No. 15-666

In the Supreme Court of the United States

TAYLOR BELL,

Petitioner,

v.

ITAWAMBA COUNTY SCHOOL BOARD,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE MARION B. BRECHNER FIRST AMENDMENT PROJECT IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Marion B. Brechner First Amendment Project is a nonprofit, nonpartisan organization located in the College of Journalism and Communications at the University of Florida in Gainesville. Directed by professor and attorney Clay Calvert, the Project is dedicated to contemporary issues of free expression, including current cases and controversies affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition, and freedom of thought. The Project's director has published multiple scholarly law journal articles regarding the off-campus First Amendment speech rights of public school students – the topic that is at the center of this case.

The Project's arguments thus may assist the Court in deciding this matter. As an organization dedicated to research into First Amendment rights, and advocacy in support of such rights – though one with no direct stake in the outcome of this case – the Project is well-positioned to offer this Court information about issues affecting the First Amendment speech rights of public school students.

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[1] Pursuant to Rule of Court 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission. Counsel of record received timely notice of the intent to file this brief under this Rule, and the parties have provided written consent for the filing of this brief.

SUMMARY OF ARGUMENT

It is the very rare public school student who unfurls and hoists a low-tech banner about drugs (or perhaps nonsense) while at a school-sanctioned and school-supervised event and who, in turn, is punished for it by school authorities. In contrast, it is the very common student who posts or texts a high-tech message about classmates (or perhaps teachers) while away from campus and not under school supervision, yet who nonetheless is punished for it by school authorities.

This Court squarely addressed the former, quirky scenario in *Morse v. Frederick*, 551 U.S. 393 (2007). It never, however, has addressed the latter, oft-recurring situation, despite it being a truly chronic problem.

This case now gives this Court the chance to address that latter situation. And it is important to embrace this opportunity now because, in the face of a steady drumbeat of incidents of on-campus punishment for off-campus, high-tech speech, this Court "has never said schools have authority over off-campus speech equivalent to that of on-campus speech." Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. Bus. & Tech. L. 1, 10 (2014).

This Court's seminal decision in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), dealt squarely with a low-tech, on-campus speech scenario. Justice Abe Fortas made it clear that the *Tinker* Court was measuring and defining the scope of First Amendment speech rights for students "in light of the special characteristics of the school environment."

Id. at 506. In contrast, when minors are at home using their own or their families' computers, they are far, far removed from the school environment.

Yet, *Tinker* is now is being ripped from its judicial moorings by multiple lower courts – including here in *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) – to apply to high-tech, off-campus expression. See also *S.J.W. v. Lee's Summit R-7 Sch. Dist*., 696 F.3d 771, 777 (8th Cir. 2012) ("*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" and noting that other appellate circuits have adopted this position).

The question presented in this case by the Petitioner – whether and to what extent public schools, consistent with the First Amendment, may discipline students for their off-campus speech – is, in fact, neither a new issue nor one soon to go away, unless the Court resolves it. That is because some minors inevitably will post and upload – while away from campus, on their own time and using their own digital communication devices – allegedly disparaging, offensive or threatening messages and images about fellow students, teachers and school officials on social media platforms such as Facebook, Twitter, YouTube and Snapchat.

Similar situations have occurred for at least the past fifteen years. *See* Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 Boston U. J. Sci. & Tech. L. 243, 286 – 287 (2001) (examining in 2001 an early crop of off-campus, high-tech student speech

cases, and correctly predicting that "[g]iven the pervasiveness of the Internet and World Wide Web, the problems encountered by administrators in the cases described in this article are not likely to disappear anytime soon. Indeed, it seems very likely that more students will turn to the Web to express their feelings"). More recently, a 2013 law journal article observed there has been a "wave of lower court decisions that involve students' use of off-campus social media." Lily M. Strumwasser, *Testing the Social Media Waters: First Amendment Entanglement Beyond the Schoolhouse Gates*, 36 Campbell L. Rev. 1, 15 (2013). The problem, however, is that, in riding this wave, "lower courts have not spoken with a unified voice." Martha McCarthy, *Cyberbullying Laws and First Amendment Rulings: Can They be Reconciled?*, 83 Miss. L.J. 805, 806 (2014).

This lack of clarity and uniformity detrimentally affects public school students, who currently do not have fair notice – a Fifth Amendment due process right addressed by this Court squarely in another recent speech-rights case, *Federal Commc'ns Comm'n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) – regarding what their off-campus, online speech rights are under the First Amendment. Should they still be treated just as "students," even when they are miles away from campus, speaking on their own time and using their own personal communication devices when they post messages and videos to the Internet? Or should they be treated simply as people – as adults – subject to the full panoply of First Amendment safeguards? All public school students deserve the right to know, pre-posting and pre-texting, what their First Amendment rights are.

The same holds true for their elders – the school officials who seek to punish students without violating their constitutional rights. As a 2015 law journal article encapsulates the problem, "the Supreme Court has yet to deal specifically with electronic student speech that originates off the school campus. Therefore, school administrators continue to struggle to appropriately balance the school's interest in safety, order, and discipline against the First Amendment rights of students." Watt Lesley Black, Jr., *Omnipresent Student Speech and the Schoolhouse Gate: Interpreting Tinker in the Digital Age*, 59 St. Louis L.J. 531, 531-532 (2015).

Another problem wrought by this unsettled landscape is qualified immunity. Until this Court articulates a clearly established rule for determining whether and to what extent public schools may permissibly discipline students for off-campus/online expression, some school officials will escape liability under the doctrine of qualified immunity. In brief, the benefits of not resolving the issue in this case extend only to government officials, not to the individuals who are far less likely to understand the potential gravity of their speech.

Amicus thus respectfully requests that this Court grant the petition for writ of certiorari to decide whether and to what extent public schools may permissibly discipline students for off-campus/online expression.

ARGUMENT

I. The Cases Keep Coming: Cases Involving On-Campus Punishment of Students for Their Off-Campus, Online Speech Continue on a Steady Basis, Thus Meriting Review by This Court

The case of *Bell v. Itawamba Cnty. Sch. Bd.* is just one of at least a half-dozen federal cases decided, in part or conclusively, since the start of 2013 alone. These cases demonstrate the prevalence of the problem of punishing off-campus/online student speech and, in turn, how lower courts must grapple with it without guidance from this Court. Those cases, set forth below in chronological order from most recent to oldest, include:

1) In August 2015, a federal district court in Minnesota considered a case in which a National Honor Society student was suspended from his public school after he jokingly posted – while outside of school hours and not on school grounds – the words "actually yes" on a gossip website in response to an anonymous post asking him if he had made out with a particular teacher. *Sagehorn v. Indep. Sch. Dist. No. 728*, 2015 U.S. Dist. LEXIS 105974 (D. Minn. Aug. 11, 2015).

2) In April 2015, a federal district court in Oregon considered a case in which a fourteen-year-old, eighth-grade student was suspended from his public middle school based upon out-of-school comments he posted on his personal Facebook page. *Burge v. Colton Sch. Dist. 53*, 2015 U.S. Dist. LEXIS 50819 (D. Ore. Apr. 17, 2015).

3) In September 2014, a federal district court in New York considered a case in which a public high

school student was suspended "based on a text-message conversation he had with another student regarding a third student while outside of school." *Bradford v. Norwich City Sch. Dist.*, 54 F. Supp. 3d 177, 178 (N.D.N.Y. 2014). District Judge Glenn Suddaby observed that "the Supreme Court has yet to speak on the scope of a school's authority to discipline a student for speech that does not occur on school grounds or at a school-sponsored event." *Id.* at 185.

4) In May 2014, a federal district court in Texas considered a case in which a junior high school student was transferred to a disciplinary learning program for thirty days based upon an allegedly lewd image of the student "that had circulated between students off campus." *S.N.B. v. Pearland Independent Sch. Dist.*, 2014 U.S. Dist. LEXIS 72688 (S.D. Tex. May 28, 2014). District Judge Gregg Costa observed that the student's First Amendment free speech claim against the school's principal and assistant principal "certainly raises some interesting questions. For instance, what protection does the First Amendment afford off-campus speech?" *Id.* at *33. He noted that this question has "not been fully resolved." *Id.* at *34.

5) In December 2013, a federal district court in Tennessee considered a case in which a public middle school student was temporarily transferred to an alternative school based upon a series of Twitter messages – tweets – she made while off campus. *Nixon v. Hardin Cnty. Bd. of Educ.*, 988 F. Supp. 2d 826 (W.D. Tenn. 2013). District Judge J. Daniel Breen observed that "[n]either the United States Supreme Court nor the Sixth Circuit Court of Appeals has considered the First Amendment issue raised in this

case — whether schools may regulate offcampus online speech by students — in light of *Tinker* and its progeny." *Id.* at 836. In the absence of any guidance from this Court and the Sixth Circuit, the parties were forced to "rely on decisions from other circuits." *Id.*

6) In August 2013, the U.S. Court of Appeals for the Ninth Circuit considered a case in which a public high school student was temporarily expelled based upon a series of "instant messages sent from home to his friends . . . " *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1065 (9th Cir. 2013). The Ninth Circuit remarked that "[t]he Supreme Court has not yet addressed the applicability of its school speech cases to speech originating off campus." *Id.* at 1067.

These represent only federal cases in which opinions have been rendered in off-campus, online student speech cases. Other disputes have occurred during the past three years in which students claim their First Amendment rights of free speech were violated when they were punished by their schools for posting speech while off campus on their own time.

For example, in March 2014 a complaint was filed in the Middle District of Pennsylvania in *R.L. v. Central York Sch. Dist.*, Complaint, Case 1:14-cv-00450-JEJ (M.D. Pa. Mar. 11, 2014). It alleges that a ninth-grade public school student was suspended for ten days in violation of his First Amendment rights based upon his posting of a message – while away from school property and using his personal machine – to his Facebook page. *Id.* at 4.

Of course, many instances of punishment of off-campus/online speech never even make it to court.

Additionally, some schools districts now are attempting to make pre-emptive strikes against the First Amendment rights of students who engage in off-campus/online expression by adopting Orwellian social media use policies that stretch far beyond the schoolhouse gates.

For example, in October 2015, the Palm Beach County (Florida) School District reportedly was considering adopting a policy "to put students on notice that what they post on Twitter, Facebook and the like can also get them in trouble at school – *even if those posts originate off campus*." Sonja Isger, *District Weighs Rules on Speech*, Palm Beach Post (Fla.), Oct. 5, 2015, at 1A (emphasis added). In March 2015, school officials in Lowell, Massachusetts, were "reportedly considering using social media monitoring to watch students' activity online." Samantha Allen, *Schools Turn Attention to Student Social Media*, Telegram & Gazette (Mass.), Mar. 9, 2015, at A1. In brief, school districts will fill the void left by this Court in the off-campus/online speech space by drafting Draconian policies that reach into the homes and bedrooms of minors to control and monitor their digital speech. See Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers and Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 First Amend. L. Rev. 210, 219 (2009) ("Other school districts have adopted similar policies that punish students for comments they post online while at home").

II. Qualified Immunity Danger: Clear Guidance is Needed to Eliminate Abuse of the Qualified Immunity Doctrine by School Officials Who Punish Students for Off-Campus Speech Yet Evade Monetary Liability Because the Right in Question is Not Clearly Established

This Court wrote in 2011 that "[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011). This doctrine "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Counsel for *amicus* asserted in a 2009 article that the muddled state of affairs regarding the power of school administrators over the off-campus, high-tech speech of minors leads to a troubling result under the qualified immunity doctrine:

> [P]ublic school officials can squelch off-campus student speech posted on the Internet and get away with it, at least without fear of paying monetary damages, because the extent of First Amendment protection for such expression simply is not clearly established by the courts. In a bizarre sense, then, it helps school officials' censorial powers that the Supreme Court has yet to hear a case to clarify this muddled area of the

> law; that is the beauty of ambiguity, at least from the perspective of those tasked with educating the nation's youth. Although qualified immunity does not protect against equitable remedies like injunctive relief, it certainly eliminates the risk and cost of paying monetary damages from the calculus involved in deciding whether to censor Internet-based speech.

Clay Calvert, *Qualified Immunity and the Trials and Tribulations of Online Student Speech: A Review of Cases and Controversies From 2009*, 8 First Amend. L. Rev. 86, 89 (2009).

Counsel for *amicus* contended in the same article that "it is time for the Supreme Court to enter into the fray to resolve the confusion and to bring uniformity so that both students and principals know the legal boundaries and so that the doctrine of qualified immunity can no longer be abused in the name of censorship." *Id.* at 108. Six years after publication of that article, the urgency for the Court to address this issue is even greater.

Others more recently also have observed the dangers of qualified immunity in this area. See Meg Hazel, *Social Media: Students Behaving Badly*, 26 S. Carolina Lawyer 39, 44 (Sept. 2014) (asserting that, in the context of public schools punishing students for alleged off-campus cyber bullying, "the lack of guidance from the Supreme Court may give school districts more leeway in escaping liability under a First Amendment challenge by invoking qualified immunity").

This is not academic conjecture; it is reality. In 2011, in an off-campus/online student speech case, U.S. District Judge Philip P. Simon observed that "[o]n this issue, and in similar (although not identical) circumstances, many courts have found school administrators sued individually to have qualified immunity, generally on a finding that the constitutional rights at issue were not clearly established." *T.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 786 (N.D. Ind. 2011).

Amicus fears that some public school officials embrace the ambiguity and uncertainty in this area because it reduces the chances of personal liability when they punish students for their off-campus expression. In 2015, for instance, school officials in the *Sagehorn* case described earlier asserted qualified immunity, but fortunately U.S. District Judge John R. Tunheim rejected that argument. *Sagehorn v. Indep. Sch. Dist. No. 728*, 2015 U.S. Dist. LEXIS 105974, *39 – 42 (D. Minn. Aug. 11, 2015). But until this Court clearly establishes a rule for such cases, some school officials might well try to continue to take advantage of the qualified immunity doctrine by claiming they had no idea of what to do in this muddled area of law.

By granting Petitioner's Petition for a Writ of Certiorari, the Court can take a crucial step forward in defining where the First Amendment limits exist on school officials' power over off-campus, high-tech student speech.

CONCLUSION

For the reasons set forth above, *amicus* respectfully requests that this Court grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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