No. 23-_____

In The

Supreme Court of the United States

BRONSON MCCLELLAND,

Petitioner,

versus

KATY INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a civil rights action under 42 U.S.C. § 1983, does *Monell* liability exist for a public school district when an official who committed a constitutional violation had been delegated final policymaking authority to "develop and enforce" a specific policy and then relied on that policy to cause the constitutional injury?

2. Based on the "true threat" doctrine in *Counterman v. Colorado*, with respect to public school students' off-campus speech, before school districts are permitted to impose a *final* disciplinary decision which will become part of a student's official education record, does the First Amendment require that school officials must prove that the student speaker had some "subjective understanding" of a statement's threatening nature before making a *final* determination on whether the speech was "protected speech" or an unprotected "true threat"?

PARTIES TO THE PROCEEDINGS

Petitioner Bronson McClelland was the plaintiff in the district court proceedings, and the appellant in the appellate court proceedings. Respondent Katy Independent School District was a defendant in the district court proceedings and appellee in the appellate court proceedings. Other defendants-appellees below not included herein are: Kenneth Gregorski; Justin Graham; Henry Gaw; Robert Keith Meier; Ken Tabor; Stephanie Fulgencio; Katy Independent School District Police Department; KISD Board of Trustees; Gary Joseph; Joan McPherson; Courtney Doyle; Ashley Vann; Ashly Darnell; Leslie Haack; and Rick Hull.

RELATED CASES

McClelland v. Katy Independent School District, No. 4:21-cv-520, United States District Court for the Southern District of Texas. Opinion issued November 1st, 2021; judgment entered November 2nd, 2021.

McClelland v. Katy Independent School District, No. 21-20625, United States Court of Appeals for the Fifth Circuit. Judgment entered March 31st, 2023.

McClelland v. Katy Independent School District, No. 21-20625, United States Court of Appeals for the Fifth Circuit. Rehearing denied May 10th, 2023.

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The Fifth Circuit's opinion is reported at *McClelland v. Katy ISD*, 63 F.4th 996 (5th Cir. 2023), and reproduced at App. 1–34. The opinion of the District Court for the Southern District of Texas is reported at *McClelland v. Katy Indep. Sch. Dist.*, 2021 U.S. Dist. LEXIS 210190 (S.D. Tex. Nov. 21, 2021), and reproduced at App. 35–70.

JURISDICTION

The Court of Appeals issued its opinion and entered judgment on March 31st, 2023. App. 1. It then denied a timely petition for rehearing *en banc* on May 10th, 2023. After receiving an extension, this petition is timely filed on or before September 7th, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

Public schools are not immune from the dictates of the First Amendment. "[Boards of education] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Exercises of free speech are consistently met with attempts to stifle or chill speech because the First Amendment protects uncomfortable, controversial, and even downright hateful speech. "We should not give the government the power to decide which opinions are hateful, for history has taught us that government is more apt to use this power to prosecute minorities than to protect them." *See* Freedom of Expression—ACLU Position Paper, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/other/freedom-expression-aclu-position-paper.

In *Monell v. Department of Social Services of City of N.Y.*, 436 U.S. 658 (1978), this Court held that a municipal entity may be held liable for constitutional violations caused by its policies, or by an official "whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. Under *Monell* and its progeny, the scope of municipal liability turns on the definition of what constitutes "policy" and who is a "policymaker." Through *Mahanoy*, *Pembaur*, and *Praprotnik*, the Court made clear the law regarding "policy," the law regarding "final policymaking authority," and the law regarding "delegating policymaking authority" within the meaning of *Monell*. As Petitioner will demonstrate, his case should have been a straightforward application of those principles.

On October 3, 2019, Petitioner Bronson McClelland was a 17-year-old junior at Katy High School. That night, after a rival football game, McClelland and some of his friends, on their own time, were in the parking lot of a local restaurant. While there, teenagers from both rival schools were engaged in distasteful banter, both in-person and on Snapchat. At one point, McClelland and Jose Fernandez, a Hispanic student that attended the rival school, engaged in mutual bravado and "trash-talk." McClelland, through Snapchat, sent a private, 1-to-1, three-second message to Hernandez which stated "we'll put your mother-f***ing ass in the hospital ni**a, what the f**k?" Shortly thereafter, all the teenagers departed the restaurant without incident, and no complaint of McClelland's video was ever made to authorities or school officials by Fernandez or

his parents. Later that night, Fernandez recorded and forwarded the private message to a few of his friends. One of the recipients of the recorded message was Tnumise Adelye, an African American student-athlete on the rival school's football team—the same team that McClelland's team was victorious over in a spirited football game hours earlier that evening. Upon receiving the recorded message, Adelye, for unknown reasons, uploaded McClelland's message to his personal Twitter page, giving the illusion that the white Katy High School quarterback had sent *him* this message which contained the slang n-word, "n******a***" as opposed to "n******er***." Adelye's Twitter page had over a thousand followers at the time, and the video of McClelland was circulated on social media and attracted many views and comments, as well as attracting the attention of KISD, who incorrectly assumed that McClelland had sent the Snapchat video directly to Adelye.[1]

The following morning, on October 4, 2019, after KISD school officials became aware of McClelland's video, McClelland and his parents were summoned to the school for a meeting with the Principal and the Head Coach. During this meeting, Petitioner McClelland was told by the Principal and Head Coach that he was going to be punished for the Snapchat video,

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[1] Notably, Jose Fernandez, the original recipient of McClelland's message, did not attend the same school as McClelland. In *Wynar v. Douglas County School District*, the Ninth Circuit held a student's off-campus harassment of other students was subject to school discipline because there was a sufficient nexus to the school in large part because the harassment exclusively involved students from the same school. 728 F.3d 1062 (9th Cir. 2013).

specifically due to his use of the n-word. Immediately thereafter, McClelland was stripped of his title as captain of the football team and removed from competition for the next two weeks of their game schedule.

As reflected in the record, McClelland's message was not directed at the school in any way, it did not bear the imprimatur of the school, and it did not cause any legally cognizable disruption to the school. As this Court reiterated two short years ago, "There are more than 90,000 public school principals in this country and more than 13,000 separate school districts. The overwhelming majority of school administrators, teachers, and coaches are men and women who are deeply dedicated to the best interests of their students, but it is predictable that there will be occasions when some will get carried away, as did the school officials in the case at hand. If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2058–59 (2021) (Alito, J., concurring).

In response to McClelland's off-campus speech, on October 4, 2019, at 4:42 pm, KISD released a public statement that read:

> Dear Katy High School Parents, Students, and Staff,
>
> On the evening of Thursday, October 3, 2019 and following a varsity football game between

> Katy and Tompkins high schools, a KHS student-athlete posted a video of himself on social media in which he used ***racially charged language to taunt*** a student-athlete on the opposing team.
>
> Campus administration, Katy ISD police and local law enforcement thoroughly investigated the video incident. The student responsible will face disciplinary consequences in accordance with the Katy ISD Discipline Management Student Code of Conduct and Athletic Code of Conduct. However, it is important to note there are other related incidents that continue to be under investigation that would lead to additional consequences for any student found to be involved.
>
> This type of behavior and language is not in line with the values of our District, staff and community who work hard every day to instill exemplary character and behavior in all Katy ISD students. The District is committed to keeping students safe, both physically and emotionally. It is our highest priority.
>
> As always, thank you for your continued patience and support as this matter is investigated and addressed.
>
> Katy ISD

(emphasis added)

At the time McClelland was punished for his off-campus speech, neither he nor his parents were ever told that school officials thought he had made a threat

of violence, or, that he had violated the school's bullying or harassment policy. As further confirmation that McClelland was punished for saying "nigga," where he used "***racially charged language to taunt***" another student, which was KISD's original justification for McClelland's punishment, six days later, on October 9, 2019, Gary Joseph, Petitioner's Head Coach, and one of the school officials that was responsible for punishing McClelland, stated in an interview with the Katy Times newspaper that "it was not meant to be a divisive thing at all. . . . It's a slang term. It's stuff they hear every day. I hate it for the distraction it's become. ***He's been punished for it***, and they understand now. . . . I've said from the very beginning of the year, it's best to stay off social media." Dennis Silva II, *Katy coach Joseph: QB, team to use incident as learning experience*, Katy Times (Oct. 9, 2019, 1:05 PM), https://katytimes.com/stories/katy-coach-joseph-qb-team-to-use-incident-as-learning-experience, 657 (emphasis added).

Yet, sixty-two days after the incident, and after being told of a forthcoming First Amendment lawsuit, and after realizing their initial justification for punishing McClelland would not withstand a First Amendment challenge, school officials from the district office, including the general counsel—without any new evidence—provided McClelland with an *ex post facto* determination letter that stated he had actually been punished for making a threat of violence. The record makes clear that KISD school officials ignored the holding in *Tinker* which has been the prevailing law since 1969. Specifically, the *Tinker* Court held that

school officials may not proscribe expression by "the mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Yet, that is exactly what KISD chose to do.

Initially, Petitioner did not challenge his punishment for his off-campus speech. However, after eleven months of failed attempts to have KISD retract and correct an erroneous allegation in the "KISD Statement," McClelland commenced this suit against KISD and other school officials in their individual and official capacities. Due to qualified immunity, KISD is the only Defendant remaining in this case.

Petitioner originally filed this suit in state court, which KISD removed to federal court. Once in federal court, Petitioner amended his complaint, and KISD filed a Rule 12(b)(6) motion to dismiss that was ultimately granted over McClelland's motion response and subsequent motion to reconsider.

Despite McClelland's clearly sufficient pleadings, the district court dismissed McClelland's case for failure to state a claim. Specifically, the district court held that McClelland had not shown that the KISD Athletic Code of Conduct was an official policy of the school district, yet this was the exact policy KISD said it would rely on to discipline McClelland for his off-campus speech as confirmed in the KISD Statement. McClelland timely appealed to the Fifth Circuit Court of Appeals. After McClelland submitted his Appellant's Brief and Reply Brief, followed by oral argument which included significant discussion about McClelland's off-campus

speech, the panel affirmed the district court's opinion and dismissed McClelland's First Amendment claim for failure to satisfy the policy requirement of *Monell*. The panel's decision was made without reaching the issue of whether McClelland's off-campus Snapchat video was protected or unprotected speech. McClelland timely filed Motions for Panel Rehearing and Rehearing En Banc, followed by a Motion to Take Judicial Notice, all of which were denied.

In its opinion, the Fifth Circuit concluded that Petitioner did not adequately demonstrate a connection between the KISD Board of Trustees and the Athletic Code of Conduct. Although the pleadings clearly demonstrated such a connection on their face, if the panel had taken judicial notice of KISD's publicly-available policies—as was requested in McClelland's Reply Brief, and again during oral argument, and again as in his Motion for Judicial Notice—it would have clearly seen that the KISD Board of Trustees delegated final policymaking authority to the Superintendent and Principal to "develop and enforce standards of behavior" of extracurricular activities, such as the Athletic Code of Conduct. Thus, even if the documents provided at the pleading stage could not be directly attributed to KISD (which they can), KISD should have been liable under *Monell* because its lawful policymaker (the Board of Trustees) delegated final policymaking authority to the Superintendent and Principal, who then used that authority to develop and enforce an extracurricular conduct policy. As Petitioner will demonstrate, the KISD Athletic Code of Conduct (ACC)

clearly falls within what *Monell*, *Mahanoy*, *Pembaur*, and *Praprotnik* deem to be a "policy" attributable to a municipality.

Petitioner asserts that the Katy Independent School District Athletic Code of Conduct (ACC) is an official district policy, and thus, meets the criteria for *Monell* liability. *Monell* liability permits a plaintiff to hold a municipality liable for constitutional injuries that are carried out pursuant to an official policy or custom of that municipality. In this case, McClelland contends that the KISD Athletic Code of Conduct fulfills the essential requirements to be recognized as an official district policy.

a) The Written and Published Nature of the Code:

First and foremost, identical to the Student Code of Conduct (SCC), the ACC is a formally written and published policy. It is not an informal guideline or mere internal communication within the District. Rather, it is a comprehensive set of rules and regulations governing the behavior and responsibilities of student-athletes participating in KISD sports programs. This policy is made available to all student-athletes, parents, coaches, and staff members involved in the athletic programs, emphasizing its official status, and can be found on the official KISD website. The KISD ACC is included in the KISD Athletic Handbook and states that: "It is the responsibility of each head coach to convey to his/her team the expectations and need for

adherence to team and training rules. The Executive Director of Athletics must be consulted when a violation of the Katy ISD Athletic Code of Conduct occurs." Further, student-athletes are required to sign the KISD ACC acknowledgement form as a condition of participation, and the student's signature confirms that the student "will abide by the guidelines and procedures of the Katy ISD District. I understand that I can review a hard copy of this document on my campus or in the Katy ISD athletic department."

b) Approval by the School Board:

Furthermore, the KISD ACC has undergone the process of approval by the KISD Board of Trustees. This signifies a formal endorsement by the highest governing body of the School District. The KISD Board's role in approving such policies underscores the fact that the ACC is not merely an administrative guideline, but a crucial district-wide policy.

c) Enforcement and Penalties:

The ACC outlines specific enforcement mechanisms and penalties for violations. Student-athletes who breach the code are subject to disciplinary actions, which may include temporary removal from the extracurricular activity, suspension from athletic events, or even expulsion from the team or program. The clear delineation of consequences underscores the code's official and binding nature, as it directly affects the rights and privileges of the students involved.

d) Consistency in Application:

KISD consistently applies the ACC across all its athletic programs, demonstrating that it is not a discretionary guideline but a mandated policy that governs the conduct of student-athletes uniformly.

e) Conclusion:

The KISD ACC clearly satisfies the requirements for *Monell* liability as it is a written and published policy, approved by the School Board, includes clear enforcement mechanisms, and is consistently applied. Therefore, it can be unequivocally considered an official KISD policy. As such, the district should bear responsibility for any actions taken pursuant to this policy, further emphasizing the need for careful consideration in the case at hand.

As this First Amendment case is a matter of nationwide importance affecting all students in K-12 schools, Petitioner respectfully requests that the Court acknowledges the official status of the KISD Athletic Code of Conduct and proceeds accordingly in evaluating *Monell* liability in this case.

REASONS FOR GRANTING THE PETITION

McClelland v. Katy Independent School District has national significance, has precedential value, and will harmonize conflicting decisions among the federal circuit courts.

This Court's standard for municipal liability in civil rights claims is long-standing and clear: "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

The Fifth Circuit correctly understands *Monell* to require "three elements: that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Webb v. Town of Saint Joseph*, 925 F.3d 209, 214 (5th Cir. 2019). The Parties and the Court all agree that the policymaker here is the KISD Board of Trustees (KISD Board). Below, the Fifth Circuit affirmed the dismissal on the first element—claimed lack of an official policy—without reaching the third element.

With respect to the first element, the panel's decision is obviously wrong based on the facts available and this Court's, the Fifth Circuit's own, and other circuits' recent jurisprudence. And with respect to the third, this Court has two recent, dispositive cases buoyed by a bevy of Circuit court decisions that put liability beyond question. Specifically, both elements are a clear misapprehension of and cannot be reconciled with this Court's recent decision in *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021), despite other circuits' ability to correctly apply that decision. As a result, summary reversal is appropriate here. *See Tolan v. Cotton*, 572 U.S. 650, 659–60 (2014).

Not only does this case present an opportunity to correct the Fifth Circuit's rogue misapplication of *Mahanoy*, it also provides an avenue to clarify this year's decision in *Counterman v. Colorado*, 143 S. Ct. 2106 (2023) with respect to its application in the school context and in civil cases. *See Counterman*, 143 S. Ct. at 2122–23 (Sotomayor, J., concurring) (noting the importance of the true threat doctrine in the high school context and as a means of protecting marginal and minority groups). Moreover, allowing this decision to stand unnecessarily calls into question this Court's otherwise clear pronouncement in *Mahanoy* and allows K-12 schools across the country to punish disfavored off-campus speech, leading to a morass of litigation over this issue.

Thus, Petitioner will begin by demonstrating his clear evidence—far beyond what is typically required at the pleading stage—that the policies under which he was punished are KISD's official policies under *Monell* as it is understood throughout the circuit courts. He will then explain how this case so far departs from *Mahanoy* and the other circuits' application of its rule that it requires correction, and why this case is an ideal vehicle to apply *Counterman* unequivocally to the school context. Finally, he will illuminate the sheer breadth of negative side effects that will result if this case is allowed to go uncorrected.

I. Petitioner more than adequately established that multiple KISD policies are, in fact, actionable policies under *Monell*, and the Fifth Circuit's decision to ignore those policies is an egregious error that must be reversed.

A. The facts presented are so clear and the Fifth Circuit's decision is such a departure from universally understood principles of the motion to dismiss standard and of *Monell* liability that summary reversal is appropriate.

It is well-settled that cases should be decided on their merits. Moreover, there is no doubt that lower court judges are obligated to follow squarely applicable Supreme Court precedent. Thus, oral argument is not necessary in this case due to the reasoning it was dismissed. Rather, on the basis of this petition alone, McClelland seeks a summary reversal as the appropriate vehicle to remand this case back to the lower court, because a fuller exposition of views is not required or warranted, as court precedent regarding *Monell* liability has been previously established.

The Supreme Court's use of summary dispositions goes back to the late nineteenth century. Note, Supreme Court Per Curiam Practice: A Critique, 69 HARV. L. REV. 707, 708 (1956). These dispositions took the form of short, per curiam decisions, sometimes offering only a single sentence stating the result and not always providing even a citation to authority. *See id.* at 707. Cases were summarily affirmed or reversed when

they presented issues falling squarely within existing Supreme Court precedent. *See id.* at 708.

The presence here of clear error by the Fifth Circuit confirms the necessity of granting this petition; as Justice Alito pointed out, summary reversals may be appropriate "if the lower court conspicuously failed to apply a governing legal rule." *Salazar-Limon v. City of Houston*, 581 U.S. 946, 947 (2017) (Alito, J., concurring with the denial of a petition for writ of certiorari). As an example, this Court utilized this tool in *Tolan v. Cotton*, where it summarily reversed the Fifth Circuit because it "failed to adhere to the axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (per curiam) (cleaned up) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). It went on to reiterate later in the opinion that "while this Court is not equipped to correct every perceived error coming from the lower federal courts, we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents." *Id.* at 659 (cleaned up).

On this basis, McClelland asks the Court to grant summary reversal in order to rebuke the Fifth Circuit for its "clear misapprehension" of this Court's standards and precedents regarding municipal liability as set forth in *Monell*, *Mahanoy*, *Pembaur*, and *Praprotnik*—not to mention its own previous precedent in *Jett* and *Groden*. Furthermore, McClelland's justification is

consistent with the standard criteria for granting certiorari because the sole purpose is not to correct the error in his individual case, but rather, to provide more broadly useful precedential guidance about the meaning of the standard at issue, specifically, the law governing *Monell* liability and its applicability to the nation's public school districts.

B. Both on the facts pled and on further facts of which the lower courts should have taken judicial notice, Petitioner clearly established multiple policies under *Monell*.

In order to establish a policy under *Monell*, the Fifth Circuit notes that its

> caselaw establishes three ways of establishing a municipal policy for the purposes of *Monell* liability. First, a plaintiff can show "written policy statements, ordinances, or regulations." Second, a plaintiff can show "a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy." Third, even a single decision may constitute municipal policy in "rare circumstances" when the official or entity possessing "final policymaking authority" for an action "perform the specific act that forms the basis of the § 1983 claim."

Webb, 925 F.3d at 214–15 (internal citations omitted).

Also available in the Fifth Circuit and throughout the circuit courts is the concept that a policymaker

may ratify a constitutional injury, accepting the injurious behavior as its own action and pursuant to its own policy. *See Hobart v. City of Stafford*, 916 F. Supp. 2d 783, 793 (S.D. Tex. 2013) (summarizing Fifth Circuit ratification jurisprudence in the context of this Court's precedent); *see*, *e.g.*, *Starbuck v. Williamsburg James City Cty. Sch. Bd.*, 28 F.4th 529, 534 (4th Cir. 2022) (applying the concept of ratification to a closely analogous case).

Here, there is no permissible construction of the facts that supports the Fifth Circuit's conclusion that McClelland failed to plausibly plead the existence of a KISD policy as the moving force behind the alleged constitutional violation. In fact, the facts pled can support the existence of a KISD policy in three ways: KISD's written policies, the acts of its policymakers, and ratification.

With respect to written policies, McClelland included in his complaint the two sources of his punishment as identified and confirmed by KISD: the Student Code of Conduct (SCC) and the Athletic Code of Conduct (ACC). Each of these documents should have been considered official KISD written policies by the district court and the Fifth Circuit. The SCC is not only a mandatory document under state law for school districts to create and adopt, *see* Tex. Educ. Code § 37.0001(a), but it also states *on its face* that it is "adopted by the Board of Trustees of Katy ISD." Similarly, the ACC is in the KISD Department of Athletics Handbook which has KISD's logo on the cover, bears the signature of KISD's executive athletic director, references the Board of

Trustees, and is referred to as its *own* ACC within its own handbook and internal documentation.

The Fifth Circuit was presented with this information multiple times, yet it still inexplicably concluded that "McClelland has not shown that the KISD Board promulgated a policy that caused injury." App. 26.

Moreover, the Fifth Circuit did not at all consider the effect of the publicly released KISD Statement under its own precedent. Where a government spokesperson publicly announced a policy and that the plaintiff was punished under that policy, an "allegation that an official [] spokesperson announced an official [] policy allows for a reasonable pleading inference that this [] policy was attributable to an official policy made by the policymaker." *Groden v. City of Dallas*, 826 F.3d 280, 286 (5th Cir. 2016).

But beyond these three items that were directly pled—the SCC, the ACC, and the KISD Statement—the Fifth Circuit failed to take judicial notice of further dispositive documents that put this issue beyond question. The first is the "Katy ISD Board Policy Manual GBBA—School Communications Program: News Media Relations" (Media Policy).[2] This Policy is published by KISD and is readily available on its public website, and thus fits squarely under Federal Rule of Evidence 201(b)(2). The policy confirms that the KISD Board delegates final policymaking authority to prepare and

[2] https://pol.tasb.org/PolicyOnline/PolicyDetails?key=594&code=GBBA#localTabContent.

issue news releases concerning political or controversial issues or the operation of schools to the Superintendent or another designee. Further, this policy confirms that the "Superintendent shall be the official District spokesperson and shall be responsible for all communication." As a result, even apart from the Fifth Circuit's own standard in *Groden* that the panel ignored, the panel was wrong to conclude that the KISD Statement did not constitute ratification or delegation by the KISD Board. App. 26. Instead, the official district statement confirms that McClelland's punishment for his off-campus speech was meted out according to its own behavior and conduct policies and signed by "KISD."

Second is the "Katy ISD Board Policy Manual FO—Student Discipline" (Discipline Policy),[3] which is also published by KISD on its public website. That policy clearly delegates final *policymaking* authority, not merely *decision making* authority, with respect to extracurricular codes of conduct to the Superintendent and the Principal. As a result, the Superintendent and Principal's actions themselves may directly lead to liability under *Monell*.

Finally, there is no question that the KISD Board ratified the decision to punish McClelland for his protected speech. Both the KISD Statement, as discussed *supra*, and KISD's continued insistence on punishing

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[3] https://pol.tasb.org/Policy/Download/594?filename=FO(LOCAL).pdf (follow "PDF" hyperlink next to "Download Local Policy") (all websites last visited Sept. 6, 2023).

McClelland despite McClelland's challenges, including those by his mother and father on February 28, 2022,[4] and then Petitioner and his father on March 28, 2022,[5] speaking directly to the Board of Trustees about this matter at a public school board meeting, making clear that even if the Superintendent and Principal had not been delegated policymaking authority (which they had been), the KISD Board ratified the decision leading to the constitutional injury, accepting it as its own. The Board of Trustees had numerous opportunities to reverse course and correct this unlawful decision; they defiantly chose not to.

C. The Fifth Circuit's decision to reject the near-universal understanding of *Monell* with respect to policies creates a circuit split as demonstrated by numerous cases in this Court and the circuit courts.

Clearly, the panel's decision breaks uniformity with the well-established understanding of policies under *Monell*. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) ("if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability"); *Seamons v. Snow*, 206 F.3d 1021 (10th Cir. 2000) (applying *Pembaur* to a

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[4] KATY INDEPENDENT SCHOOL DISTRICT (Feb. 28, 2022), https://katyisdtx.new.swagit.com/videos/172492.

[5] KATY INDEPENDENT SCHOOL DISTRICT (Mar. 28, 2022), https://katyisdtx.new.swagit.com/videos/172494.

football coach); *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241 (5th Cir. 1993) (applying *Pembaur* to the school board context).

But more tellingly, it stands in stark contrast to two recent decisions based on similar facts. In *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) held that the school violated a cheerleader's First Amendment rights by punishing her for creating a Snapchat that used vulgarity to disparage the school's cheerleading team. Neither this Court nor the Third Circuit, *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3d Cir. 2020), directly addressed whether or not B.L. was punished according to official policy, demonstrating that both Courts agreed with the district court's determination on the issue. This Court noted that "[t]he school's athletic director, principal, superintendent, and school board, all affirmed B. L.'s suspension from the team." *Mahanoy*, 141 S. Ct. at 2043.

The district court squarely addressed a similar *Monell* argument made by the Mahanoy School District in that case, concluding that "[t]his argument can be dismissed out of hand" because the district "approved or ratified" the cheerleading rules under which B.L. was punished, and delegated its authority to those that punished her. *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 438 (M.D. Pa. 2019) (citing *Seamons*, 206 F.3d at 1029 ("[T]he record indicates that Coach Snow, and only Coach Snow, was vested by the school district with the authority to make final decisions regarding membership on the . . . football team. Because of this delegation of authority, the school district can

be held liable for Coach Snow's actions on team membership.")) (other citations omitted). With the sheer amount and clarity of documentation provided by McClelland, KISD's *Monell* argument can be and should have previously been "dismissed out of hand."

In *Starbuck*, the Fourth Circuit analyzed a similar situation in which a student was punished for his speech, attempted to challenge the punishment, only for the school board to expressly consider and then approve the punishment months later. 28 F.4th at 532. Despite facing similar arguments from the school board, the Fourth Circuit correctly concluded that the plaintiff successfully "allege[d] facts supporting his contention that the School Board ratified his suspension for uttering protected speech," and noted that the school board's decision to uphold the punishment ensured that it would "remain on his permanent record," which has serious present and future consequences. *Id.* at 534–35 (citing *Goss v. Lopez*, 419 U.S. 565, 575 (1975) (attaching a punishment to a student's permanent record "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment")).

Here, there is no material difference in McClelland's allegations to justify a different result. As demonstrated *supra*, KISD approved the SCC, ACC, and KISD Statement akin to the district in *Mahanoy*, and it ratified the punishment akin to *Starbuck*. On that basis alone, the Fifth Circuit split itself from at least this Court (*Monell*, *Pembaur*, *Mahanoy*), the Third

Circuit (*Mahanoy*), the Fourth Circuit (*Starbuck*), and the Tenth Circuit (*Seamons*). But as Petitioner will demonstrate *ante*, the Circuit split runs far deeper when also considering the constitutional violation at issue. *See ante* at pp. 26–28 (collecting cases). Thus, the Fifth Circuit's rogue departure from both long-established and recent precedent cannot remain uncorrected.

II. Petitioner established not only that KISD had multiple actionable policies under *Monell*, but also that those policies indisputably caused injury to his First Amendment rights as authoritatively established by this Court in *Mahanoy* and *Counterman*.

A. Petitioner's off-campus speech is nearly identical to and squarely governed by this Court's recent decision in *Mahanoy*, and a survey of the other circuits confirms that his speech is protected by the First Amendment.

With respect to the constitutional violation itself, this case is squarely governed by *Mahanoy*, and the panel's opinion is the only published opinion in the Fifth Circuit directly applying *Mahanoy*. As a result, it is imperative that this Court correct the Fifth Circuit now, so as to not accept or tolerate its erroneous decision which conflicts with the prevailing law of this Court and the other circuits.

In *Mahanoy*, this Court considered weaker facts than those presented here, but held that *Monell* liability

could attach anyway. There, B.L. posted a private Snapchat viewable by all of her roughly 250 "friends" on the platform, most of whom were other students at her school, *Mahanoy*, 141 S. Ct. at 2043; here, McClelland sent a private message to a single student of another school. There, B.L.'s objectionable speech was unprompted, specific criticism directed squarely at the school and the cheerleading program, *Id.*; here, McClelland's objectionable speech was mutual trash-talk directed at a single student of *another* school. In both cases, the Snapchats were recorded and posted or sent from personal devices in off-campus locations. *Id*.

In making its decision, this Court identified three main reasons for deciding in favor of B.L. First, it held that although the speech was vulgar and ill-mannered, the school did not stand *in loco parentis* with respect to B.L.'s behavior at a local convenience store. *Id.* at 2047. And here, there is no reason for KISD to stand *in loco parentis* with respect to McClelland's behavior in the parking lot of a Whataburger restaurant, outside of school hours, and outside *any* nexus to the school whatsoever. Second, the *Mahanoy* Court held that the "alleged disturbance here does not meet *Tinker*'s demanding standard." *Id.* at 2047–48.

Here, in *McClelland*, there is also "no evidence in the record of the sort of 'substantial disruption' of a school activity or a threatened harm to the rights of others that might justify the school's action." *Id.* at 2047 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)). Indeed, the students who wore black armbands in *Tinker* created more of a

disruption in the school than McClelland did, as his off-campus speech caused no disruption to the school environment in any way. And although the *Tinker* Court acknowledged some disruption was caused by the black arm bands, the majority still held the school had not met its burden of justifying its disciplinary actions. *See Tinker*, 393 U.S. at 514.

And third, the *Mahanoy* Court held that the district's undifferentiated fear with respect to team morale "is not enough to overcome the right to freedom of expression." *Mahanoy*, 141 S. Ct. at 2048 (quoting *Tinker*, 393 U.S. at 508). The same principle applies directly to McClelland. Indeed, "sometimes it is necessary to protect the superfluous in order to preserve the necessary." *Id*.

Moreover, other circuits that have either applied *Mahanoy* directly or reached similar conclusions under *Tinker* before *Mahanoy* was published, universally agree that a school's ability to regulate off-campus speech requires extraordinary circumstances, such as extreme, targeted bullying or harassment, or true threats, including hit lists. *See*, *e.g.*, *Kutchinski v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350 (6th Cir. 2023) (student's creation of a parody Instagram account of a teacher was not protected speech where other students to whom he gave the login created posts using personal pictures of the teacher, his family, and students along with captions containing extremely vulgar, graphic descriptions of sex and/or violence—the account fit under the severe bullying or harassment exception in *Mahanoy*); *Chen v. Albany Unified Sch. Dist.*, 56 F.4th

708 (9th Cir. 2022) (two students' participation in a private, 13-member social media account was not protected speech because the posts in the account fit under an exception in *Mahanoy* for severe bullying or harassment targeted at specific classmates—the posts in question involved pictures taken of Black students without their consent, edited to depict or describe lynchings or hangings); *Cl. G. v. Siegfried*, 38 F.4th 1270 (10th Cir. 2022) (a student's private Snapchat post, made off campus, was protected under the First Amendment because stating that he "and the boys [were ']bout to exterminate the Jews" because under *Mahanoy*, the district could not stand *in loco parentis* and there was no forecast of a substantial disruption, and noting in particular the lack of a specific threat and the fact that it was not directed toward the school); *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700 (9th Cir. 2019) (a student's hit list was not protected speech); *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142 (9th Cir. 2016) (middle school student's speech was not protected where he made increasingly sexual remarks to younger students—to the point of sexual harassment—just off campus on a public park bike path on the way home from school); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (a student's vulgar, parody profile of his principal on social media—created on an non-school computer—was protected speech under the First Amendment); *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (a student's extremely lewd and sexually explicit parody profile of her school principal was protected speech because it was made off

campus and did not cause a substantial disruption under *Tinker*).

B. Because Petitioner was punished without KISD determining that his speech was a "true threat," *Counterman* should apply and this is the ideal case in which to apply *Counterman* to the school discipline context.

Just this year, this Court held that the State must prove that a criminal suspect was making a "true threat" in order for their threatening speech to fall outside of First Amendment protection. *Counterman v. Colorado*, 143 S. Ct. 2106 (2023). Here, originally and consistent with the time McClelland received his punishment, KISD did not even claim to have punished McClelland for making any kind of threat. Further, in a notable admission, KISD's counsel admitted during oral argument before the Fifth Circuit that McClelland was not disciplined for making a "true threat," but for making a "threat," a "general threat." However, this manufactured admission, which is not supported by the facts or allegations contained in the Second Amended Complaint or throughout the record, runs afoul of the deposition testimony of McClelland's assistant principal at Katy High School and a KISD police officer assigned to the same school. Specifically, both of these school employees have already provided deposition testimony confirming that in 2019, neither McClelland himself, nor the speech at issue here was considered a threat. Petitioner was punished for his

taunt where he used the slang n-word, not for making a threat of violence, despite the untruthful, strawman argument proffered *after the fact* by KISD. Further, as stated by Judge Wilson, one of McClelland's Fifth Circuit panel Judges, "frankly I think there's taunts all the time . . . I don't really perceive any of those things as threats."

However, if this Court takes as truthful the admission by KISD's counsel that McClelland was punished for making a "taunt," or a "threat," but *not* for making a "true threat," then the question becomes whether *Counterman* should govern and be applicable to him in the school context. McClelland agrees with Justice Sotomayor's concurrence that it should; given the risk of overcriminalizing protected speech, especially that of minority or marginalized groups, in the Internet age is particularly acute, sufficient protection is needed to prevent the unnecessary criminalization of, for example, "a high school student who is still learning norms around appropriate language." *Counterman*, 143 S. Ct. at 2122 (Sotomayor, J., concurring). The latter scenario is the exact case here—McClelland's speech may have been miscalculated and was certainly not appropriate, but it was not a "true threat" deserving of punishment. Moreover, as will be discussed *ante*, allowing the overpunishment of McClelland here puts marginalized and minority groups at risk of facing similar or worse consequences for non-threatening speech.

In an *amicus* brief for the Court in *Counterman*, the Foundation for Individual Rights and Expression (FIRE) presented particularly instructive examples

with respect to the "true threat" standard applying to schools. It notes that its "experience in the public college and university settings demonstrates the prevalence of state officials administratively punishing speech that they deem to be threatening, even though the speakers had no intent to make a threat." Brief for the FIRE as Amicus Curiae, p. 5, *Counterman v. Colorado*, 143 S. Ct. 2106 (2023). In that context,

> a specific-intent requirement to 'true threats' analyses strikes the optimal balance between protecting that commitment to uninhibited debate and deterring the harm that true threats may cause. Because a general-intent standard can reach lawful expression, including hyperbolic or humorous but fully protected commentary on matters of public concern, it unnecessarily chills speech. In contrast, the specific-intent standard protects speech on the margins, maintaining space for the wide-open and robust discussion of all manner of ideas.

Id. at p. 4.

FIRE provided three examples of speakers that were punished for what should be protected speech, because they made a more "general threat" like KISD accused McClelland of making. One student joked on social media that "if we don't win today, I'm detonating the nuclear reactor on campus," and she was arrested and charged for making a "terroristic threat." *Id.* at p. 2. Another student was blocked from driving home by protestors and commented to a city garbage truck

driver that was parked between her and the protestors that "[i]t's a good thing you are here because, otherwise, these people would have been speed bumps." *Id.* at p. 8. She was sanctioned and disciplined, and the school refused to expunge her disciplinary record. *Id.* at pp. 8–9. And a community college professor was ultimately fired for implying that he would like to "clock [President Trump] with a bat." *Id.* at pp. 9–10.

Petitioner's case is just such a fringe case—McClelland's trash talk remark that he would put someone "in the hospital" were words that even school officials determined, *after* meting out McClelland's initial punishment, and *after* sixty-two days of deliberation and settling on a new justification for punishment, and *after* admittingly knowing the difference between a "general threat" and a "true threat," *still*, even to this very day, determined that McClelland did not make a "true threat." Indeed, the "First Amendment protects the 'freedom to speak foolishly and without moderation.'" *Id.* at p. 8 (quoting *Baumgartner v. United States*, 322 U.S. 665, 674 (1944)). Thus, it is imperative that such clearly protected speech—even if it is objectionable, or on the "fringe" of permissible speech—must remain protected in *all* contexts lest a broad range of protected speech be chilled for fear of punishment.

This fear is directly at stake in this case. If this Court fails to grant certiorari and apply *Counterman* to McClelland, the message will be that in the context of student discipline, school districts across this nation are not bound by the "true threat" doctrine, nor required to prove that in true-threat cases, a defendant

has some subjective understanding of their statements' threatening nature. *Counterman*, 143 S. Ct. at 2111.

As a result of *Counterman*, in regards to student threat cases, it was held that the government, including school districts, are required to adhere to the "true threat" doctrine, including meeting the recklessness standard. *Id.*

KISD school officials acted identically to the government officials from the state of Colorado where this Court held that the State prosecuted Counterman in accordance with an objective standard, but did not show any awareness on Counterman's part of his statements' threatening character, which is a violation of the First Amendment. *Id.* at 2113.

Petitioner argues and stresses to this Court that KISD, in unambiguous fashion, admitted to the Fifth Circuit panel that McClelland was disciplined for making a "taunt," a "general threat," not for making a "true threat." Therefore, in no way can McClelland's punishment for his off-campus speech be squared with *Counterman* or any other Supreme Court cases dealing with "true threats" and the First Amendment. KISD clearly knows the difference between a "taunt," "general threat," and a "true threat," only one of which is *not* protected speech.

The gravity of this issue, the continued rapid expansion of social media usage and access, including the recent advancement of artificial intelligence, and recognizing that this Court has *never* had an opportunity

to confirm its *Counterman* opinion in relation to the context of school discipline, this Court should grant certiorari and deliver a clear message to school officials across this nation. The message should be clear and unambiguous; that before a school district can reach a *final* disciplinary determination regarding threatening words that are spoken by a student, the school officials must adhere to the prevailing law in *Counterman.* Petitioner does not argue that school officials are forbidden from taking immediate and necessary action based on a perceived "true threat" to prevent an act of violence, rather, before a *final* disciplinary determination is made and such discipline becomes part of the student's permanent education record, *Counterman* must be satisfied so as not to offend the First Amendment.

III. The risks of allowing the Fifth Circuit's ruling to stand are too great.

In considering these recent cases, this Court has seen *amici* in *Mahanoy* and *Counterman* that both crystalize exactly why an extracurricular punishment should be actionable, and encapsulate the risks of the Fifth Circuit's decision here with painful clarity.

In *Mahanoy*, the *amici* pointed out the critical danger of allowing schools to punish the "n-word" for its distastefulness alone—it clearly gives schools the ability to punish Black and Brown students who use the word most for no reason other than their vernacular. As one brief pointed out, "college sports are overwhelmingly run by white administrators, and

disproportionately populated by students of color," meaning that a ruling "in favor the School District will equip white college administrators with virtually unreviewable authority to silence the voices of Black and brown speakers." Brief for the College Athlete Advocates as Amicus Curiae, p. 11, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021). This danger is even more acute in the social media context, which is "uniquely vulnerable to cultural 'mistranslation.'" *Id*. "Simply put, 19-year-old Black students and 50-year-old white administrators do not always share a cultural vocabulary. If a misinterpreted social-media post becomes grounds for unreviewable punitive action impervious to First Amendment challenge, it is no mystery which athletes will suffer most. *Id.* at pp. 11–12.

Moreover, in *Mahanoy* as here, the easy path may be to downplay the role and importance of extracurricular activities, but doing so would be a clear mistake. Not only do extracurricular activities provide numerous tangible benefits to students, such "activities are intrinsic to the educational experience, regarded as no longer an 'extra' activity but a necessity for any college-aspiring student." *Id.* at p. 26. As was the case for McClelland, the extended fallout from the public punishment he received by KISD for his Snapchat video, specifically, his "being removed from taking part in athletics [was] . . . a life-altering punishment" due to its substantial and adverse effect on his reputation, his ability to secure an athletic scholarship at a Division 1 college or university, his loss of a potential NIL (name,

image, or likeness) deal as a college athlete, and its impact on his future career opportunities. *Id*.

But even to the extent that extracurricular activities are not considered strictly necessary to a public education,

> The Court has long recognized that, even if a person has no entitlement to receive a benefit—such as a government job—that benefit still cannot be withdrawn for a retaliatory or speech punitive reason, because a reasonable speaker will be deterred from speaking regardless of whether the deprivation is considered the loss of an "entitlement" or of a "privilege." *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

Id. at 24–25.

From the school district's perspective, even school board and administrative *amici* in favor of the district in *Mahanoy* recognize the importance of extracurricular activities, and inadvertently spell out the critical danger in allowing dismissal at the *pleading* stage of a claim because an extracurricular code of conduct may not be readily tied to the district. After pointing out schools' ability to regulate the behavior of extracurricular participants and nonchalantly taking the position that participants' behavior *should* be regulated by the school 24/7, they note that "[w]hether these expectations appear in formal behavior contracts, codes of

conduct, official school policies, or informal team guidelines, student-participants understand that their positions on their school squads *depend on good behavior*." Brief for the National School Boards Association *et al.* as Amicus Curiae, pp. 8–9, *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 178 (3d Cir. 2020) ("It is widely recognized that public schools may impose behavioral standards for student participation in extracurricular activities. . . . Student athletes, debaters, musicians, and robotics team members all understand that when they represent their school in competition or practice, they assume responsibility for respectful speech and sportsmanship during the competitions and practices themselves, *and in their free time*") (emphasis added to both quotes). They go on to explain that "[s]uch rules and standards are *necessary* to the value of extracurricular programs," and that the ability to mete out punishment under these codes of conduct is essential to protect the school and its reputation. *Id.* at p. 18.

Therefore, because monitoring participant behavior, developing and enforcing extracurricular codes of conduct, and the ability to discipline students are all necessary to the provision of extracurricular activities, school districts should not be able to put forth crafty and deceitful arguments to skirt *Monell* liability. Specifically, in the instant case, when KISD confirmed to the general public by releasing the KISD Statement that McClelland would "face disciplinary consequences in accordance with the Katy ISD Discipline Management Student Code of Conduct and Athletic Code of

Conduct," thus, displaying their authority to regulate his speech and discipline McClelland in accordance with these "Codes of Conduct," KISD is tied directly to the authority they projected and to the policies they relied on in the KISD Statement. The prevailing law of Monell jurisprudence does not provide for a "skirting of liability" brought forth by a contrived legal strategy. Further, to accept KISD's Monell argument, this Court would deliberately be granting school officials a pathway on how to avoid municipal liability by merely structuring extracurricular codes of conduct such that they do not appear as an "official" policy (e.g., "informal team guidelines"). Clearly these extracurricular codes of conduct provide a crucial role in extracurricular activities. Therefore, these codes of conduct should and must be subject to the same constitutional scrutiny as any other school district policy.

Moreover, as the district court pointed out in *Mahanoy*, "there is nothing unique about athletics that would justify a broader application of *Tinker* or *Fraser* to a student athlete's off-the-field profanity. . . . The interest that a school or coach has in running a team does not extend to off-the-field speech that, although unliked, is unlikely to create disorder on the field. . . . Coaches cannot punish students for what they say off the field if that speech fails to satisfy the *Tinker* or *Kuhlmeier* standards." *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 442–43 (M.D. Pa. 2019). And as the Third Circuit went on to hold, the First Amendment does not protect athletes or extracurricular

speech any less vigorously than speech uttered in the classroom. *See Mahanoy*, 964 F.3d at 181–82.

CONCLUSION

The punishment McClelland received from KISD cannot be squared with *Mahanoy* or *Counterman*. The First Amendment rights at stake as conveyed here have far reaching consequences well beyond this case—it impacts all students in K-12 public schools. With an opportunity to reiterate the prevailing law in *Mahanoy*, and with its first opportunity to apply *Counterman* to free speech in a school disciplinary matter, McClelland provides this Court with a unique record that allows for both.

Moreover, at this stage in the proceedings, the lower courts were required to accept as true all of the factual allegations in the complaint, and draw all reasonable inferences in Petitioner's favor; they clearly failed to do so. As held in *Twombly*, in order to survive a motion to dismiss, the allegations must show a plausible entitlement to relief, a feat accomplished by offering substantiating facts that move liability from a speculative possibility to something that discovery is reasonably likely to confirm. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). McClelland has far exceeded this requirement.

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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