No. 15-___

IN THE

Supreme Court of the United States

TAYLOR BELL,

Petitioner,

v.

ITAWAMBA COUNTY SCHOOL BOARD,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LISA S. BLATT
R. STANTON JONES
ELISABETH S. THEODORE
WILLIAM C. PERDUE
ARNOLD & PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@aporter.com

DANIEL M. PASTOR
ARNOLD & PORTER LLP
3 Embarcadero Center
San Francisco, CA 94111
(415) 471-3100

WILBUR O. COLOM
Counsel of Record
SCOTT COLOM
COLOM LAW FIRM
PO Box 866
200 Sixth St. North
Suite 700
Columbus, MS 39703
(662) 327-0903
wil@colom.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

In *Tinker v. Des Moines Independent Community School Distric*t, 393 U.S. 503 (1969), this Court held that the First Amendment permits public schools to restrict their students' speech "on the campus" if school officials reasonably forecast that the speech will "materially and substantially disrupt the work and discipline of the school." *Id*. at 512-13. Courts of appeals and state high courts are hopelessly splintered over whether, and if so when, *Tinker* applies to students' speech outside of the school environment. In a deeply fractured decision, the en banc Fifth Circuit held that *Tinker* applied to off-campus speech—a student's rap song accusing two male teachers of sexually harassing and assaulting female students.

The question presented is whether and to what extent public schools, consistent with the First Amendment, may discipline students for their off-campus speech.

RULE 14.1(b) STATEMENT

The parties to the proceeding below were petitioner Taylor Bell and respondent Itawamba County School Board, as well as plaintiff Dora Bell and defendants Teresa McNeese, Superintendent of Education for Itawamba County, and Trae Wiygul, principal of Itawamba Agricultural High School, each in his or her individual and official capacity.

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JURISDICTION

The en banc Fifth Circuit issued its decision on August 20, 2015. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the U.S. Constitution provides in pertinent part that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I.

INTRODUCTION

This case presents a First Amendment question of the utmost importance that has vexed school officials and courts across the country: whether this Court's landmark decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), applies to students' off-campus speech. This question arises with startling frequency in an age when students communicate primarily through online social media such as Facebook, Instagram, and Twitter. Only this Court can provide the guidance that students, parents, teachers, school administrators, and lower courts desperately need.

In a deeply fractured decision, the en banc Fifth Circuit held that the First Amendment allowed a Mississippi public high school to censor an 18-year-old

senior's entirely off-campus speech calling attention to sexual misconduct by school officials. Petitioner Taylor Bell composed, recorded, and posted to the Internet a rap song reporting that two of his school's male teachers had sexually harassed and assaulted female students. Bell wrote the song over winter break, recorded the song at a professional studio, and uploaded the song to Facebook and YouTube from his personal computer at home. No one even heard the song at school, except one of the accused teachers at his own initiative.

The respondent School Board did not deny Bell's accusations of sexual misconduct, but nonetheless suspended Bell and forced him to attend the county's "alternative school" for the remainder of the nine-week term. Pet. App. 9a. The court below upheld this punishment under *Tinker*, which held that schools may restrict speech "on the campus" that "would materially and substantially disrupt the work and discipline of the school." 393 U.S. at 512-13.

The court below held that *Tinker* applies to "off-campus speech." Pet. App. 2a. By posting his song online, the majority explained, Bell "intentionally direct[ed] his rap recording at the school community, thereby subjecting his speech to *Tinker*." *Id.* at 30a. The majority acknowledged that five other circuits have adopted "differing standards" on whether, and if so when, "*Tinker* applies to off-campus speech." *Id.* at 21a, 23a. Bell would have prevailed in the Third Circuit, which twice has held that schools violated the First Amendment by disciplining students for off-campus online speech.

Absent this Court's intervention, the decision below will have far-reaching and deeply troubling consequences. The majority's holding "inevitably will

encourage school officials to silence student speakers . . . solely because they disagree with the content and form of their speech." *Id.* at 50a (Dennis, J., dissenting). And the mere "specter of punishment will deter [students] from engaging in off-campus expression that could be deemed controversial or hurtful to school officials." *Id.* at 77a. The principal dissent thus castigated the majority for "obliterat[ing] the historically significant distinction between the household and the schoolyard," and "expanding schools' censorial authority from the campus and the teacher's classroom to the home and the child's bedroom." *Id.* at 47a.

If *Tinker* applies to off-campus speech, schools could punish a student for expressing a controversial religious idea in church, writing a blog post against abortion, or advocating on a public sidewalk to cut the school's football program—so long as a school official could envision a substantial disruption. Bell's song likewise addressed a matter of urgent public concern—child sexual abuse. And while his song contains violent rhetoric—as is common in rap music—the Fifth Circuit expressly declined to hold that the song was a threat that would be unprotected under ordinary First Amendment principles. Nor could the record remotely support such a holding. The actions of school officials were manifestly inconsistent with any notion that Bell's song was a threat.

Applying *Tinker* to off-campus speech has particularly devastating consequences in light of students' ubiquitous use of online social media in the Internet age. "[V]irtually any speech on the Internet can reach members of the school community" and therefore can be censored by school officials under the decision below. *Id.* at 74a. As a result, students risk life-altering consequences like suspension or expulsion

any time they say anything potentially controversial on Facebook, Instagram, or Twitter.

The dueling opinions below agreed on one thing: "Ultimately, the difficult issues of off-campus online speech will need to be addressed by the Supreme Court." *Id.* at 109a (Prado, J., dissenting); *see also id.* at 24a (majority); *id.* at 44a (Costa, J., concurring). This Court accordingly should grant certiorari to resolve this important and recurring issue, and to safeguard students' freedom to express themselves—through music and otherwise—especially on matters of public concern.

STATEMENT

A. Factual Background

1. In December 2010, Taylor Bell was an 18-year-old senior at Itawamba Agricultural High School in Fulton, Mississippi. Other than a single in-school suspension for "tardiness," Bell had a spotless disciplinary record through three-and-a-half years of high school. Bell also was and is an aspiring rap music artist. He began writing music and lyrics as a young child, and began recording original rap songs in his early teens. Pet. App. 116a.

Shortly before Christmas, several of Bell's female friends told him that two of the school's male teachers and athletic coaches, Michael Wildmon and Chris Rainey, had inappropriately touched them and made sexually explicit comments to them and other female students at school. *Id.* at 117a. According to sworn affidavits submitted by the young women in this case, Wildmon told one 17-year-old student, R.M., that she had a "big butt" and that he would "date" her if she were older. *Id.* He also looked down her shirt,

inappropriately touched her, and told her that she was "one of the cutest black female students" at Itawamba. *Id.* Another student, 16-year-old D.S., told Bell that she had witnessed these incidents, and that Rainey had "rubbed [her] ears at school without her permission, and [that she] had to tell him to stop." *Id.* Yet another student, 16-year-old S.S., told Bell that Rainey had said he would "turn [her] back 'straight' from being 'gay.'" *Id.* A fourth student, 17-year-old K.G., told Bell that Rainey had approached her in the school gym and said, "damn baby, you are sexy." *Id.* *See also id.* at 220a-228a (female students' sworn affidavits).

Bell did not report these incidents directly to school officials because officials generally ignored student reports of teacher misconduct. Instead, over winter vacation—*i.e.*, when school was not in session—Bell composed a rap song about his friends' complaints. He recorded the song at a professional recording studio unaffiliated with the school. Bell did not use any school resources in creating or recording the song. *Id.* at 117a-118a.

Bell's song, entitled "P.S. Koaches The Truth Needs to be Told," accused the two coaches of telling female students that they are "sexy"; "looking down girls[']shirts" with "drool running down [their] mouth[s]"; "[r]ubbing on the black girls' ears in the gym"; "t[aking] some girls in the locker room in PE" and "cut[ting] off the lights"; and acting like "pervert[s]" who were "30 years old fucking with students at the school." *Id.* at 3a-5a, 56a n.2. The song compared one of the coaches to "Bobby Hill," a former Itawamba football coach who in 2009 was arrested and accused of sending sexually explicit text messages to a female student. *Id.* at 56a, 92a n.19.

As is common in rap music, Bell's song contains vulgar and profane language, as well as violent rhetoric such as "betta watch your back," "hit you with my rueger," "going to get a pistol down your mouth," and "middle fingers up if you want to cap that nigga." *Id.* at 5a. The song's complete lyrics are reprinted at Pet. App. 3a-5a.

In early January 2011, Bell posted the song to his Facebook page using his personal computer at home. School computers block all access to Facebook, and while Bell's Facebook "friends" could listen to the song on cellphones, school rules prohibited students from bringing cellphones to school. *Id.* at 122a-123a. Bell never played, performed, or encouraged anyone to listen to the song at school. *Id.* at 123a.

2. On January 6, 2011, Coach Wildmon received a text message about the song from his wife during school, and asked a student to play the song for him on the student's cellphone, in violation of school rules that prohibit cellphones. Wildmon then reported the song to Itawamba's principal, who in turn informed the school district's superintendent. *Id.* at 6a.

The next day Bell was summoned to the principal's office, where the principal, superintendent, and a school-district attorney accused Bell of making false accusations and threats. Bell explained that the song's hyperbolic language was not a threat, and that the song's reports of sexual misconduct by the coaches were true. The school officials sent Bell home for the rest of the day, and the principal drove him home. School officials did not call police, search Bell's person or locker, or take any other security measures. *Id.* at 6a, 123a-124a.

The following week, while school was closed due to snow, Bell produced a more polished version of the song and posted it to YouTube, again from his personal computer. *Id.* at 6a, 124a. In the YouTube version, Bell added a concluding monologue stating that the song is about "something that's been going on . . . for a long time [ ] that I just felt like I needed to address." *Id.* at 124a. Bell continued: "I'm an artist . . . . I speak real life experience. . . . The way I look at it, one day, I'm going to have a child." *Id.*

The school allowed Bell to return and attend classes on January 14. Though Bell observed no disruption to the school's normal routine, an assistant principal removed him from class around midday and informed him that he was suspended pending a disciplinary hearing. Bell was not required to leave the building, however, and remained unattended in the school commons until his school bus arrived at the end of the day. Again, schools officials did not call police or take any other security measures. *Id.* at 6a, 125a.

3. At a hearing before the school's Disciplinary Committee on January 26, 2011, Bell explained that his rap song was a form of artistic expression intended to increase awareness of the coaches' misconduct, and was not intended to threaten, harass, or intimidate them. He presented letters from multiple female students corroborating the song's serious allegations of sexual misconduct. The coaches did not appear at the hearing, and there was no evidence that either of them felt threatened, harassed, or intimidated. Nor did school officials offer any evidence that the song caused a disruption or that anyone even listened to the song at school, aside from when Coach Wildmon asked to listen to the song on a student's cellphone. *Id.* at 7a-9a, 125a-128a.

At the close of the hearing, one Disciplinary Committee member admonished Bell: "I would say censor your material. . . . Censor that stuff. Don't put all those bad words in it. . . . The bad words ain't making it better. . . . Sometimes you can make emotions with big words, not bad words. . . . Big words, not bad words. Think about that when you write your next piece." *Id.* at 128a.

The next day, the Disciplinary Committee upheld Bell's suspension and ordered that he be placed at the county's "alternative school" for the remaining six weeks of the nine-week grading period. *Id.* at 9a. In a letter explaining its decision, the Committee stated that it was "vague" whether Bell's lyrics constituted threats, but that the lyrics constituted harassment and intimidation in violation of district policy and unspecified state law. *Id.* A week later, the School Board upheld the Committee's decision, stating that Bell's song "did threaten, harass, and intimidate school employees." *Id.* at 9a-10a.

B. Proceedings Below

1. On February 24, 2011, Bell filed this action in the United States District Court for the Northern District of Mississippi, asserting a § 1983 claim that the School Board violated his First Amendment rights by punishing him for his off-campus speech. Bell sought nominal damages and injunctive relief, including expungement of the discipline from his school records. Pet. App. 10a, 130a.[1]

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[1] Bell also asserted claims against the principal and superintendent, and his mother, Dora Bell, asserted a claim that all defendants violated her Fourteenth Amendment right to control her child's upbringing. The district court granted summary

At a hearing on Bell's motion for a preliminary injunction allowing him to return to Itawamba, Coach Rainey testified that he had not heard Bell's song. *Id.* at 131a. Anyway, Rainey felt the song was "just a rap," and that if he "let it go, it [would] probably just die down." *Id.* Rainey testified that the song had "affected" the way he "talk[ed] to kids," *id.*, and that he could not be as "hands on" with female members of the track team, *id.* at 98a n.23. Though students "seem[ed] to act normal" around him, Coach Wildmon testified that he avoided "look[ing] in one area too long" so he would not be "accused of . . . staring at a girl." *Id.* at 98a & n.23a. He also said he felt "scared" because "you never know in today's society . . . what somebody means." *Id.* at 12a. The court denied the preliminary injunction as moot because Bell had only one day left at the alternative school. *Id.* at 12a-13a.

The district court granted the School Board's summary judgment motion, and denied Bell's. *Id.* at 203a-217a. The court held that "the *Tinker* standard applies to Taylor Bell's song without regard to whether it was written, produced, and published outside of school." *Id.* at 208a. Applying *Tinker*, the court concluded that Bell's song "in fact caused a material and/or substantial disruption" because each coach's "teaching style [was] adversely affected out of fear students suspect him of inappropriate behavior," and because Coach Wildmon "testified that he felt threatened." *Id.* at 213a. The court also found that a substantial disruption was "reasonably foreseeable" because the song "levies charges of serious sexual misconduct against two teachers using vulgar and threatening language," and was available to all of

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judgment for the defendants on those claims, and they are not at issue here. Pet. App. 116a n.1.

Bell's "friends" on Facebook and the "unlimited internet audience on YouTube.com." *Id.* at 213a-214a. The district court did not adopt the School Board's argument that Bell's song lyrics constituted a "true threat" under this Court's decision in *Watts v. United States*, 394 U.S. 705 (1969) (per curiam).

2. A divided panel of the Fifth Circuit reversed, ruling that Bell—not the School Board—was entitled to summary judgment. Pet. App. 114a-202a.

a. The panel majority first stated that this Court's "'student-speech' cases, including *Tinker*, do not address students' speech that occurs off campus and not at a school-approved event." *Id.* at 134a. This Court "has not decided whether, or, if so, under what circumstances, a public school may regulate students' online, off-campus speech." *Id.* Other circuits have adopted "unique threshold tests" for determining whether *Tinker* applies to off-campus speech, or "left open the question." *Id.* at 140a n.38.

Even if *Tinker* applied, the majority held that "the teachers' alteration of their teaching styles in order to avoid accusations of sexual harassment does not constitute the material and substantial disruption of school work or discipline." *Id.* at 144a-145a. Nor could school officials reasonably forecast a substantial disruption when Bell composed, recorded, and uploaded his song "entirely off campus"; "[s]chool computers blocked Facebook and school policy prohibited possession of cell phones"; and "the violent lyrics in Bell's song were plainly rhetorical in nature, and could not reasonably be viewed as genuine threats to the coaches." *Id.* at 145a. The majority further held that Bell's song was not a "true threat" under *Watts* and thus could not be censored under ordinary First Amendment principles. *Id.* at 152a-159a.

b. Judge Barksdale's dissent argued that *Tinker* applied. In his view, "technological developments . . . have rendered the distinction [between on-campus and off-campus speech] obsolete," and "[w]ith students having instant access to the Internet anywhere, drawing such an arbitrary distinction both tortures logic and ignores history." *Id.* at 191a.

3. The Fifth Circuit granted rehearing en banc, *id.* at 218a-219a, and, in a deeply fractured decision, affirmed the district court's order granting summary judgment to the School Board, *id.* at 1a-113a. The en banc court produced eight opinions, including four separate dissents.

a. Writing for the en banc majority, Judge Barksdale acknowledged that "those courts to have considered the circumstances under which *Tinker* applies to off-campus speech have advocated varied approaches." *Id.* at 27a; *accord id.* at 21a (noting the "differing standards applied to off-campus speech across circuits"). Rather than "adopt or reject approaches advocated by other circuits," the majority held that *Tinker* applies "when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources." *Id.* at 28a.

Under *Tinker*, the majority held that regardless of whether Itawamba officials actually forecast any disruption, "a substantial disruption reasonably could have been forecast as a matter of law." *Id.* at 33a. The majority reasoned that "the school district's Discipline–Administrative Policy lists '[h]arassment, intimidation, or threatening other students and/or teachers' as a severe disruption," and Bell's song

purportedly uses "threatening, intimidating, and harassing" language. *Id.* at 34a. But despite labeling Bell's speech as "threatening," the majority held that "it is unnecessary to decide whether Bell's speech also constitutes a 'true threat' under *Watts*." *Id.* at 37a.

b. Judge Jolly concurred, noting that "the use, the extent and the effect of [ ] online speech seem to have multiplied geometrically." *Id.* at 39a. He argued that students' speech must be "subject to school discipline when that speech contains an actual threat to kill or physically harm personnel and/or students of the school." *Id.* at 40a.

c. Judge Elrod, joined by Judge Jones, also concurred to state her position that "nothing in the majority opinion makes *Tinker* applicable off campus to non-threatening political or religious speech, even though some school administrators might consider such speech offensive, harassing, or disruptive." *Id.* at 41a. She cautioned that "broad off-campus application of *Tinker* 'would create a precedent with ominous implications [and] would empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school.'" *Id.* at 42a (quoting *J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (en banc) (Smith, J., concurring)).

d. Judge Costa, joined by Judges Owen and Higginson, also concurred, stating that this Court "soon . . . will need to provide clear guidance for students, teachers, and school administrators" on the issue of "off-campus speech." *Id.* at 44a. "That task will not be easy in light of the pervasive use of social media among students." *Id.* Judge Costa stated that if "*Tinker* does not apply to this type of off-campus speech," Bell's song "would

enjoy First Amendment protection from school discipline." *Id.* at 43a.

e. Judge Dennis, joined by Judge Graves and by Judge Prado in part, penned a scathing 50-page dissent. The dissent explained that the majority's holding "impinges the very core of our Constitution's fundamental right to free speech," *id.* at 50a, and "denigrates and undermines not only Bell's First Amendment right to engage in off-campus online criticism on matters of public concern, but also the rights of untold numbers of other public school students," *id.* at 46a-47a. By applying *Tinker* to off-campus speech, the majority's decision paves the way for "schools to police their students' Internet expression anytime and anywhere—an unprecedented and unnecessary intrusion on students' rights." *Id.* at 49a. The majority "wholly glosses over the urgent social issue that Bell's song lays bare," *id.* at 47a; "disregards Supreme Court precedent" regarding protection of speech by minors and on the Internet, *id.* at 47a-48a; and delegitimizes rap music in favor of "the School Board's aesthetic preferences for socio-political commentary," *id.* at 47a. The dissent found Bell's song a "darkly sardonic but impassioned protest of two teachers' alleged sexual misconduct," and observed that "the School Board has never attempted to argue that Bell's song stated any fact falsely." *Id.* at 56a-57a, 60a.

f. Judge Prado separately dissented, stating his "hope that the Supreme Court will soon give courts the necessary guidance to resolve these difficult cases." *Id.* at 105a. He explained that "off-campus online student speech is a poor fit for the current strictures of First Amendment doctrine," and that the issue "has divided the circuits and state supreme courts." *Id.* at

105a-106a. The en banc majority's holding, he wrote, "appears to depart from the other, already divided circuits in yet another direction." *Id.* at 106a. Judge Prado concluded: "Ultimately, the difficult issues of off-campus online speech will need to be addressed by the Supreme Court." *Id.* at 109a.

g. Judge Haynes dissented as well, stating that "the majority opinion greatly and unnecessarily expands *Tinker* to the detriment of Bell's First Amendment rights." *Id.* at 110a.

h. Judge Graves also dissented, explaining that "the *Tinker* framework was not intended to apply to off-campus speech." *Id.* at 110a. He proposed "a modified *Tinker* standard [for] off-campus speech" that would "protect the First Amendment rights of students to engage in free expression off campus, while also recognizing that school officials should have some ability, under very limited circumstances, to discipline students for off-campus speech." *Id.* at 110a-111a. Under this alternative test, "the school's discipline of Bell would clearly fail." *Id.* at 113a.

REASONS FOR GRANTING THE PETITION

Whether the First Amendment permits public schools to restrict, punish, and censor core protected speech by students occurring off campus is one of the most pressing and recurring issues under the First Amendment. Only this Court can definitively determine whether its landmark decision in *Tinker* merits expansion to off-campus speech, and only this Court can resolve the confusion and disarray perplexing lower courts and schools nationwide. The Court should grant certiorari to ensure uniformity and even-handed application of the First Amendment across the country.

I. The Decision Below Conflicts With this Court's School-Speech Precedents and Deepens an Acknowledged Division Among Lower Courts

Students "in school as well as out of school are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect." *Tinker*, 393 U.S. at 511. While freedom of expression is significantly curtailed when students are at school, no decision of this Court gives schools any special power to restrict students' speech away from school. Quite the contrary, the Court consistently has held that schools may restrict some student speech *in school* that schools could not restrict *outside of school*. The decision below applying *Tinker* to a student's purely off-campus speech is squarely at odds with this jurisprudence, and any extension of *Tinker* to off-campus speech should not be left to the lower courts. The decision below also deepens an acknowledged split regarding whether and when *Tinker* permits schools to restrict off-campus speech.

A. This Court's School-Speech Precedents Apply Only to Students' On-Campus Speech

In *Tinker*, this Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. At the same time, the Court recognized the need for "school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct *in the schools*." *Id.* at 507 (emphasis added). *Tinker* thus adopted a First Amendment standard tailored to the "special characteristics of the school environment": when students are in school, schools may restrict speech that they reasonably conclude will "materially and substantially disrupt the work and discipline of

the school." *Id.* at 506, 513-14. This test applies to student speech "in class or out of it"—*i.e.*, "in the classroom," "in the cafeteria, or on the playing field, or on the campus during the authorized hours." *Id.* at 512-13.

Since *Tinker*, the Court has addressed student speech on three occasions, each time reaffirming that the justifications for restricting speech at school have so similar application to speech outside of school.

In *Bethel School District No. 43 v. Fraser*, 478 U.S. 675 (1986), the Court explained that *Tinker* rests on the premise that "the constitutional rights of students *in public schools* are not automatically coextensive with the rights of adults in other settings." *Id.* at 682 (emphasis added). *Fraser* held that the First Amendment did not prohibit a high school from suspending a student "for giving a lewd speech at a school assembly." *Id.* at 677. "The undoubted freedom to advocate unpopular and controversial views *in schools and classrooms* must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681 (emphasis added). Justice Brennan concurred to clarify that the Court's school-speech precedents "obviously do not [apply] outside of the school environment," and thus if the student "had given the same speech outside of the school environment, he could not have been penalized . . . ; the Court's opinion does not suggest otherwise." *Id.* at 688 & n.1 (citation omitted).

Similarly, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court described *Tinker* as "address[ing] educators' ability to silence a student's personal expression that happens to occur *on the school premises*." *Id.* at 271 (emphasis added). *Kuhlmeier* held that the First Amendment allowed a school to

control the "style and content" of a school newspaper that was "produced as part of the school's journalism curriculum" and "disseminated under [the school's] auspices." *Id.* at 262, 272-73. "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech *outside the school*." *Id.* at 266 (emphasis added).

And in *Morse v. Frederick*, 551 U.S. 393 (2007), Justice Alito's controlling concurrence stated that schools may regulate some "*in-school* student speech . . . in a way that would not be constitutional *in other settings*." *Id.* at 422 (emphases added). Justice Alito stressed the historically significant difference between on-campus and off-campus speech: "School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children." *Id.* at 424.[2]

The majority in *Morse* left open the question of where this Court's school-speech precedents end and full First Amendment protection begins: "There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but not on these facts." *Id.* at 401 (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)); *see also id.* at 418 (Thomas, J., concurring) (lamenting the Court's failure to "offer an explanation

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[2] Justice Alito's concurrence, joined by Justice Kennedy, is controlling under *Marks v. United States*, 430 U.S. 188 (1977), because "the votes of Justices Alito and Kennedy were necessary to the majority opinion and were expressly conditioned on their narrower understanding" of the majority opinion. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 310 (3d Cir. 2013) (en banc); *accord* Pet. App. 18a (same).

of when [*Tinker*] operates and when it does not"). But the majority twice observed that, under the Court's precedents, schools may restrict some student speech in school that they could not restrict outside of school. Thus, had the student in *Fraser* "delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* at 405. Likewise, "*Kuhlmeier* acknowledged that schools may regulate some speech 'even though the government could not censor similar speech outside the school.'" *Id.* at 405-06 (quoting *Kuhlmeier*, 484 U.S. at 266).

In short, schools may restrict students' protected speech only in school, not out of school. The doctrinal foundation of all four of the Court's school-speech precedents is that, in the "school environment," schools act *in loco parentis*. Outside of school, children answer to their parents or other authority figures. Yet the court below applied *Tinker* to off-campus speech. Certiorari is warranted to bring the Fifth Circuit in line with this Court's jurisprudence.

B. Lower Courts Are Hopelessly Divided Over Whether and How *Tinker* Applies Off-Campus

As the majority below explained, courts of appeals have applied "differing standards . . . to off-campus speech." Pet. App. 21a. "[T]hose courts to have considered the circumstances under which *Tinker* applies to off-campus speech have advocated varied approaches." *Id.* at 27a; *accord id.* at 106a (Prado, J., dissenting) ("This issue has divided the circuits and state supreme courts."). The division among lower courts has led to wildly inconsistent results.

In a pair of en banc decisions issued the same day, the Third Circuit ruled that schools violated the First

Amendment by punishing students for off-campus speech. Each case involved a student's parody MySpace profile mocking the school's principal. In the first case, the court assumed without deciding that *Tinker* applied, but held that the off-campus speech did not create any reasonably foreseeable disruption. *J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist.*, 650 F.3d 915, 926, 931 (3d Cir. 2011) (en banc). The court reasoned that "the School District's computers block access to MySpace, so no . . . student was ever able to view the profile from school," and "the only printout of the profile that was ever brought to school was one that was brought at [the principal's] express request." *Id.* at 929.

Five judges concurred to express their view that *Tinker* does not apply to off-campus speech at all, and instead "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* at 936 (Smith, J., concurring). Six judges dissented, stating that the majority "cause[d] a split with the Second Circuit" over whether "off-campus hostile and offensive student internet speech that is directed at school officials results in a substantial disruption." *Id.* at 950 (Fisher, J., dissenting).

In the second case, the Third Circuit held that the "First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline" for a student's "expressive conduct that originated outside of the schoolhouse, did not disturb the school environment and was not related to any school sponsored event." *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc). The First Amendment cannot "tolerate the School District stretching its authority into Justin's

grandmother's home and reaching Justin while he is sitting at her computer after school in order to punish him for expressive conduct that he engaged in there." *Id.* at 216. Two judges concurred, stating that *Tinker* "can be applicable to off-campus speech." *Id.* at 220 (Jordan, J., concurring).

Contrary to the court below's assertion that the result would have been the same in "every other circuit to have addressed this issue," Pet. App. 23a, Bell would have prevailed in the Third Circuit. As in *Layshock*, the First Amendment prohibits the School Board from "reaching beyond the schoolyard" and "stretching its authority" into Bell's home to punish him for posting his song to Facebook and YouTube. 650 F.3d at 207, 216. And under *Snyder*, the off-campus nature of Bell's speech forecloses any reasonably foreseeable disruption. Like the school in *Snyder*, Itawamba's computers block access to Facebook, and the school's rules prohibit students from bringing cell-phones to school. Thus, the only time anyone listened to Bell's song at school was at Coach Wildmon's "express request." 650 F.3d at 929.

By contrast, other courts have adopted "their own unique threshold tests before applying *Tinker* to speech that originates off campus." Pet. App. 140a n.38. The Fourth Circuit and the Pennsylvania Supreme Court apply "nexus" tests, holding that *Tinker* applies if off-campus speech "has a sufficient nexus with the school." *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 577 (4th Cir. 2011); *see also J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) (*Tinker* applies if there is a "sufficient nexus between [off-campus speech] and the school campus to consider the speech as occurring on campus.").

Two circuits have adopted "foreseeability" tests. The Eighth Circuit held that "*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." *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012). The Second Circuit rejected a similar foreseeability test before adopting it. *Compare Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1053 n.18 (2d Cir. 1979) (holding that schools may not "punish off-campus expression simply because they reasonably foresee that in-school distribution may result"), *with Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (holding that *Tinker* applies "at least when it was . . . foreseeable that the off-campus expression might also reach campus").

The Ninth Circuit recently declined to decide "whether *Tinker* applies to all off-campus speech," or "whether to incorporate or adopt the threshold tests from our sister circuits." *Wynar v. Douglas Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013). The court instead applied *Tinker* because "any of these tests could be easily satisfied in this circumstance"—*i.e.*, when a student "engaged in a string of increasingly violent and threatening instant messages sent from his home to his friends bragging about his weapons, threatening to shoot specific classmates, intimating that he would 'take out' other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre." *Id.* at 1064-65, 1069.

Widening the split, the court below "depart[ed] from the other, already divided circuits in yet another direction." Pet. App. 106a (Prado, J., dissenting). The court held that *Tinker* applies "when a student

intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources." *Id.* at 28a. To our knowledge, no other court has applied a threshold test that relies on the student's "intention" or the content of the speech.

In light of the extreme confusion, numerous commentators have recognized that "lower courts are in disarray" over First Amendment protection for off-campus speech—particularly online speech—and that "the issue is ripe for Supreme Court review." Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 Drake L. Rev. 97, 102 (2010) (quotation marks omitted); *see also* David J. Hudson, Jr., The First Amendment: Freedom of Speech § 7:6 (2012) ("[T]he next frontier in student speech that the U.S. Supreme Court will explore is online speech.").[3] So too have many courts. *E.g.*,

[3] *See also, e.g.*, Brittany L. Kaspar, *Beyond the Schoolhouse Gate: Should Schools Have the Authority to Punish Online Student Speech?*, 88 Chi.-Kent L. Rev. 187, 188 (2012) ("[L]ower courts have struggled to decide whether it is constitutional under the First Amendment for schoolteachers and administrators to discipline students for speech originating off-campus and on the Internet."); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 Fla. L. Rev. 395, 396 (2011) ("[C]ommentators have attributed the plethora of lower court cases and inconsistent results to a lack of direction from the Supreme Court."); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fla. L. Rev. 1027, 1029 (2008) ("For several decades lower courts have struggled to determine when, if ever, public secondary schools should have the power to restrict student expression that does not occur on school grounds during school hours.").

Wynar, 728 F.3d at 1062 ("A number of our sister circuits have wrestled with the question of *Tinker*'s reach beyond the schoolyard.").

Only this Court can resolve whether *Tinker* applies to off-campus speech, and if so, under what circumstances. And only this Court can resolve the confusion and disarray among lower courts, and ensure uniformity and even-handed application of the First Amendment for all students and school districts nationwide. The Court should grant review to decide how one of its landmark First Amendment precedents applies outside of the school environment, especially in light of modern technology.

II. The Question Presented Is Vitally Important and Recurring, and this Case Is an Ideal Vehicle

The question of how the First Amendment applies to students' off-campus speech is unquestionably important, recurring, and worthy of this Court's plenary review. The majority, concurrences, and dissents below united in urging this Court to address the issue. The majority stated that this Court "has not expressly ruled on this issue." Pet. App. 24a. Judge Costa recognized the "need" for this Court to "provide clear guidance to students, teachers, and school administrators." *Id.* at 44a. Judge Jolly noted that these "school speech and discipline cases" are "continually arising." *Id.* at 38a-39a. And Judge Prado expressed "hope that the Supreme Court will soon give courts the necessary guidance to resolve these difficult cases." *Id.* at 105a. "Ultimately, the difficult issues of off-campus online speech will need to be addressed by the Supreme Court." *Id.* at 109a.

This issue was important when students communicated through underground newspapers, *see Thomas*, 607 F.2d at 1045, and it has only become more significant in the Internet age. Ninety-two percent of teens age 13 to 17 use the Internet daily, and more than half go online several times each day. *See* Pew Research Center, *Teens, Social Media & Technology Overview 2015*, at 2 (Apr. 9, 2015), http://www.pewinternet.org/files/2015/04/PI_TeensandTech_Update2015_0409151.pdf. Online social media websites have become the primary medium through which teenagers communicate. Seventy-one percent of teenagers use Facebook; 52 percent use Instagram; 41 percent use Snapchat; 33 percent use Twitter; 33 percent use Google+; 24 percent use Vine; 14 percent use Tumblr; and 11 percent use other social media sites. *Id.* And 74 percent of teenagers use YouTube. Shea Bennett, *Teens, Millennials Prefer YouTube to Facebook, Instagram to Twitter*, Social Times (Feb. 24, 2014), http://www.adweek.com/socialtimes/teens-millennials-twitter-facebook-youtube/496770.

The rapid rise of teen Internet use has led to a veritable "explosion of student speech cases." Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 Wm. & Mary Bill Rts. J. 591, 617 (2011). "[S]tudent speech cases are among the most commonly litigated cases under the First Amendment." Goldman, *supra*, at 396.

This case offers an ideal vehicle for the Court to consider the question presented. The majority, three concurrences, and four dissents below thoroughly examined the issue and vigorously disagreed over whether *Tinker* or some other standard applies to students' off-campus speech. And unlike in *Morse*,

Bell's song is indisputably off-campus speech. He wrote the song over the winter holidays when school was out of session, recorded the song at a professional studio unaffiliated with the school, and posted it on Facebook and YouTube from his home computer. He never played, performed, or otherwise brought the song to school in any way. No one even listened to the song at school, except when one of the accused coaches listened to it on a student's cellphone in violation of school rules. And the issue is outcome-determinative. Under ordinary First Amendment standards, Bell's song does not constitute a threat or fall into any other category of unprotected speech. Pet. App. 152a-159a.

III. The Decision Below Is Wrong

Students' off-campus speech is entitled to full First Amendment protection. But at a minimum, off-campus speech should be governed by a more protective standard than *Tinker*, which was developed to balance the relevant considerations when students speak on campus.

A. *Tinker* Does Not Apply to Off-Campus Speech

The Fifth Circuit erred in applying *Tinker* as if this case involved purely on-campus speech—*i.e.*, as if Bell had played or performed his song during class, in the school cafeteria during lunch, or on the athletic field during sports practice. When students are outside of the school environment—at church, at home, in a public park, or on a public sidewalk—they have the same freedom as adults to express themselves. This is equally true when students use the Internet on their personal computers at home when school is closed. Parents may censor their children's off-campus

speech, but the government may not. The school certainly could not have punished Bell if he had published the lyrics to his song in *Rolling Stone* magazine or performed the song in Central Park. This case is no different. To punish Bell for his song as if he performed it at school defies reality and significantly curtails the freedoms guaranteed by the First Amendment.

"Applying *Tinker* to off-campus speech would create a precedent with ominous implications." *Snyder*, 650 F.3d at 939 (Smith, J., concurring). It would "empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school." *Id.* Although "*Tinker*'s 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard," "the concept of the 'school yard' is not without boundaries and the reach of school authorities is not without limits." *Layshock*, 650 F.3d at 216. It "would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities." *Id.*

"[I]f *Tinker* were held to apply to off-campus speech," a school could punish a student who, "while at home after school hours, [wrote] a blog entry defending gay marriage," so long as "several of the student's classmates got wind of the entry, took issue with it, and caused a significant disturbance at school." *Snyder*, 650 F.3d at 939 (Smith, J., concurring). A school could punish a student who expressed controversial political ideas at a protest rally during spring break, or published a controversial op-ed about climate

change. A school could punish a student who spent the summer advocating for more standardized testing in public schools (or less), or advocating for more charter schools (or fewer). Students could hardly say anything, anywhere, without risking suspension or expulsion—*i.e.*, life-altering consequences for a student. "That cannot be, nor is it, the law." *Id.*

A student's "intention that his [off-campus] speech reach the school community" does not transform the speech into on-campus speech subject to *Tinker*. Pet. App. 27a. The vast majority of everything students say off campus is intended to be heard by members of the "school community"—*i.e.*, classmates, parents, teachers, and so on. The Fifth Circuit's "intent" standard thus would pave the way for schools to censor or restrict disclosure of school misconduct to parents, the media, or the police.

In the Internet age, moreover, an "intent" standard obliterates any distinction between what students say at school and what they say elsewhere. "[V]irtually any speech on the Internet can reach members of the school community" and thus can be censored by school officials under the decision below. *Id.* at 74a (Dennis, J., dissenting). The majority embraced this result: "The pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction." *Id.* at 28a. That assertion is flatly inconsistent with this Court's repeated statements that schools may regulate some "*in-school* student speech . . . in a way that would not be constitutional *in other settings*." *Morse*, 551 U.S. at 422 (Alito, J., concurring) (emphases added). In any event, this Court alone should determine whether *Tinker* is no longer restricted to speech at school in light of technological

developments. The First Amendment should not vary circuit by circuit.

B. At a Minimum, *Tinker* Should Not Apply to Off-Campus Speech on Matters of Public Concern

Tinker is particularly unsuited for off-campus speech that addresses a "matter of public concern." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Such speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* (citation omitted). Bell's off-campus song is an "impassioned protest of two teachers' alleged sexual misconduct"—a matter of urgent public concern. Pet. App. at 57a (Dennis, J., dissenting). "Bell composed his song after a number of his female friends at school informed him that [the two teachers] had frequently sexually harassed them during school." *Id.* at 55a. The song's lyrics "describe in detail the female students' allegations of sexual misconduct" and "ridicule[] the coaches for their outrageously inappropriate conduct with the female students." *Id.* at 55a-56a. Notably, "the School Board has never attempted to argue that Bell's song stated any fact falsely." *Id.* at 60a. The decision below "perversely *faults* Bell for his efforts to publicize the teachers' sexual misconduct." *Id.* at 62a.

If allowed to stand, the decision below "inevitably will encourage school officials to silence student speakers . . . solely because they disagree with the content and form of their speech, particularly when such off-campus speech criticizes school personnel." *Id.* at 50a. The decision "effectively inoculates school officials against off-campus criticism by students." *Id.* at 63a.

C. The First Amendment Contains No Exception for Rap Lyrics That Are Not a Threat

The decision below raises additional First Amendment concerns because school officials targeted rap music, an established form of artistic expression of particular relevance to African American youth. The rap genre "derives from oral and literary traditions of the Black community." Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 22 (2007). And rap, like other musical genres, "has historically functioned as a mechanism to raise awareness of contemporary social issues." Pet. App. 57a-58a (Dennis, J., dissenting). "Bell invoked this same tradition by deploying the artistic conventions and style of the rap genre in order to critique the coaches' sexual harassment of female students." *Id.* at 58a.

As is common in rap music, Bell's song contains violent rhetoric. The majority below improperly used the violent hyperbole characteristic of rap to justify applying *Tinker*. Thus, the majority held that "regardless of whether Bell's statements in the rap recording qualify as 'true threats' [under *Watts*], they constitute threats, harassment, and intimidation, as a layperson would understand the terms." *Id.* at 29a. But that is just another way of eviscerating any distinction between *Watts* and protected speech. Either the speech was a threat or it was not. The Fifth Circuit improperly created a new doctrinal category of speech that receives less than full First Amendment protection—perhaps a "fake" threat.

Bell's song was not threatening under *Watts* or any other conceivable standard. The district court did not adopt the School Board's argument that the song was

a threat, and the panel majority held that the song was not a threat. Had the en banc majority addressed the question, it would have reached the same conclusion. When "taken in context" and given "the reaction of the listeners," school officials thought the lyrics were mere "hyperbole." *Watts*, 393 U.S. at 708. After learning of the song, the school's principal drove Bell home for the day. School officials thereafter allowed Bell to return and attend classes. After suspending Bell, the officials allowed him to remain *unattended* in the school commons until his bus arrived at the end of the day. And the School Board sent Bell to attend another school, without ever calling the police, searching Bell's person or locker, or taking any other security measures. As one of the coaches who was the subject of Bell's song testified, the song was "just a rap." Pet. App. 97a. The Fifth Circuit thus had no basis for invoking Columbine and fears of school massacres to justify censoring a non-violent student with a nearly spotless disciplinary record who records rap music.

When students actually make threats—on campus or off—schools of course can react and punish them. *See, e.g.*, *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 626-27 (8th Cir. 2002) (en banc) (affirming school discipline because student's off-campus letter to ex-girlfriend was unprotected "true threat"); *Jones v. Arkansas*, 64 S.W.3d 728, 736 (Ark. 2002) (affirming felony conviction because student's off-campus rap song made unprotected "true threats"). And Mississippi has ample and broad anti-threat laws, including criminal prohibitions. Miss. Code Ann. §§ 37-11-20, 97-3-107, 97-3-87, 97-45-15. First Amendment doctrine thus already provides all the necessary tools "for school officials to be able to react quickly and efficiently to protect students and faculty from threats." Pet. App. 23a.

The majority's holding not only ignores settled First Amendment jurisprudence, but also poses a grave threat to artistic expression. *Every* genre of music—not to mention literature, poetry, film, and every other artistic medium—uses violent rhetoric and hyperbole. *See id.* at 155a-156a (Dennis, J. dissenting). In perhaps the most famous line in country music, Johnny Cash sang, "I shot a man in Reno just to watch him die." Bob Marley and Eric Clapton each won critical acclaim for "I Shot the Sheriff," a song about killing a police officer. In the Beatles' "Run for Your Life," John Lennon threatened to kill his paramour: "I'd rather see you dead, little girl, than to be with another man." Of course listeners do not take any of these lyrics literally. Nor could they. But the majority took Bell's rap lyrics literally. By "reflexively reducing Bell's rap song to 'intimidating, harassing, and threatening' speech without any analysis," the majority delegitimized the entire rap music genre in favor of "the School Board's aesthetic preferences for socio-political commentary." *Id.* at 57a, 60a-61a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LISA S. BLATT
R. STANTON JONES
ELISABETH S. THEODORE
WILLIAM C. PERDUE
ARNOLD & PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@aporter.com

DANIEL M. PASTOR
ARNOLD & PORTER LLP
3 Embarcadero Center
San Francisco, CA 94111
(415) 471-3100

WILBUR O. COLOM
Counsel of Record
SCOTT COLOM
COLOM LAW FIRM
PO Box 866
200 Sixth St. North
Suite 700
Columbus, MS 39703
(662) 327-0903
wil@colom.com

Counsel for Petitioner

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