No. 15-666

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

REPLY BRIEF

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REPLY BRIEF

Few First Amendment issues come to this Court with a more pressing need for national resolution. This case squarely presents the question of whether, and if so how, *Tinker* applies to students' off-campus speech. Indeed, the School Board acknowledges that Taylor Bell's rap song is purely "off-campus speech." Opp. 7-8. The Board argues that the question presented is insignificant because the Internet has "render[ed] useless an ... on campus/off campus distinction when it comes to disruptive speech." Opp. 22. But that response only confirms the need for this Court's immediate review. In the Board's view, *Tinker* gives schools a roving commission to regulate everything students say online—anytime, anywhere, in any form, and on any subject. If that is the law, this Court should be the one to say so.

The exceptional importance of this case is underscored by the pleas for this Court's guidance from multiple judges below—including three who joined the majority opinion—and by the six amicus briefs supporting certiorari. The amici include free speech advocates, child protection advocates, social justice organizations, and scholars and Grammy-winning rap artists. Their briefs highlight that schools are restricting students' off-campus speech with ever-increasing frequency, and that decisions like the one below enable schools to silence students who publicize serious misconduct.

The lower courts are hopelessly confused. The courts themselves, including the court below, recognize the "differing standards applied to off-campus speech across circuits." Pet. App. 21a. The Board's insistence that *Tinker* is "easily applied" to off-campus

speech is especially ironic in a case that itself produced eight separate opinions. Opp. 8.

As the amicus brief of scholars and rap artists explains, Bell's song (available at http://tinyurl.com/jhxnwbf) borrows the rap genre's most basic conventions by using hyperbolic and provocative rhetoric as a form of artistic expression. Nielson *Amicus* Br. 6. Yet the court below created a new category of unprotected speech: rap music that was not a threat, was neither intended nor perceived as a threat, but was nonetheless "threatening." Opp. i. That decision is profoundly wrong and sends an unfortunate signal that rap is not on the same First Amendment footing as other genres of music. Regardless, the creation of a new category of unprotected student speech warrants this Court's review.

I. The Decision Below Conflicts With this Court's Precedents and Deepens a Circuit Conflict

1. The Board asserts that one "cannot realistically dispute that *Tinker* is the appropriate standard" for off-campus, online speech. Opp. 8. But this Court has never held that *Tinker* applies off campus. Pet. 15-18. Rather, this Court's precedents reason that the "special characteristics of the school environment" give schools power to regulate speech on campus that they could not reach off campus. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In other words, "schools may regulate some speech 'even though the government could not censor similar speech outside the school.'" *Morse v. Frederick*, 551 U.S. 393, 405-06 (2007) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

The Board (at 22) wrenches out of context *Tinker*'s statement that schools may restrict disruptive speech "in class or out of it." 393 U.S. at 513. That statement refers to speech outside the classroom but still on campus. In the same paragraph, the Court explained that *Tinker* applies during "the classroom hours" *and* "in the cafeteria, or on the playing field, or on the campus during the authorized hours." *Id.* at 512-13.

The Board contends that this Court need not extend *Tinker* to off-campus speech, because the Internet already has done so. In the Board's view, the Internet has "render[ed] useless an ... on campus/off campus distinction when it comes to disruptive speech." Opp. 22. The Board contends that schools may regulate *all* online speech anywhere, anytime, so long as a school official could forecast a disruption. But technological developments do not license departure from this Court's precedents. Only this Court should decide if the Internet expands *Tinker* to off-campus speech.

2. The Board asserts that courts "have had no trouble applying *Tinker* to student speech occurring both on and off campus." Opp. 8. But the court below recognized the "differing standards applied to off-campus speech across circuits." Pet. App. 21a. The principal dissent likewise stated that "[t]his issue has divided the circuits," and the majority "depart[ed] from the other, already divided circuits in yet another direction." *Id.* at 106a.

Other circuits have acknowledged the division, including in decisions that the Board cites (at 9-10) to show uniformity. The Ninth Circuit explained that "[a] number of our sister circuits have wrestled with the question of *Tinker*'s reach beyond the schoolyard," and each circuit has adopted a different "threshold test." *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d

1062, 1068-69 (9th Cir. 2013). Myriad commentators recognize the "disarray," "inconsistent results," and "lack of direction" in the lower courts. Pet. 22 & n.3.

The decision below conflicts with *J.S. v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (en banc), and *Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011) (en banc), and Bell would have prevailed in the Third Circuit. The Board stresses that *J.S.* assumed without deciding that *Tinker* applied off campus. Opp. 15-16. But *J.S.* held that officials could not forecast a disruption from speech that was neither spoken nor heard on campus. In *J.S.*, school computers blocked access to MySpace, and "the only printout of the [student's parody MySpace] profile that was ever brought to school was one that was brought at [the principal's] express request." 650 F.3d at 929. So too here: Itawamba computers block access to Facebook; school rules prohibit smartphones; and no one heard Bell's song at school except one of the coaches who ordered a student to play it. Pet. 20. The panel thus held that officials could not reasonably have forecast a disruption from Bell's song. Pet. App. 141a-145a. By contrast, the en banc majority treated the song as if Bell had performed it in the school cafeteria; the off-campus nature of the speech was irrelevant.

The decision below is also irreconcilable with *Layshock*. The Third Circuit rejected the school's argument that *Fraser* applied to off-campus speech, holding that the "First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline." *Layshock*, 650 F.3d at 207. That holding cannot be squared with the decision below. The Board relies (at 14-15) on a two-judge concurrence in *Layshock* stating

that *Tinker* "can be applicable to off-campus speech." *Id.* at 220. But that concurrence is non-precedential and irrelevant.

In all events, no circuit has adopted anything close to the perplexing holding below that non-threatening speech is nonetheless threatening. That holding, which adds yet another layer of confusion to an already confused body of law, warrants this Court's immediate review.

II. The Question Presented Is Important and Recurring

The rapid rise of teen Internet use has led to a veritable explosion of student-speech cases, which today are among the most commonly litigated cases under the First Amendment. Pet. 24; Marion B. Brechner Project (Brechner) *Amicus* Br. 6-9. That reality belies the Board's assertion that this case presents no "compelling issue." Opp. 7. The Board's refrain that the Internet is "everywhere, all the time," Opp. 22, only highlights the importance of the issue. If the First Amendment allows schools to regulate what students say "everywhere, all the time," this Court should make that pronouncement, not the lower courts in piecemeal fashion.

The eight separate opinions below underscore the need for this Court to step in. The majority recognized that this Court "has not expressly ruled on" schools' power to regulate off-campus speech. Pet. App. 24a. Judge Costa's concurrence, joined by two other judges, urged this Court to "provide clear guidance to students, teachers, and school administrators." *Id.* at 44a. And Judge Prado's dissent stated that "the difficult issues of off-campus online speech will need to be addressed by the Supreme Court." *Id.* at 109a.

The six amicus briefs confirm that this case merits review. Free speech advocates highlight the need to clarify the scope of protection for off-campus, online speech. Student Press Law Center (SPLC) *Amicus* Br. 9-15; Brechner *Amicus* Br. 2-5. A prominent child advocacy group describes the chilling effect of allowing schools to punish students for publicizing educator sexual misconduct. Massachusetts Citizens for Children (MassKids) *Amicus* Br. 3. Social justice organizations explain that the decision below enables schools to censor off-campus speech that officials dislike, and exacerbates a well-documented pattern of racially disproportionate discipline. Mississippi Center for Justice *Amicus* Br. 7-14; Advancement Project *Amicus* Br. 11-23. And renowned scholars and Grammy-winning rap artists explain that Bell's song was no more "threatening" than any number of critically acclaimed and commercially successful rap songs. Nielson *Amicus* Br. 5-6.

This issue won't go away as long as teenagers use the Internet:

- A Minnesota school recently disciplined a sixth grader for complaining in an off-campus, online post that a hall monitor was "mean to" her. Advancement Project *Amicus* Br. 6.
- Last year, an Arkansas school suspended nine students for "liking" a Facebook post that showed other students vandalizing school property. *Id.*
- A Minnesota high school recently suspended a National Honor Society student for jokingly posting the words "actually yes" in response to an anonymous question on a gossip website

asking whether he had kissed a teacher. Brechner *Amicus* Br. 6.

- Just last month, a New Jersey school reprimanded a student—and warned that she could face prosecution for cyberbullying—for "tweeting" criticism of Israel and expressing happiness that a pro-Israel classmate had "unfollowed" her on Twitter. Liam Stack, *Tweets about Israel Land New Jersey Student in Principal's Office*, N.Y. Times, Jan. 7, 2016.

School districts also actively surveil students' online communications outside of school. One Alabama school district hired a former FBI agent to monitor and investigate hundreds of students' social media activity. Technology companies now market services to school districts that promise to comprehensively surveil students' social media posts. Advancement Project *Amicus* Br. 8. School districts accordingly have warned students that they can be punished for anything they say on Twitter, Facebook, and other social media sites. Brechner *Amicus* Br. 9.

The Board devotes an entire section of its opposition to the denial of certiorari in *Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007). Opp. 19-22. That denial "means nothing more than that 'this Court has refused to take the case' or that 'fewer than four members of the Court deemed it desirable to review a decision of the lower court.'" Shapiro et al., *Supreme Court Practice* 335 (10th ed. 2013). Anyway, the explosion of online communication since 2007—including Twitter, Instagram, and Facebook—makes the issue far more pressing today than when the student in *Wisniewski* was punished for an AOL Instant Message.

III. The Decision Below Is Wrong

1. The Board argues that *Tinker* applies broadly to off-campus speech, but ignores the "'ominous implications'" of "broad off-campus application of *Tinker*." Pet. App. 42a (Elrod, J., concurring). "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." *Layshock*, 650 F.3d at 216; *accord J.S.*, 650 F.3d at 939 (Smith, J., concurring). The Board apparently believes that blogposts against abortion and speeches on public sidewalks are different, but offers no principled reason why. Opp. 6.

The Board stresses that Bell "knew [his song] would be viewed and heard by students," and that the song was "intended to reach," "designed to reach," and "likely to reach campus." Opp. 5-11. But the same can be said about rumors spread at a weekend sleepover or party, students' letters to the press or the President, or political debates at summer camp. Because students intend almost everything they say to reach their peers or other members of the school community, an "intent" standard would allow schools to regulate essentially all student speech, everywhere, about anything.

The Board argues that *Tinker* should apply if "a student sent a disruptive email to school faculty from his home computer." Opp. 17 (quoting *J.S.*, 650 F.3d at 940 (Smith, J., concurring)). But a student's email to a teacher is a far cry from a professionally recorded song posted to social media and never sent to any school employee. Indeed, Judge Smith's concurrence in *J.S.*, on which the Board relies, concluded that

ordinary First Amendment principles—not *Tinker*—applied to the student's parody MySpace profile mocking the school principal, because the student "created the Myspace profile at home on a Sunday evening"; "she did not send the profile to any school employees"; and "the Myspace website is blocked on school computers." 650 F.3d at 940. All the same is true here.

2. The Board does not dispute that Bell's song addressed a matter of public concern—namely, coaches sexually harassing and inappropriately touching underage students. Nor does the Board contest that such speech "is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Yet the Board maintains that Bell's attempt to publicize educator sexual misconduct is irrelevant under the First Amendment. Opp. 25.

Sexual abuse of minors, including in schools, is endemic. MassKids *Amicus* Br. 6-7. Such abuse is vastly underreported because victims and witnesses fear that authorities will disbelieve or even blame them. *Id.* at 7-8. Here, Itawamba officials went one step further—without regard to the veracity of Bell's accusations, the Board severely disciplined him for publicizing them. Punishing Bell for calling attention to educator sexual abuse of students is not only unconstitutional and unjust; it is perverse.

The Board chastises Bell for writing a song rather than alerting a "responsible adult" at the school. Opp. 25. But Bell produced a song precisely because he believed that school officials would ignore any report of teacher misconduct. Pet. App. 117a. And Bell was right. To this day, the Board has never denied Bell's accusations. Yet no "responsible adult" has done anything to investigate them.

Bell's song induced the coaches to change their behavior to avoid inappropriate interactions with students. Stunningly, the Board asserts that those salutary effects constitute a disruption that justifies the decision to punish Bell. Opp. 6, 23. That Bell's song helped remedy a serious problem at his school is a reason to protect his speech, not restrict it.

The Board relies on *Pickering* and other cases involving the "somewhat analogous field of public employment." Opp. 25-26. But this Court has never linked the *Pickering* and *Tinker* standards. The Second Circuit rejected the analogy. *Doninger v. Niehoff*, 642 F.3d 334, 350 (2d Cir. 2011).

The decision below is especially pernicious given that students communicate on matters of public import primarily through social media. SPLC *Amicus* Br. 11-14. If Bell had spoken through a more low-tech medium, Itawamba apparently might have let him stay in school. Opp. 6. But a blogpost or tweet is no less deserving of protection than an op-ed or speech on a public sidewalk.

3. The troubling racial overtones of this case should encourage rather than deter the Court from granting review. The Board does not contest that the hyperbolic lyrics in Bell's song are commonplace in rap music, and borrowed nearly verbatim from some of the genre's most successful artists. Pet. 29; Nielson *Amicus* Br. 13-19. The Board instead insists that Bell's song was "threatening." Opp. i, 1, 11, 17, 24. But the court below declined to find that the song conveyed an unprotected threat under *Watts v. United States*, 394 U.S. 705 (1969). And this Court has never recognized a category of unprotected speech for "threatening" rap lyrics that are not a threat.

The Board admits that Bell "did not intend [the song] to be a threat." Opp. 5. The Board does not contest that Itawamba officials took no security measures, initially allowed Bell to return to school and attend classes, and after suspending Bell, allowed him to remain unattended on campus for the rest of the school day. Pet. 30. The Board's position—and the decision below—thus eviscerates *Watts*' distinction between hyperbole and unprotected threats.

Bell does not advocate a "blanket assumption that no rap artist means what he says literally." Opp. 24. If any musician—professional or amateur—makes a true threat, the government can punish them under *Watts*. Courts in other cases have found that rap lyrics conveyed unprotected threats. Pet. 30. Any remand from this Court would leave the Board free to renew its argument under *Watts*.

The Board mischaracterizes the record by asserting that Bell testified he "meant what he said" in the song's violent lyrics. Opp. 23-24. When Bell testified that "everything I said in the song was true," he was referring to the sexual misconduct allegations—not the rhetoric. Resp. App. 3a-4a. School officials never even asked Bell if he intended to threaten anyone. *Id.* at 3a. They instead expressed concern that "one coach in particular felt he had been slandered," and told Bell that he "needed to provide some information showing that the things [he] said in the songs were true." *Id.*

The Board stresses that one of the coaches testified he felt scared and made the basketball team stay inside while he went to his car after practice. Opp. 23. But as the song itself explains, Bell already had quit the basketball team. Pet. App. 3a-4a. And the other accused coach testified that the song was "just a rap," not to be taken seriously. *Id.* at 131a.

* * *

Lower courts, students, schools, and parents need this Court's guidance regarding when and to what extent schools may regulate students' speech outside the school environment. This case involves purely off-campus speech and thus offers the Court an ideal vehicle to resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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