment implications. Here, the school was well within its authority to pull Bell out of class and question him (and to alert police and turn the matter over for criminal investigation if a serious threat existed). The school was well within its authority to briefly remove Bell from school during the investigatory process while determining whether a genuine threat existed. The school was well within its authority to educate Bell about appropriate language when speaking to a public audience. And the school was well within its authority to call in Bell's parents and show his parents the video.

That is plenty of authority to respond to any perceived threat to school safety. It does nothing for school safety to – having ascertained that no laws were

broken and no genuine threat was intended – impose after-the-fact discipline. To the contrary, imposing discipline appears calculated to further enrage and alienate any student who is feared to be volatile.

The online medium does not make speech so qualitatively different from other media that a reduced level of First Amendment dignity should apply. Off-campus speech has *always* been able to make its way onto campus, whether through copy machines or through the gossip pipeline, and yet courts have not seen fit to penalize speech based on where the audience transports it.

There is a temptation to believe that the advent of the Internet has so fundamentally "changed the game" that lofty pronouncements about off-campus First Amendment rights – like those of Chief Judge Kaufman in *Thomas*, *supra* – are outmoded. But the Court should look beyond myths and phobias about the Internet to the reality. The reality is that the viewership of a typical student Facebook page or YouTube video is limited to a tiny audience of the student's immediate social circle. It is the same audience that the student in an earlier generation would have reached through a hand-drawn cartoon or a song performed in the shopping-mall parking lot, and no bigger than the readership of the student magazine "Hard Times" in the *Thomas* case, which sold 93 copies. *Thomas*, 607 F.2d at 1045. For example, in the Third Circuit's *J.S.* case, the MySpace social networking page at issue was viewed by a grand total of 22 visitors, and was

irretrievably deactivated within a few days. *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 300-01 (3d Cir. 2010), *rev'd by* 650 F.3d 915 (3d Cir. 2011) (*en banc*). This is scarcely such a game-changer that it justifies throwing out 40 years of established First Amendment jurisprudence.

Amici's principal concern is not for speakers like Bell, but for those engaging in more substantive journalistic commentary that would be swept up in the net of censorship. Journalism, when practiced at its best, is often *meant* to provoke change. Causing change – even a "disruptive" level of change – cannot be punishable, and this Court should say so emphatically.

Penn State University most assuredly was in a state of "substantial disruption" after the disclosure of child-molestation allegations that brought down the school's president and head football coach. Florida A&M University most assuredly was in a state of "substantial disruption" after the revelation of widespread hazing that followed the death of a marching-band member. But no student who cried out to the public for help with these crises at Penn State or at FAMU could conceivably have been punished for "disruptive" speech. Sometimes, "disruption" is the appropriate response. The District Court failed to distinguish between the type of "disruption" that accompanies progress and reform on one hand and a wrongful, ill-motivated disturbance on the other.

Judge Sippel made the point powerfully in *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998). In that case, a student created an off-campus web page using harsh profanity to attack the principal, which the principal overheard some students discussing at school. Though the Court acknowledged sympathy with the school's position, it recognized that even sharply worded criticism of school officials has value and is entitled to First Amendment protection:

> One of the core functions of free speech 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. Speech is often provocative and challenging. Indeed, it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose. Speech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection.

Beussink, 30 F. Supp. 2d at 1180-81 (internal quotes and citation omitted).

There is no plenary authority for a school to use government authority to silence criticism of school officials, any more than there is plenary authority for the Governor of Mississippi to use the power of his office to punish citizens who post attacks about him on the Internet. To hold otherwise would be to hold that students never enjoy the benefit of the First Amendment – anyplace, anytime – but rather

that they labor under the infirmity of second-class citizenship so long as they remain enrolled in school.

For all the reasons set forth above, *Amici* respectfully request that the District Court's judgment be vacated and reversed, and that the case be remanded for analysis under the First Amendment precedent applicable to defamatory and/or threatening speech.

Respectfully submitted,

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June 13, 2012

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on June 13, 2012, an original and seven copies of the foregoing Brief for *Amicus Curiae* The Student Press Law Center were filed with the Clerk's Office of the United States Court of Appeals for the Fifth Circuit.

I further certify that on June 13, 2012, a true and correct copy of the foregoing Brief for *Amicus Curiae* was served by deposit in U.S. Mail, first class postage paid, and an electronic copy was served by electronic mail on the following:

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COMBINED CERTIFICATION

Bar Membership: Pursuant to Local Rules 28.3(d), I hereby certify that Scott Sternberg is a member of the bar of the United States Court of Appeals for the Fifth Circuit.

Identical Briefs: I hereby certify that the text of the electronic and hard copy versions of this brief are identical.

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