NUMBER 21-9999

UNITED STATES COURT OF APPEALS

FOR THE FIFTEENTH CIRCUIT

CARL FORD,

APPELLANT,

v.

WILLIAM PRICE,

APPELLEE.

BRIEF OF APPELLEE

On Appeal from the United States District Court

For the Southern District of Bayside

Hon. Rosa B. Garrett

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STATEMENT OF JURISDICTION

The District Court had federal question-based subject matter jurisdiction to enter judgment under 28 U.S.C. §§ 1331 and 1343. Mr. Ford filed timely notice of appeal on January 7, 2021 in response to the judgments entered on December 20, 2020. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Should the *Tinker* standard apply to non-threatening off-campus student speech allowing a school official to discipline the student based on his off-campus speech if the school official believes the speech is forecasted to cause a disruption in the school?
2. Does a broad right of a student to exercise free speech off-campus under the First Amendment constitute a "clearly established" right to overcome the qualified immunity defense?

STATEMENT OF THE CASE

William Price (hereinafter "Price") filed a lawsuit with the United States District Court for the Southern District of Bayside alleging that Mr. Ford (hereinafter "Ford") violated his First Amendment right to free speech. Ford filed a

motion for summary judgment, which the District Court denied. Bench Trial then commenced on December 1, 2020.

At trial, the court found in favor of Price on all accounts, finding that: (1) *Tinker* does not apply to off campus speech, and that even if it did, Price's speech was not reasonably forecasted to cause a material and substantial disruption; and (2) Ford is not entitled to qualified immunity and thus, violated Price's "clearly established" constitutional right to free speech. R. at 23. This appeal ensued.

Factual Background

Price is the starting quarterback for the varsity football team. R. at 5. Ford is the head football coach for Bayside Lights High and teaches history. *Id.* On or about Friday, September 16, 2019, Price posted on his Instagram page (hereinafter "the Post") a black background with white text reading, "Can't believe Coach is making us wear PINK to play FOOTBALL for an entire month next month, how dumb is that???? Too bad I'll show up repping the 'ol black and maroon. Ugh I would not be caught dead wearing pink any time much less for breast cancer awareness playing football!" R. at 21.

Price created and posted the Post using his phone. R. at 6. The Post was created and uploaded at Price's home. *Id.* The Post was created at 8:45 PM, when

Price was not participating in football or any other school activity. *Id.* Typically, the football team would have had a game during this time. R. at 5.

On Monday, September 19, 2019, Ford pulled Price out of homeroom to inform him that he was dismissed from the football team. *Id.* Ford confronted Price with a screenshot of the Post and told him that the Post was "disrespectful" to Ford, the school, and his teammates, and that the Post was the reason Price was being dismissed from the football team. R. at 7.

After being informed of his suspension from the team, Price visited the principal's office. *Id.* The principal informed Price that the decision to terminate and/or to reinstate a student is ultimately that of Ford's, subject only to being overruled by the principal, and he would not overrule Ford's decision. *Id.* Price was also told he could receive school discipline for "disrespecting" the school. *Id.* Price's father then attended a board meeting to seek his reinstatement to the team. R. at 8. The school board decided to stand by Ford's decision. *Id.*

SUMMARY OF THE ARGUMENT

First, the District court erred in denying Mr. Ford's Motion for Summary Judgment because *Tinker* does apply to off-campus speech where, as seen here, it's reasonably forecasted to cause substantial disruption on campus. In assessing whether Price's speech substantially reached the school, the District Court

erroneously relied on the Third Circuit's narrow interpretation of *Tinker*'s applicability to off-campus speech to the exclusion of every other circuit court.

Additionally, the District Court erred in denying qualified immunity by finding that Ford violated a "clearly established" right. A finding of exclusion from protection under qualified immunity is proper where Plaintiff can sufficiently satisfy the requisite elements. Here, Price has not presented sufficient evidence to demonstrate that Ford violated a "clearly established" right, because *Tinker* is inherently ambiguous or that Ford failed to act as a reasonable person, objectively.

STANDARD OF REVIEW

The standard for appellate review of a judgment below on appeal of a Bench Trial Order is *de novo*, "as though no decision were rendered below." *In re Traverse*, 753 F.3d 19, 24 (1st Cir. 2014). This court shall vacate the District Court's finding based on principle that appellate court is, "free to substitute [its] own judgement for that of the district court." *Hottenroth v. Vill. of Slinger*, 388 F.3d 1015, 1036 (7th Cir. 2004).

ARGUMENT

The instant case, at its core, is an analysis of the law that exists at a crossroads between the First and Fourteenth Amendments. The Fourteenth Amendment provides that, "No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The First Amendment provides that: "Congress shall make no law prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I. In tandem, these amendments ensure that citizens cannot be deprived of the right to freedom of expression without due process. However, no such constitutional violations occurred here.

I. Tinker applies because Price's speech caused a material and substantial disruption on-campus.

The court in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)[1], vested school officials with the authority to regulate on-campus expression, "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 not immunized by the constitutional guarantee of freedom of speech." Given the school official show that "its action was caused by something more than a mere

[1] In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, a student brought a civil action against his high school after being suspended indefinitely for wearing an armband to school that symbolized his opposition to the Vietnam war, asserting punishment violated his First Amendment rights. 393 U.S. 503, 504 (1969). The court found the student's expression "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others." *Id.* at 514. Because "they caused discussion outside of the classrooms, but no interference with work and no disorder." *Id.* Therefore, "our Constitution does not permit officials of the State to deny their form of expression." *Id.*

desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 513.

And while it is true that, "[n]either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. "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." *Id.* at 507.

Through subsequent litigation, The Supreme Court has been provided the opportunity to carve out a handful of narrow exceptions to the broader *Tinker* standard. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding school officials may discipline student speech that is school-sponsored); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (holding school officials may regulate speech that is lewd, vulgar and offensive); *Morse v. Frederick*, 551 U.S. 393, 407-08 (2007) (holding school officials may regulate speech that promotes illegal drug use). None of which overtly govern the instant case.

A. *Tinker* applies to Price's off-campus speech because it was not entirely off-campus and did raise on-campus school concerns.

Although *Tinker* exclusively analyzed on-campus student speech, off-campus student speech, "though generally protected, could be subject to analysis under the *Tinker* standard as well if the speech raises on-campus concerns." *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1370 (S.D. Fla. 2010). Thus, speech will only be considered "on-campus" and subject to *Tinker* when these 'unique concerns' of the school environment are implicated." *Id.* And, a student will not be afforded First Amendment protection for off-campus speech that causes a material and substantial disruption on campus. *See Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012); *D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011) (holding *Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting).

Here, Price's speech created a sufficiently strong material and substantial disruption on-campus to render *Tinker* applicable to his off-campus speech because Price's speech raised on-campus concerns and directly implicated the school environment through the content of his Post. Opposing counsel does not contest that one student found Price's post so disruptive that it needed to be brought to Ford's attention. R. at 20. Nor do they deny that some of Price's friends found it

necessary to verbalize their objections to the content of his speech directly, whether for its "insensitivity" or "idiocy." R. at 18. Both disruptions occurred on campus.

A paramount "on-campus" concern of any school is the maintenance of a robust and secure learning environment. A school's students are an integral facet of the dynamic that defines the vitality of this learning environment from one school to another. It is therefore inherent that the maintenance of a quality learning environment largely hinges on a school's ability to positively influence the individual well-being of a school's students. *See Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2011) (observing "harassment and bullying is inappropriate and hurtful and it must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment").

Generally, schools accomplish this aim by attempting to control the factors that can influence a student's well-being in an academic setting. Today, this has become common knowledge and explains why the mental well-being of their students is a top priority of the schools that comprise our public-school system. *See* StopBullying.gov, available at www.stopbullying.gov. Therefore, Price's speech also raised on-campus concerns by adversely affecting the mental and emotional state of a fellow student. *See Jackson v. Ladner*, 626 F. App'x 80 (5th Cir. 2015); *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008).

Therefore, *Tinker* applies to Price's off-campus speech because it caused a material and substantial disruption on campus. However, even if the court decides Price's speech did not actually cause a substantial disruption on campus, *Tinker* is still applicable here because Ford can prove that he reasonably forecasted a substantial disruption as a result of Price's Post. Ford can also prove there existed a "sufficient nexus" between Price's speech, and the interests of the school.

B. Price's speech rose to the requisite thresholds provided under other Circuit Court's interpretations of Tinker.

Circuit Courts have deliberated upon their interpretation of *Tinker* in its application to "off-campus" speech in the following ways: (1) the Second, Seventh and Eighth Circuits have applied a "reasonably foreseeable" threshold that establishes *Tinker* will apply if a student's "conduct would foreseeably create a risk of substantial disruption within the school environment," *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008); (2) the Fourth Circuit applies *Tinker* if a "sufficient nexus" exists such that, "the off-campus conduct is sufficiently connected to the school's pedagogical interests," *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2011); (3) the remaining circuits interpretations are irrelevant to Price's Post; see the Eleventh Circuit's application of a "true threat" test.

1. The Reasonable Foreseeability Test is satisfied.

Tinker establishes school officials may regulate student speech when there exists "facts[2] which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. In *Doninger*, the Second Circuit interprets, "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 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." *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (quoting *Wisniewski v. Bd. of Educ.,* 494 F.3d 34, 40 (2d Cir.2007)). Therefore, "*Tinker* does not require certainty that disruption will occur." *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 767 (9th Cir. 2006).

Here, Ford reasonably forecasted Price's speech would create a risk of substantial disruption within the school environment to justify discipline because Price's speech was reasonably forecasted to reach school grounds, and subsequently, undermine Ford's authority and sew division in the team. Similar to

[2] In determining whether a student's off-campus speech was reasonably forecasted to cause a "substantial disruption," the court examines a multitude of factors: (1) whether it was reasonably foreseeable that the speech would reach and/or impacts the school; (2) the likelihood of harm to the school caused by the speech; and (3) the relationship between the content and context of the speech and the school; (4) the speaker's intent to keep private or disseminate the speech; and (5) the objective seriousness of the speech. *Bell*, 799 F.3d at 398; *D.J.M.*, 647 F.3d at 766; *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 338 (6th Cir. 2010).

school officials in *Doninger*[3], Ford reasonably forecasted that Price's speech would reach school grounds and impact the school because of the intrinsic public nature of the medium Price utilized to express himself – social media – and the content of Price's speech. *Id.* at 48. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (holding school officials reasonably forecasted disruption after student's off-campus speech; noting "forecasting disruption is unmistakably difficult to do").

We urge the court take into consideration the record. Price's account has fifty followers, this post received twenty-seven likes and three comments. R. at 21. See *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565-73 (4th Cir. 2011) (holding school officials reasonably forecasted disruption; noting, at issue student-created webpage's membership consisted of approximately 100 fellow students). Price asserts that his account's status as "private" precludes the Post from reaching school grounds. R. at 30. However, this assertion omits the fact that many of his followers – fellow students – operate on public accounts. R. at 17. The functionality of Twitter enables public accounts to "re-tweet" the posts published

[3] In *Doninger*, a mother brought civil action asserting violation of student's First Amendment rights after student was disqualified from running for senior class secretary due to an incendiary blog post student published regarding school's cancellation of student event. *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). There, the Second Circuit reasoned that "it was reasonably foreseeable that Plaintiff's posting would reach school property" and "cause substantial disruption." *Id.* at 50. Because, although created off-campus, the student's post "was purposely designed to come onto the campus." *Id*. The content of the student's post "directly pertained to events at" school, and the student's "intent in writing it was specifically to encourage her fellow students to read and respond." *Id*. The court noted that the student "knew other [school] community members were likely to read [her posting]," and that "several students did in fact post comments in response" and, "the posting managed to reach school administrators." *Id. See Wisniewski,* 494 F.3d at 39.

via private accounts, therefore, all-together mitigating that visibility barrier. Thus, because Price expressed himself through Twitter to a plethora of fellow students – who can share that speech with all the students at his school through their "public" account's capability – Ford reasonably forecasted that Price's speech would reach school grounds. *See Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012); *D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011) (holding *Tinker* applies to off-campus student speech where it is reasonably forecastable speech will reach the school and cause substantial disruption to the educational setting).

Additionally, similar to student's off-campus speech in *Doninger*, as demonstrated above, Price's speech "was purposely designed to come onto the campus" because Price's speech "directly pertained to events at" school. The explicit mention of Ford – in the Post, "Coach" – and the emblematic color scheme of the school – "ol black and maroon" – present in Price's speech directly implicate the school environment. These phrases are not ambiguous in their nature. Therefore, they cannot be construed to represent anything other than a direct implication of the school in Price's speech. *See Johnson v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1321 (D. Utah 2018) (holding school officials could regulate off-campus student speech due to reasonable forecast of disruption because

students were recognizably in school-related attire; "rulings in such cases are fact-intensive and can turn on slight differences in the factual situation presented").

Given the inherent social nature of social media, Price's "intent in writing it was specifically to encourage fellow students to read and respond." *Id*. at 50. As indicated in the record, Price "knew other [school] community members were likely to read [his posting]," and "several students did in fact post comments in response" to his speech. *Id.* Additionally, "as in *Wisniewski,* the posting" made by Price "managed to reach school administrators." *Id.* Thus, like student's off-campus speech in *Doninger*, Price's speech "created a foreseeable risk of substantial disruption to the work and discipline of the school." *Id*. at 53. *See Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir.2007) (holding art depicting shooting of teacher created reasonably foreseeable risk of disruption at school).

In *B.L. v Mahanoy Area Sch. Dist.*[4], 964 F.3d 170, 194 (3d Cir. 2020), student's off-campus speech was described by that court as "crude, rude, and

[4] In *B.L. v. Mahanoy Area Sch. Dist.*, a student brought a civil action against her high school after being dismissed from cheerleading team for an exercising of off-campus speech through a social media post, alleging punishment violated her First Amendment rights. 964 F.3d 170 (3d Cir. 2020). The student vented her frustrations – on a Saturday while at a local store – by creating a social media post that stated, "Fuck school fuck softball fuck cheer fuck everything." *Id.* at 175. One of the student's teammates brought the post to a coach's attention. *Id.* The coaches decided the student's post violated team and school rules and removed her from the team for a year. *Id.* The Third Circuit found that student's Snapchat story fell outside of school context and therefore occurred off campus and could not be subject to school authority or punishment. The court specifically noted, "B.L. created the snap away from campus, over the weekend, without school resources, and shared it on a social media platform unaffiliated with the school. While the snap mentioned the school and reached fellow students and officials, *J.S.* and *Layshock* hold that those few points of contact are not enough." *Id.* at 181. *See J.S. v. Blue Mountain School Dist.*, 650 F.3d 915 (3d Cir. 2011); *See also Layshock v. Hermitage School Dist.*, 650 F.3d 205 (3d Cir. 2011) (holding students cannot be punished for creating, from their home computers, parody profiles for school principals that contained adult language and sexually explicit content).

juvenile," but it's content only alluded to her disdain for school athletics. Here, dissimilar to the content of student's off-campus speech there, Price's speech pertained to content of an inherently hyper-personal nature – breast cancer. A devastating and far-too common affliction, breast cancer impacts millions of Americans every year. Therefore, Ford reasonably forecasted Price's insensitive speech regarding breast cancer awareness would lead to a material and substantial disruption on-campus because it can be reasonably inferred that the inherently insensitive and offensive nature of the Post would produce a material and substantial disruption on-campus, and within the team. *See Brogdon v. Lafon*, 217 F. App'x 518 (6th Cir. 2007) (holding school officials reasonably forecasted disruption after Plaintiff was prohibited from wearing clothing depicting the Confederate flag to school).

Additionally, similar to *Lowery v. Euverard*[5], 497 F.3d 584 (6th Cir. 2007), Ford reasonably forecasted that Price's speech would cause a material disruption on-campus by undermining his authority because the Post explicitly challenged Ford's instruction. There, as noted by the court, "the success of an athletic team in

[5] In *Lowery*, 497 F.3d 584 a group of high school football players were removed from the team after signing a petition expressing their disdain for the coach and nonexistent desire to play for him. *Id.* at 585. The players subsequently brought action against the coach under an alleged violation of the First Amendment. *Id.* In analyzing the issue, the court found that the relevant question under *Tinker* was whether the Coach's "forecast of substantial disruption was reasonable," i.e., if "it was reasonable for them to forecast that the petition would disrupt the team" by "foreseeably frustrat[ing] efforts to teach the values of sportsmanship and team cohesiveness through participation in sport as an extracurricular activity" by undermining the coach's authority and sewing division within the team *Id.* at 593, 596. Thus, the court held that no First Amendment violation occurred; "what they are not free to do is continue to play football for him while actively working to undermine his authority." *Id.* at 600

large part depends on its coach." *Id.* at 594 "The ability of the coach to lead is inextricably linked to his ability to maintain order and discipline. Thus, attacking the authority of the coach necessarily undermines his ability to lead the team." *Id.*

Here, similar to the player's petition there, Price's speech was "equivalent to saying he had no respect for" Ford. *Id*. Therefore, Price's speech "was a direct challenge to" Ford's authority, and "undermined his ability to lead the team." *Id.* "It could have no other effect." *Id. See Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 772 (8th Cir. 2001) (pointing out that "coaches are entitled to respect from their players"); *See also Johnson v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1318 (D. Utah 2018) (holding student's social media post substantially disrupted the work and discipline of the cheer squad by undermining the authority of the cheer coach, and causing conflict between students, which justified her dismissal from the squad); *Cf. Pinard v. Clatskanie School Dist. 6J*, 467 F.3d 755, 769 (9th Cir. 2006) (holding school officials could discipline school's basketball players after their petition undermined the authority of the coach and manifested into the team boycotting a game through refusal to board the bus).

Furthermore, Ford reasonably forecasted Price's speech would have a substantial disruption on-campus by sewing division within the team and undermining team unity (chemistry) because it divided players and pertained to content of a hyper-personal nature. R. at. 20. The court in *Lowery* notes, "although

team chemistry is impossible to quantitatively measure, it is instrumental in determining a team's success." *Lowery*, 497 F.3d at 595. And "mutual respect for the coach is an important ingredient of team chemistry." *Id.* Therefore, like student's petition in *Lowery*, Price's speech "in addition to challenging [Ford's] authority, the petition threatened team unity" because Price's speech "necessarily divided players into two camps, those who supported [Ford] and those who didn't." 497 F.3d 584, 595 (6th Cir. 2007). *See Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768 (8th Cir. 2001) (holding school officials did not violate student's First Amendment right after dismissing her from the school basketball team for refusing to apologize after she sent other students an off-campus letter that undermined the authority of her coaches through insubordinate speech); *See also Johnson v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1318 (D. Utah 2018) (holding student's social media post substantially disrupted the work and discipline of the cheer squad by causing conflict between students); *Contra Seamons v. Snow*, 206 F.3d 1021, 1030 (10th Cir. 2000).

Therefore, Ford reasonably forecasted Price's speech would create a risk of substantial disruption within the school environment to justify discipline. Price's speech was reasonably forecasted to reach school grounds, undermine Ford's authority, and sew division in the team. In pursuance to *Tinker*, his speech is consequently not protected by the First Amendment. *Tinker*, 393 U.S. at 514.

2. The Sufficient Nexus Test is satisfied.

The Fourth Circuit applies *Tinker* to off-campus student speech "where such speech has a sufficient nexus with the school's pedagogical interests." *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2011).

Here, the content and chosen medium of Price's speech means there exists a "sufficient nexus" between that speech and the school's "pedagogical interests." Price's speech made explicit mention of Ford – "Coach" – directly referenced the color scheme that is emblematic of the school – "ol black and maroon" – and reached both students and school officials. R. at 21. Therefore, like student's off-campus speech in *Kowalski*[6], Price could have "reasonably expected [his] off-campus speech to reach the school or impact the school environment" because "even though [Price] was not physically at school when [he] operated [his] computer to create the webpage, it was foreseeable that [Price's] conduct would reach the school via computers, smartphones, and other electronic devices," given Price's followers largely consist of fellow students and he implicated the school

[6] In *Kowalski*, a high school student created a webpage on a social media site while at home. *Id.* at 567. The webpage contained approximately 100 members and the content was largely directed towards demeaning a fellow student. *Id.* Consequently, school officials suspended the student. *Id.* at 569. The court found that a sufficient nexus existed between the student's off-campus speech and the school's pedagogical interests to permit school official's discipline because the student could have "reasonably expected her off-campus speech to reach the school or impact the school environment" because "even though the student was not physically at school when she operated her computer to create the webpage, it was foreseeable that the student's conduct would reach the school via computers, smartphones, and other electronic devices," given that many of the webpage's members were students at the school. *Id.* at 569, 573. Thus, the school officials did not infringe on the student's First Amendment right because "her speech interfered with the work and discipline of the school." *Id.* at 569.

environment. *Id.* at 569, 573. *See C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150 (9th Cir. 2016) (finding although student speech "took place off school property, it was closely tied to the school"); *See Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013) (finding school proved existence of nexus in part because all those involved were student). Therefore, the content and chosen medium of Price's speech means there exists a "sufficient nexus" between that speech and the school's "pedagogical interests."

II. Ford is entitled to, and protected under, qualified immunity.

It is well established precedent that the defense of qualified immunity requires courts to enter judgment in favor of a government employee unless that employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To qualify as "clearly established," "the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). Moreover, an official's actions are evaluated under "an objective-reasonableness test" wherein qualified immunity applies when an official can show that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Courson v. McMillian*, 939 F.2d 1479, 1484-87 (11th Cir. 1991). Thus, qualified immunity

is intended to shield "all but the plainly incompetent or those who knowingly violated the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

A. Ford did not violate a "clearly established" right.

In *Morse v. Frederick*[7], the court held that Principal Morse should "enjoy qualified immunity for her actions." *Id.* at 409. "Because she did not clearly violate the law during her confrontation with the student." *Id.* at 429.

Here, as there, qualified immunity applies and entitles Ford to judgment on Price's claim because he did not clearly violate the law when he disciplined Price due to the inherent ambiguity of *Tinker*. At the time of Ford's disciplining of Price, *Tinker*, 393 U.S. at 513, provided that school officials could not regulate a student's on-campus speech unless it "materially and substantially disrupt[ed] the work and discipline of the school." *Kuhlmeier*, 484 U.S. at 260, further provided that school officials may regulate student speech that is school-sponsored. *Fraser*,

[7] There, "[a]t a school-sanctioned and school supervised event, a high school principal [Morse] saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use." *Id.* at 396. The banner read: "BONG HiTS 4 JESUS" *Id.* at 397. "Consistent with established school policy prohibiting such messages at school events, [Morse] directed the students to take down the banner." *Id.* at 396. Frederick, a student responsible for the banner, refused to comply and Morse consequently, "confiscated the banner and later suspended [Frederick]." *Id.* The court held that the Principal Morse should "enjoy qualified immunity for her actions." *Id.* at 409. "Because she did not clearly violate the law during her confrontation with the student." *Id.* at 429. The court elaborates, "When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act – or not act – on the spot." *Id.* at 409-10. Therefore, "It was reasonable for her to conclude that the banner promoted illegal drug use – in violation of established school policy – and that failing to act would send a powerful message to the students in her charge about how serious the school was about the dangers of illegal drug use." *Id.* And that, "The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers." *Id.*

478 U.S. at 675, further provided that school officials may regulate student speech that is lewd, vulgar and plainly offensive. As noted by the District Court, none of the aforementioned cases clearly govern Price's case. R. at 33.

Consequently, the District Court of Bayside outlined with implicit certainty their opinion that these cases did not permit Ford's actions. R. at 33. Because, in the District Court's opinion, "none of these situations exist relative to Plaintiff's Instagram post." *Id.* However, dissimilar to the District Court, other courts have described the tests these cases provide as complex and often difficult to apply. *See*, *e.g., Guiles v. Marineau,* 461 F.3d 320, 326 (C.A.2 2006) ("It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser,* or whether it applies only to political speech or to political viewpoint-based discrimination"); *Baxter v. Vigo Cty. School Corp.,* 26 F.3d 728, 737 (C.A.7 1994) (pointing out *Fraser* "cast some doubt on the extent to which students retain free speech rights in the school setting").

Tinker is so ambiguous in its application to off-campus speech that even Supreme Court Justices find it laborious. Justice Breyer's concurrence in *Morse*, when addressing the issue of qualified immunity, highlights the ambiguity present in *Tinker*, "the fact that this Court divides on the constitutional question (and that the majority reverses the Ninth Circuit's constitutional determination) strongly suggests that the answer as to how to apply prior law to these facts was unclear."

Morse, 551 U.S. at 430. Furthermore, the existence of the aforementioned Circuit split – innately defined by court's varying interpretations of *Tinker* – also evidences the contention that *how* and *when* courts should apply the law is lacking clarity. Inferentially, *Tinker* is therefore intrinsically ambiguous and cannot qualify as "clearly establishing" Price's off-campus First Amendment right.

Finally, in many cases that involve school officials and qualified immunity, courts discuss the need for a school official to be provided with "fair warning" that their conduct would violate a student's right. *Jackson v. Ladner*, 626 F. App'x 80, 88 (5th Cir. 2015)[8]. See *Bush v. Strain,* 513 F.3d 492, 501–02 (5th Cir. 2008) (finding that the "central concept" of qualified immunity is that of "fair warning"). In the instant case, as in *Jackson*, "insufficient precedent existed to provide school officials with 'fair warning' that the defendants' conduct violated the First Amendment." *Id.* at 88. Because "First Amendment case law did not provide 'clear guidance' and had sent 'inconsistent signals' with regard to 'how far school authority to regulate student speech reaches beyond the confines of the campus.'"

[8] In *Jackson v. Ladner*, 626 F. App'x 80, 81 (5th Cir. 2015), parents of a high-school cheerleader sued school officials "alleging violations of [student's] constitutional rights to privacy and freedom of speech." After the student's teacher and cheer coach accessed her Facebook and examined correspondence to a fellow student that "contained threatening and offensive language and concerned cheer squad activities." *Id.* "Accordingly, Hill suspended [student] from cheer squad activities for two weeks and required [student] to perform extra squad duties" *Id.* The court held the teacher was protected under qualified immunity because "insufficient precedent existed to provide school officials with 'fair warning' that the defendants' conduct violated the First Amendment." *Id.* at 88. Because "First Amendment case law did not provide 'clear guidance' and had sent 'inconsistent signals' with regard to 'how far school authority to regulate student speech reaches beyond the confines of the campus.'" *Jackson v. Ladner*, 626 F. App'x 80, 89 (5th Cir. 2015) (quoting *Porter v. Ascension School Bd.,* 393 F.3d 608, 620 (5th Cir. 2004)).

Jackson, 626 F. App'x at 89 (quoting *Porter v. Ascension School Bd.,* 393 F.3d 608, 620 (5th Cir. 2004)). *See Porter,* 393 F.3d at 620 (granting qualified immunity to school official on plaintiff's First Amendment claim where it would not "be clear to a reasonable [school] official that sanctioning [plaintiff] based on the content of his [speech] was unlawful under the circumstances"). Thus, Ford was not provided with "fair warning" that his conduct would violate Price's rights.

Therefore, qualified immunity applies and entitles Ford to judgment on Price's claim because he did not clearly violate the law when he disciplined Price. Whether Ford violated Price's First Amendment right is a non-issue. The law in dispute is inherently ambiguous. Therefore, the right is not sufficiently clear "that a reasonable official would understand that what he is doing violates that right," in pursuance to *Anderson*, 483 U.S. at 640. Consequently, this court need not and should not decide this convoluted First Amendment dispute on the merits. Rather, it should hold that qualified immunity bars Price's claim and grant Ford judgment.

B. Ford acted as a reasonable person, objectively.

Under the *Zeigler/Rich* formulation of the objective-reasonableness test, a government official proves that he acted within his discretionary authority – i.e., acted reasonably – by showing "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his

duties and within the scope of his authority." *Rich v. Dollar,* 841 F.2d 1558, 1564 (11th Cir. 1988) (quoting *Barker v. Norman,* 651 F.2d 1107, 1121 (5th Cir. 1981)). *See Zeigler v. Jackson*, 716 F.2d 847 (11th Cir. 1983); *See also Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990).

Here, qualified immunity applies and entitles Ford to judgment on Price's claim because he acted as a reasonable person, objectively, when he disciplined Price. The court in *Morse* notes that, in an educational context, "Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special." *Morse*, 551 U.S. at 430.

Ford was presented with a unique disciplinary challenge when Price published the Post at issue. One that warranted action in pursuance to the aforementioned "special relationship" lest Ford cede a portion of his authority by permitting it's direct, and explicit undermining, to the detriment of his ability to maintain control of the team. R. at 20. Maintaining control of a team dynamic is an inherently integral facet of Ford's occupation as Head Coach. *Id.* Thus, Ford has "adequately demonstrate[d] that his actions… were carried out in the performance of his normal job duties and were within the authority delegated to him by his employer." *Rich*, 841 F.2d at 1564. Therefore, Ford acted within the scope of his

authority when he disciplined Price. *Contra Seamons v. Snow*, 206 F.3d 1021, 1030 (10th Cir. 2000) (holding school coach was not entitled to qualified immunity after he dismissed Plaintiff from the football team for refusing to apologize to the team after they assaulted him; he did not act as "a reasonably competent public official should").

Further evidence of Ford's reasonable conduct – acting within the scope of his authority – can be distilled from the School Board, Superintendent and Athletic Director concurring with Ford and upholding his decision to discipline Price. R. at 8. Collectively, these individuals presumably have decades of experience within the realm of academia, as that is generally a prerequisite to reach such positions. Their concurrence shows they also thought Ford's disciplinary decision did not exist incongruence with a violation of a clearly established right. On the contrary, their decision implicitly evidences that they would have acted the same under Ford's circumstances. Thus, it can be inferred that Ford acted under "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority," given that his superiors – who are rich in experience – perceived his actions as not only reasonable, but justifiable. *Rich,* 841 F.2d at 1564.

Furthermore, similar to Principal in *Morse*, it was reasonable for Ford to "conclude that failing to act would send a powerful message to the students in her

charge" *Morse*, 551 U.S. at 410. Ford disclosed, "I also felt like the team would be upset if Mr. Price was the only one not wearing pink and the team might cause a scene because the team would feel like I wasn't being fair." R. at 20. Adding, "plus, I felt like the entire school at the football games would be wondering why he was the only one not wearing pink and they would ask questions and things would get out of hand." *Id.* This testimony further evidences the reasonableness of Ford's conduct, but also highlights the urgency he felt to act, and act quickly under the circumstances. An occupational product particularly pertinent to educators, this sense of urgency was another important consideration of the court's holding in *Morse*, "as the majority rightly points out, the circumstances here called for a quick decision." *Morse*, 551 U.S. at 427.

Therefore, qualified immunity applies and entitles Ford to judgment on Price's claim because he acted as a reasonable person, objectively, when he disciplined Price. In pursuance to the *Zeigler/Rich* formulation of the objective-reasonableness test, Ford proved that he acted within his discretionary authority by showing "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." *Rich,* 841 F.2d at 1564. Consequently, this court need not and should not decide this convoluted First Amendment dispute on the merits.

Rather, it should hold that qualified immunity bars Price's claim and grant Ford judgment.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the District Court denying the motion for judgment notwithstanding the verdict.

Charleston, South Carolina
July 23, 2021

Respectfully Submitted,

/s/ *Grouper*

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CERTIFICATE OF COMPLIANCE

I, *Grouper*, the undersigned student of the Charleston School of Law, hereby certify that this document was prepared in compliance with the established Local Rules and further that I have neither given nor received inappropriate assistance during the preparation of this document.

/s/ *Grouper*

Grouper

CERTIFICATE OF SERVICE

I, *Grouper*, attorney for Mr. Ford, certify that I will serve all counsel with a copy of the Brief for Mr. Price by e-mailing a copy to opposing counsel by July 23, 2021 at 5 P.M.

/s *Grouper*
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