No. 15-666

IN THE

Supreme Court of the United States

TAYLOR BELL,

Petitioner,

v.

ITAWAMBA COUNTY SCHOOL BOARD, *ET AL.*,

Respondents.

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

BRIEF OF ADVANCEMENT PROJECT AND ONE VOICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF ADVANCEMENT PROJECT AND ONE VOICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Advancement Project and One Voice are civil rights organizations working to analyze and dismantle the "school-to-prison pipeline," which describes the result of overly harsh, exclusionary, zero-tolerance school discipline policies and practices that disproportionately funnel students of color, students with disabilities, and lesbian, gay, bisexual, transgender, and queer ("LGBTQ") students away from school and into the juvenile or criminal justice systems. Because of this experience and expertise, *amici* are able to illustrate for the Court why it is of critical national importance to clearly limit schools' power to regulate and discipline student speech off school campuses.

Advancement Project is a national multi-racial civil rights organization. Rooted in the great human rights struggles for equality and justice, the organization exists to fulfill America's promise of a caring, inclusive, and just democracy. Founded by a team of veteran civil rights lawyers in 1999, Advancement

[1] Pursuant to this Court's Rule 37.2(a), counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief, and letters of consent to its filing from both parties have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Project was created to develop and inspire community-based solutions based on the same high-quality legal analysis and public education campaigns that produced the landmark civil rights victories of earlier eras. The group's Ending the Schoolhouse-To-Jailhouse Track Program has done pioneering work to end harsh school discipline. Those efforts include publishing groundbreaking reports, including one focused on Mississippi, where this case arose. The organization has also filed complaints under Title VI of the Civil Rights Act of 1964 challenging discriminatory educational practices in Mississippi and school districts across the country.

One Voice, based in Mississippi, grew out of the work undertaken by the state's NAACP conference in response to housing, education, civil rights, and related policy advocacy needs facing historically disadvantaged communities in the wake of Hurricanes Katrina, Dennis, and Rita in 2005. Education reform and leadership development, including One Voice's Youth Leadership Initiative, are among the group's major foci.

SUMMARY OF ARGUMENT

Disciplining students for off-campus speech under vaguely defined standards is fundamentally at odds with the First Amendment. Yet schools across the country regularly assert the authority to surveil their students' off-campus speech, particularly on social media, and then use the fruits of those efforts as grounds for discipline. That is the case even when the speech has at best a dubious nexus to the school and indisputably could not be regulated under traditional First Amendment standards.

Such policies are particularly disturbing against the backdrop of well-documented and pervasive racial disparities in school discipline: A student of color is many times more likely than White peers to be suspended or expelled for the same conduct, particularly for vaguely defined infractions like "disobedience," "insubordination," and "willful defiance." Students of color are similarly more likely to be arrested or otherwise referred to the juvenile or criminal justice systems for behavior traditionally handled by school authorities.

The consequences of this discriminatory treatment are significant and long-lasting: Students who are suspended, expelled, or arrested are more likely to drop out of school, more likely to become involved in the juvenile or adult justice systems, and more likely to end up living in poverty.

Allowing schools unbridled authority to punish students for off-campus speech will simply feed and accelerate the school-to-prison pipeline, and will continue to disproportionately burden students of color, as well as students with disabilities and LGBTQ students. In light of students' heavy use of social media, the Court's attention is warranted to forestall these nationally significant consequences that otherwise would flow from the Fifth Circuit's incorrect interpretation of the First Amendment.

ARGUMENT

I. THE COURT'S REVIEW IS WARRANTED TO ADDRESS THE GROWING TREND OF SCHOOLS DISCIPLINING STUDENTS FOR OFF-CAMPUS SPEECH PROTECTED BY THE FIRST AMENDMENT.

A. THIS COURT HAS MADE CLEAR THAT A SCHOOL'S AUTHORITY TO DISCIPLINE STUDENT SPEECH STOPS AT THE SCHOOLHOUSE GATE.

Each time the Court has allowed schools greater latitude to regulate student speech than otherwise permitted by the First Amendment, it has limited that expanded authority to *school* speech.

In *Tinker* v. *Des Moines Independent Community School District*, the Court explained that its relaxation of First Amendment protections allowed schools "to prescribe and control conduct *in* the schools." 393 U.S. 503, 507 (1969) (emphasis added). Similarly, in *Bethel School District No. 43* v. *Fraser*, the Court permitted greater regulation over certain speech in "high school assembl[ies] or classroom[s]." 478 U.S. 675, 685 (1986). And, in *Hazelwood School District* v. *Kuhlmeier*, the Court again held that a school can regulate some kinds of in-school speech even when "the government could not censor similar speech outside the school." 484 U.S. 260, 266 (1988).

Most recently, in his concurring opinion in *Morse* v. *Frederick*, which the Fifth Circuit below acknowledged to be controlling, Justice Alito emphasized that speech in "the school setting" was subject to greater regulation than speech "outside of school." 551 U.S. 393, 424 (2007) (Alito, J., concurring); *see*

also id. at 436 (Stevens, J., dissenting) (acknowledging that it may be "necessary . . . to modify" regular First Amendment "principles in the school setting").

To be sure, non-school authorities—with the input of school officials, if appropriate—can regulate and react to true threats, that is, "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 538 U.S. 343, 359 (2003). So too can they regulate "fighting words," "advocacy intended, and likely, to incite imminent lawless action," and "speech integral to criminal conduct." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2544 (2012).

But nothing in this Court's cases provides authority for a school to regulate out-of-school speech; those precedents govern only *school* authority over "*school* speech." *Morse*, 551 U.S. at 400 (emphasis added); *see also id.* at 400-01 (explaining that speech at a school-sanctioned, school-supervised event is "school speech" even if it occurs off-campus). The latitude given schools over in-school speech does not apply when public schools or any other element of "government [seek to] censor similar speech outside the school." *Hazelwood*, 484 U.S. at 266.

B. NOTWITHSTANDING THIS COURT'S RULINGS, SCHOOLS REGULARLY ASSERT JURISDICTION OVER A VAST RANGE OF EXPRESSIVE BEHAVIOR TAKING PLACE WELL OUTSIDE THE SCHOOLHOUSE GATE.

Examples abound of schools, emboldened by decisions like the Fifth Circuit's opinion below, assert-

ing authority to discipline students for off-campus speech—particularly online speech. Although these practices are unconstitutional under this Court's precedent, many of them have not been subjected to any meaningful judicial scrutiny.

For example, Tulsa Public Schools recently suspended nine students for "liking" a post on Facebook that included a video of other students committing vandalism on school property. Andrea Eger, *11 Booker T. Washington Students Suspended After Social Media Post of Vandalism, Gay Slur*, Tulsa World, May 8, 2015, http://bit.ly/1P64zF5.[2]

In Minnesota, a sixth-grader was disciplined for "rude/discourteous" behavior: an off-campus, online complaint that she hated a hall monitor who was "mean to" her. *R.S. ex rel. S.S.* v. *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1133 (D. Minn. 2012) (citation omitted).

And a California school district—facing community protests and threatened litigation—backed down from a policy that would have authorized "suspend[ing] high school athletes and club members based on disparaging statements" made online. Ross Farrow, *Lodi Unified School District Adopts Social*

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[2] "Facebook is an online social network where members develop personalized web profiles to interact and share information with other members." *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 816 (9th Cir. 2012). "The 'like' button, which is represented by a thumbs-up icon, and the word 'like' appear next to different types of Facebook content. Liking something on Facebook is an easy way to let someone know that you enjoy it." *Bland* v. *Roberts*, 730 F.3d 368, 385 (4th Cir. 2013) (citation omitted).

Media Policy, Lodi (Cal.) News-Sentinel, Sept. 4, 2013, http://bit.ly/1QsCZ58. But the school district nonetheless implemented a replacement policy that authorizes disciplinary action for off-campus speech "related to school attendance or activit[ies]." Lodi Unified Sch. Dist., *K-12 Student Conduct Code* II.B (2014-2015), http://bit.ly/1mje5bm; *see also* Helen Jung, *Scappoose School District Settles Dance-Team Lawsuit, Revises Social-Media Policy*, Oregonian, June 17, 2014 (describing an Oregon school district policy similar to that proposed in Lodi but rescinded only after students filed a federal lawsuit), http://bit.ly/1IXjjUb.

These policies are usually created by local school districts, but often are explicitly authorized by state law. By one tally, 14 states have statutes affirmatively allowing schools to regulate off-campus speech, often framed as addressing cyberbullying. *See* Cyberbullying Research Ctr., *State Cyberbullying Laws* (2015), http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf. Some are vaguely worded, creating a threshold for disciplining off-campus speech that is *less* demanding than *Tinker*'s "substantial disruption" test for on-campus speech. *See*, *e.g.*, N.H. Rev. Stat. Ann. § 193-F:4(I)(b) (authorizing school discipline "if the [off-campus] conduct interferes with a pupil's educational opportunities"); Tenn. Code. Ann. § 49-6-4502(a)(3)(B) (same where off-campus speech creates a "hostile educational environment").

Similarly, school officials attempt to extend their authority by forcing students to turn over passwords to social media accounts so that the school may examine their private off-campus speech. Students

who do not comply are subject to discipline. *See*, *e.g.*, *R.S. ex rel. S.S.*, 894 F. Supp. 2d at 1134 (threatening student with detention); *see generally* Benjamin Herold, *Schools Weigh Access to Students' Social-Media Passwords*, Educ. Week, Feb. 17, 2015, http://bit.ly/17S9AO4.

All of the above practices impermissibly extend this Court's measured limitations on students' *in-school* First Amendment rights to students' out-of-school speech—anytime, anywhere, and on any topic.

C. Allowing Schools To Monitor And Discipline Off-Campus Speech Creates A Chilling Effect On All Off-Campus Speech.

Fed by a growing corps of consultants hired to monitor students' social media activity, schools have moved beyond just disciplining students for off-campus speech of which they became aware to actively tracking it. One school district recently paid more than $150,000 for a former FBI agent to run its program for a year—an effort that included investigations of 600 social media accounts. *See* Challen Stephens, *Huntsville Schools Release Details on Spying Program*, Huntsville (Ala.) Times, Nov. 2, 2014; *see also* Somini Sengupta, *Warily, Schools Watch Students on the Internet*, N.Y. Times, Oct. 28, 2013, at A1 (one company's projection of having up to 3000 schools as clients within a year).

These surveillance programs raise the prospect of a separate constitutional injury: a chilling effect on *all* off-campus student speech. As one of the dissenting opinions below noted, "for students, whose performance at school largely determines their fate

in the future, even the specter of punishment will likely deter them from engaging in off-campus expression that could be deemed controversial or hurtful to school officials." Pet. App. 77a (Dennis, J., dissenting). How is a student to know when his speech might be "reasonably forecast" by a school official to cause a substantial disruption, *see id.* at 76a, let alone might violate vague standards like "interfer[ing] with a pupil's educational opportunities." N.H. Rev. Stat. Ann. § 193-F:4(I)(b).

Moreover, even if it were constitutional for a school to discipline students for off-campus conduct leading to a "substantial disruption" of school activities, there are serious constitutional concerns raised by the many state statutes permitting almost unlimited surveillance of students' electronic speech under the guise of detecting speech that schools believe is fair game for regulation. *See* Emily F. Suski, *Beyond the Schoolhouse Gates: The Unprecedented Expansion of School Surveillance Authority Under Cyberbullying Laws*, 65 Case W. Res. L. Rev. 63, 84-85 & n.87 (2014) (identifying 23 states "that allow for virtually unlimited surveillance of students' online and electronic activity," not just speech transmitted through school equipment, or that occurs on school grounds or at a school event).

Although surveillance is marketed and defended as a way of preventing school shootings, there is already ample authority for the government to address true threats. *See Virginia*, 538 U.S. at 359. Instead, surveillance programs result in school officials disciplining mundane off-campus speech with little, if any, connection to school. *See*, *e.g.*, Kelly Corrigan, *Glendale Unified Renews Online Monitoring Policy*,

L.A. Times, July 22, 2015 (noting school official's interest in off-campus behavior (street racing) reported by the district's monitoring company), http://lat.ms/1T4Hq3A.

Disciplining students for off-campus speech detected through routine surveillance programs leads to precisely the chilling effect this Court has warned against in its First Amendment jurisprudence: Speakers—including students—who "'must guess what conduct or utterance may'" lead to discipline will "necessarily . . . 'steer far wider of the unlawful zone.'" *Keyishian* v. *Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)) (chilling effect on university faculty); *see also Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (college students); *Hazelwood*, 484 U.S. at 287-88 (Brennan, J., dissenting) (high school students).

Indeed, these monitoring programs easily run afoul of the criteria articulated by the Court for identifying government surveillance that has a constitutionally suspect chilling effect. *See Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013) (defining when a chilling effect confers standing). *First*, school districts around the country are actively surveilling their students' off-campus speech. *See ibid.* (requiring surveillance to be, at least, "certainly impending"). *Second*, it is indisputable that such students are being subjected to their schools' power to take "'other and additional action detrimental to'" them. *Id.* at 1152 (emphasis omitted) (quoting *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972)).

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The Court's attention is warranted to restore the Constitution's limitations on school authority over off-campus speech and to end the chilling effects of schools' expansive monitoring of off-campus expression protected by the First Amendment.

II. THE ISSUE IS OF CRITICAL NATIONAL IMPORTANCE BECAUSE EXPANDING SCHOOL AUTHORITY TO OFF-CAMPUS SPEECH WILL EXACERBATE THE LIFELONG AND DISCRIMINATORY IMPACT OF EXISTING SCHOOL DISCIPLINARY PRACTICES.

A. SCHOOLS HAVE INCREASINGLY TURNED TO "ZERO-TOLERANCE" APPROACHES TO DISCIPLINE WITH LIFELONG, COUNTERPRODUCTIVE RESULTS FOR STUDENTS.

An exhaustive multidisciplinary report recently reiterated what scores of experts have concluded for years, explaining that "[r]esearch and data on school discipline practices are clear: millions of students are being removed from their classrooms each year, mostly in middle and high schools, and overwhelmingly for minor misconduct." Council of State Gov'ts Justice Ctr., *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System* at ix (2014).[3]

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[3] The document is the result of a "collaborative effort involving hundreds of experts in education, behavioral health, law enforcement, and juvenile justice, as well as policymakers, parents, youth, and advocates," drawing on "an extensive review of the literature and relevant research, advisory group discussions, feedback from experts across the country, multidiscipli-

In fact, schools increasingly involve law enforcement directly in student discipline, with large "number[s] of students . . . arrested for minor offenses or ticketed by officers," or otherwise referred to juvenile court. Council of State Gov'ts Justice Ctr., *supra*, at 192. The result is a literal pipeline from the schoolhouse to the jailhouse.

Experts increasingly recognize that this zero-tolerance approach actually undermines schools' educational mandate for both the disciplined students and others.

As to students remaining in the classroom, research shows that "schoolwide scholastic achievement" is *higher* when administrators rely less on "the use of school suspension and expulsion." Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 Am. Psychol. 852, 854 (2008).

The data also show that the negative effects of these practices on the disciplined students are long-lasting. Students removed from the classroom for discipline (or absent for any other reason) "are at a significantly higher risk of falling behind academically." Council of State Gov'ts Justice Ctr., *supra*, at xi, 9. These practices are thereby "contributing to the dropout crisis, particularly for those students [already] at [the] greatest risk," *id.* at 9.

Exclusionary discipline also significantly increases the chance of a student "coming into contact

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nary forums and listening sessions, and a rigorous review process." Council of State Gov'ts Justice Ctr., *supra*, at v.

with the juvenile justice system," when not sent directly to it by the school. Council of State Gov'ts Justice Ctr., *supra*, at xi. And a "youth, once arrested, is at an even higher risk of a host of negative outcomes, including recidivism and unemployment." Greta Columbi & David Osher, Nat'l Ass'n of State Bds. of Educ., *Advancing School Discipline Reform* 7 (2015). Arrest records may also jeopardize students' access to higher education. *See* Ctr. for Cmty. Alts., *The Use of Criminal History Records in College Admissions Reconsidered* (2010).

Such harsh reactions to even minor and first-time "offenses" involve unrealistic assessments of child development, imposing long-term penalties for behavior that is developmentally normal. As the Court has recognized, "psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham* v. *Florida*, 560 U.S. 48, 68 (2010); *see also Miller* v. *Alabama*, 132 S. Ct. 2455, 2480 (2012) (Roberts, C.J., dissenting) (similar).

Thus, the consensus view of researchers is "that there are serious long-term consequences" to "setting youth on a path toward juvenile justice involvement" by adopting such draconian approaches. Council of State Gov'ts Justice Ctr., *supra*, at 186. "[T]he adverse effects" and "long-term costs" of these disciplinary practices are "profound." Council on Sch. Health, Am. Acad. of Pediatrics, *Policy Statement: Out-of-School Suspension and Expulsion*, 131 *Pediatrics* e1000, e1001, e1002 (2013).

B. THE SCHOOL-TO-PRISON PIPELINE DISPROPORTIONATELY IMPACTS STUDENTS OF COLOR.

The application and consequences of heavy-handed school discipline are not felt uniformly. Rather, "Black, Hispanic, and American Indian students are suspended at much higher rates than their White peers," particularly when the penalty for an offense is left to the discretion of school officials. Council of State Gov'ts Justice Ctr., *supra*, at xi, 6. Students who have a disability or identify as LGBTQ are also disproportionately affected, *ibid.*, with those who fall into more than one of these categories the worst off, *see* Daniel J. Losen & Tia Elena Martinez, UCLA Ctr. for Civil Rights Remedies, *Out of School & Off Track* 11 (2013) (citing federal data); *see generally* Advancement Project, *Test, Punish, & Push Out: How Zero Tolerance & High-Stakes Testing Funnel Youth into the School-to-Prison Pipeline* (2010).

These are the same students "who are most affected by the achievement gap." Council of State Gov'ts Justice Ctr., *supra*, at 9. Although it is difficult to separate cause from effect, long-term "[n]egative outcomes are particularly compelling for youth of color . . . and other student groups who tend to be disproportionately represented among disciplined and arrested students." *Id.* at 186.

1. Notwithstanding widespread recognition of the school-to-prison pipeline, the pattern of disparity persists and has been confirmed by study after study on both the national and state levels.

The latest federal "data shows that African-American students without disabilities are more than three times as likely as their white peers without disabilities to be expelled or suspended." U.S. Dep't of Educ., *Guiding Principles: A Resource Guide for Improving School Climate & Discipline* i (2014). The disparity is most pronounced for students of color who also have disabilities: 36% of Black male secondary students with a disability received at least one out-of-school suspension in the 2009-2010 school year. Losen, *supra*, at 11 (citing federal data).

In response to these data, the Departments of Justice and Education recently reiterated their commitment to "enforce Federal laws to eliminate unlawful racial discrimination in school discipline." Dear Colleague Letter on Nondiscriminatory Administration of School Discipline 23 (Jan. 8, 2014), http://1.usa.gov/19dPKMn; *see also* Office for Civil Rights, U.S. Dep't of Educ., *Title VI Enforcement Highlights* 8 (2012) (noting that the Department of Education undertook 20 "proactive investigations in schools with significant racial disparities in discipline" in a recent three-and-a-half year period), http://1.usa.gov/1OajEyU.

State and local education officials have also highlighted the problem—and called for reform. The National Association of State Boards of Education noted with concern that "students of color," among others, are "punished more severely for the same offenses." Columbi, Nat'l Ass'n of State Bds. of Educ., *supra*, at 5; *see also*, *e.g.*, Am. Fed'n of Teachers, *Reclaiming the Promise: A New Path Forward on School Discipline Practices* ("African-American and Latino males are far more likely to receive more-punitive conse-

quences for school behavior infractions"), http://www.aft.org/position/school-discipline.

Juvenile court judges agree too, recognizing that "zero tolerance-based referrals to the juvenile court and/or student arrests" are both ineffective and "disproportionately impact students of color." Nat'l Council of Juvenile & Family Court Judges, *Resolution Regarding Juvenile Courts and Schools Partnering to Keep Kids in School and out of Court* 1 (Mar. 21, 2012).

This is not only an issue at the high-school level. It starts as early as pre-school, where Black students constitute 18% of students but 42% of those suspended once and 48% of those suspended multiple times. Office for Civil Rights, U.S. Dep't of Educ., *Civil Rights Data Collection—Data Snapshot: Early Childhood Education* 3 (2014) (concluding that "[r]acial disparities in discipline begin in the earliest years of schooling"), http://1.usa.gov/22eTllF. In elementary school, "African American students have almost four times the odds, and Hispanic students twice the odds, of being suspended or expelled for a minor infraction." Russell J. Skiba *et al.*, *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 Sch. Pyschol. Rev. 85, 102 (2011).

Nor is the school-to-prison pipeline isolated to particular parts of the country: As one study noted, in 2006 and 2007 "there was no state in which Black students were not suspended more often than White students," and, "for Latinos, there were racial disparities in 40 states and the District of Columbia." Ad-

vancement Project, *Test, Punish, & Push Out*, *supra*, at 21 (citing federal data).

Black students in Mississippi, like the petitioner here, "are hit the hardest" by that state's "harsh discipline practices. Statewide, they are three times more likely to receive an out-of-school suspension than their White peers, with an even greater disparity in some school districts." Advancement Project *et al.*, *Handcuffs on Success: The Extreme School Discipline Crisis in Mississippi Public Schools* 4 (2013).

The extreme disparities in one Mississippi district have led to federal enforcement action, including two consent decrees in the last three years. One, modifying the 1969 court order desegregating the school system, noted the government's conclusions that over several school years "black students frequently received harsher consequences, including longer suspensions, than white students for comparable misbehavior, even where the students were at the same school, were of similar ages, and had similar disciplinary histories." Consent Order, D.E. 36, at 3, *Barnhardt* v. *Meridian Mun. Separate Sch. Dist.*, No. 4:65-cv-01300 (S.D. Miss. May 30, 2013). In a related case, the Department of Justice reached a settlement with the state government and the city of Meridian. *See* Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement Agreements to Address Unconstitutional Youth Arrest and Probation Practices in Meridian, Mississippi (June 19, 2015). The complaint in that case highlighted that, over three-and-a-half years, "all of the students referred to law enforcement by the District were black, all of the students expelled were black, and 96 percent of the students suspended were black." Com-

plaint, D.E. 1 ¶ 32, *United States* v. *City of Meridian*, No. 4:12-cv-00168 (S.D. Miss. Oct. 24, 2012), http://1.usa.gov/1NO7AYd.

Statistics also show major disparities in many other parts of the country. For example, in Connecticut, 2936 students were arrested in 2011, a "sizeable portion" based on "behaviors that are probably not criminal, such as skipping class, insubordination, and using profanity," and with students of color arrested at a "much higher" rate of "3.7 times the rate of white students." Conn. Voices for Children, *Arresting Development: Student Arrests in Connecticut* 20, 43 (2013).

In Texas, a follow-up to a groundbreaking statewide report found that "African American students are [still] vastly overrepresented in ticketing and arrest[s]" for school-based misconduct. Tex. Appleseed, *Ticketing and Arrest Data Update* 2 (2013).

Ohio data shows that Black students in the state are between two and four times "more likely to be given out-of-school suspensions" than White students. Children's Def. Fund–Ohio, *Zero Tolerance and Exclusionary School Discipline Policies Harm Students and Contribute to the Cradle to Prison Pipeline* 6 (2012).

And 93% of the Los Angeles school district's "arrests and tickets went to Black and Latino students" during a recent period. Cmty. Rights Campaign of the Labor/Cmty. Strategy Ctr., *Black, Brown, and Over-Policed in L.A. Schools* 11, 28 (2013); *see also*, *e.g.*, Claudia G. Vincent *et al.*, *Exclusionary Discipline Practices Across Students' Racial/Ethnic Backgrounds and Disability Status: Findings from the*

Pacific Northwest, 35 Educ. & Treatment of Child. 585, 585 (2012) (finding Black, Hispanic, and American Indian/Alaska Native students were "statistically significantly over-represented in most exclusionary practices").

This is not a new issue: "For over 25 years . . . students of color have been found to be suspended at rates two to three times that of other students, and similarly represented in office referrals, corporal punishment, and school expulsion." Skiba, *supra*, at 86 (surveying literature).

By some accounts, the problem is actually getting *worse*: Compared to the 1970s, the racial disparity in suspension rates has increased, accounting in large part for the "dramati[c]" increase in overall suspension rates. Losen, *supra*, at 3. Similarly, a study of Maryland data from more recent years concluded that, while the overall percentage of students "receiving out-of-school suspension or expulsion" has decreased, disproportionality has *increased*. U.S. Dep't of Educ., *Disproportionality in School Discipline: An Assessment of Trends in Maryland, 2009-12* i (2014).

2. The data also reveal additional disparities when penalties are left to the discretion of school officials or the infraction itself is vaguely defined. Across the nation, students of color are more frequently referred to the juvenile justice system "for offenses that are subjective and at risk for bias, including showing disrespect, making threats, and loitering." Columbi, Nat'l Ass'n of State Bds. of Educ., *supra*, at 5. In contrast, "white students have been referred" to the juvenile justice system "more often

for offenses that are easier to document objectively." *Ibid.*; *see also* Am. Fed'n of Teachers, *supra* ("African-American and Latino students, particularly males, are more likely to be suspended for subjective violations.").

Reports focused on individual states and districts reveal the same trend. Black students in Los Angeles are 23 to 29 times more likely to be ticketed for the vague offense of "disturbing the peace." *Black, Brown, and Over-Policed in L.A. Schools*, *supra*, at 11, 28. In Rhode Island, researchers found that not only are Black and Hispanic students more likely to be suspended, but that the suspensions are more likely to be for "vague and minor offenses" such as "Insubordination/Disrespect." ACLU of R.I., *Over-suspended & Underserved: Rhode Island's School Suspension Disparities in the 2014-2015 School Year* 2, 11 (2015). Seattle data shows that Black and Hispanic students account for 83% of suspensions for "rule breaking," and 82% of suspensions for "intimidation of school authority." Claudia Rowe, *Race Dramatically Skews Discipline, Even in Elementary School*, Seattle Times, June 23, 2015, http://bit.ly/1BMUW8x.

A growing body of literature points to implicit, unconscious biases as part of the explanation, particularly when school administrators are meting out discipline for vaguely defined infractions. "The automatic implicit associations that school employees carry can shape their perceptions of when discipline is necessary." Cheryl Staats, Kirwan Inst., Ohio State Univ., *Implicit Racial Bias and School Discipline Disparities* (2014).

III. SCHOOLS' GROWING OVERREACH INTO OFF-CAMPUS SPEECH IS BEING APPLIED IN THE SAME UNEVEN FASHION AS DISCIPLINE FOR ON-CAMPUS BEHAVIOR.

School authorities' regulation of off-campus speech will continue and exacerbate the troubling past and current effects of discriminatory school discipline. There have already been documented instances of schools applying their assumed authority over off-campus speech in a racially disparate manner. Indeed, the petitioner here is a Black student who was disciplined for off-campus speech about a racially charged topic—White faculty members' behavior toward Black female students—in a school with a documented racial disparity in school discipline.[4]

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[4] Accordingly to data reported to the U.S. Department of Education, Itawamba Agricultural High School's 97 Black students in the 2011-12 school year (15% of the total enrollment) accounted for 22% of the reported disciplinary incidents, including 2 of 2 expulsions without educational services, 2 of 7 students (29%) with multiple out-of-school suspensions, and 7 of 23 students (30%) with one out-of-school suspension. No Black students received the least severe reported punishment, in-school suspension, although 16 White students did. Available data for earlier years also show disparities: In 2000, Black students accounted for 15% of the enrollment but 29% of out-of-school suspensions; in 2004, 12% of the students and 13% of the out-of-school suspensions; and in 2006, 14% of the students and 25% of the out-of-school suspensions. In 2009, when more specific tallies began, Black students comprised 14% of the enrollment but accounted for 20% of students receiving one out-of-school suspension and 17% of those receiving multiple in-school suspensions. *See* U.S. Dep't of Educ., Civil Rights Data Collection, Discipline of Students Without Disabilities at Itawamba

Surveillance programs will only deepen the disparities because they involve a series of subjective judgments—the very types of decisions shown to drive disparate impacts. Confronted with a vast pool of online activity, school officials and monitoring companies must decide what speech to monitor (and for what), what activities to report onward, and what expressions to discipline. Students of color, students with disabilities, and LGBTQ students are already disciplined "more for offenses that are subjective and at risk for bias." Columbi, Nat'l Ass'n of State Bds. of Educ., *supra*, at 5. These students are accordingly likely to receive a disproportionate share of the focus of these surveillance efforts, with a resulting share of the discipline and the potential to reinforce already present implicit biases. *See generally* Kirwan Inst., Ohio State Univ., *State of the Science: Implicit Bias Review 2015*, at 35.

A case in point is the Huntsville, Alabama school district's social media monitoring program using a former FBI agent. That program led to 14 students being expelled in one year—12 were students of color. *See* Stephens, *supra*. This is perhaps unsurprising given the latest findings in a school desegregation case against the district (initiated in 1963). Entering a modified consent decree, the district judge cited evidence "suggest[ing] that as late as the 2013-2014 school year, the tenacious vestiges of *de jure* segregation were affecting the way in which African-American students in the district were treated" in school discipline and other regards. *Hereford* v.

Agricultural High School (NCES ID No. 280210000949), http://ocrdata.ed.gov/flex/Reports.aspx?type=school.

United States, No. 5:63-cv-00109, 2015 U.S. Dist. LEXIS 52068, at *9 (N.D. Ala. Apr. 21, 2015); *see also id.* at *8, *9 (Black students "tended to receive . . . more serious consequences for similar behavio[r]," including being twice as likely to be sent to the office "for minor or moderate behavior as opposed to behavior that implicated student safety").

That track record bodes poorly for students of color if schools are allowed to use off-campus speech as more grist for their disciplinary mill. Indeed, civil rights groups criticized the Huntsville consent decree for not adequately addressing the "school district's past practice of disciplining students for actions they posted on social media, off school property." *Huntsville Deseg Plan Is Unenforceable, Say Southern Poverty Law Center, NAACP*, Huntsville (Ala.) Times, Mar. 18, 2015, http://bit.ly/1mqKpZN; *see also* Letter from NAACP 5-6 (Mar. 9, 2015), http://bit.ly/1P21qmx; Letter from S. Poverty L. Ctr. 5 (Mar. 10, 2015), http://bit.ly/1Yn32PC.

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The decision of the Fifth Circuit, and others like it, wrongly allows school officials to regulate off-campus speech, limited only by the reduced First Amendment protections crafted to govern "conduct *in* the schools." *Tinker*, 393 U.S. at 507 (emphasis added). This expansion of current disciplinary practices to cover all student speech, regardless of when, where, or to whom, will exacerbate the grave consequences of existing racially disparate disciplinary practices. The Court's attention is needed to address these serious issues affecting all of America's students, especially the tens of millions of students of color.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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