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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE STUDENT PRESS LAW CENTER AND THE FOUDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, INC., IN SUPPORT OF PETITIONER

FRANK D. LOMONTE
THE STUDENT PRESS LAW CENTER
1608 Rhode Island Ave. NW
Suite 211
Washington, DC 20036
(202) 785-5450

SCOTT STERNBERG
Counsel of Record
BALDWIN HASPEL BURKE & MAYER, LLC
1100 Poydras St. Suite 3600
New Orleans, LA 70163
(504) 569-2900
sls@bhbmlaw.com

Counsel for Amicus

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MOTION FOR LEAVE TO FILE BRIEF*AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Student Press Law Center ("SPLC") and The Foundation for Individual Rights in Education, Inc. ("FIRE") hereby move pursuant to Supreme Court Rule 37.2(b) for leave to file the accompanying Brief *Amicus Curiae* in Support of Petitioner's Petition for Certiorari in the instant case. Although counsel for Petitioner has filed a notice indicating Petitioner's consent to the filing of *amicus* briefs, counsel for the Respondent, Itawamba County School Board, notified *amici* by way of an exchange of email message on December 17 that Respondent will not consent. Accordingly, leave of the Court is required. *Amici* request that the Court waive compliance with the 10-day notice requirement of Rule 37.2(a), as Respondent will suffer no prejudice from having received notice four days prior to this filing, having had notice that this high-profile case would attract multiple amicus briefs and being familiar with the SPLC's position advanced in this case due to the SPLC's participation as *amicus* during the appellate proceedings below. *Amici*'s brief accompanies the filing of this Motion.

Respectfully submitted,

Scott Sternberg
Counsel of Record for Amici
Student Press Law Center and the Foundation for Individual Rights in Education, Inc.

December 21, 2015

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STATEMENT OF INTEREST[1]

The Student Press Law Center (the SPLC") is a non-profit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. The SPLC provides free legal information and educational materials for student journalists, and its legal staff jointly authors the widely used media-law reference textbook, Law of the Student Press, now in its fourth edition.

Students are particularly interested in and are prolific users of the Internet and social media. The court of appeals' decision greatly expanding the reach of *Tinker v. Des Moines Indep. Community Sch. Dist.,* to speech created and distributed off campus is of special concern to the SPLC's mission of protecting the safety of student speakers to address issues of public concern.

The Foundation for Individual Rights in Education, Inc. ("FIRE"), is a non-profit, non-partisan, tax-exempt educational and civil liberties organization dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. Since 1999, FIRE has defended the constitutional liberties of thousands of students and faculty nationwide. In the

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[1] Pursuant to Rule of Court 37.6, Amici state 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 Amici or Amici's counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for Petitioner consented to the filing of this brief but counsel for Respondent did not consent, and a motion for leave to file without consent accompanies this brief.

interest of protecting student and faculty rights at our nation's colleges and universities, FIRE has participated as *amicus curiae* in many cases. *See, e.g.*, *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008). Because courts often mistakenly apply high school First Amendment rulings to college cases, and because today's grade school students are tomorrow's college students, faculty, and administrators, FIRE has a strong interest in ensuring robust First Amendment protections for student speech in the K-12 context.

SUMMARY OF ARGUMENT

Amicus Curiae the Student Press Law Center and FIRE urge this Court to accept review to clarify that the landmark *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) is not the correct standard to be applied to a public school student's off-campus speech. The court below was incorrect in ruling that *Tinker* could be applied to speech created and distributed off campus merely because of the way people on campus might react to it. Due to the special danger of disciplinary overkill in the social-media context, *amicus curiae* urge the Court to maintain its longstanding distinction between the authority of schools to suspend or expel students for speech during school functions versus speech on personal time.

ARGUMENT

I. *TINKER V. DES MOINES* IS NOT THE CORRECT LEGAL STANDARD FOR OFF-CAMPUS SPEECH.

Student free speech jurisprudence finds its foundation in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*,

393 U.S. 503 (1969), where this Court stated affirmatively that "it can hardly be argued" that students shed their First Amendment rights to "freedom of speech or expression at the schoolhouse gate." *Id.* at 736. *Tinker* was about speech on school grounds during school time, including inside of the classroom during instruction, when school authority is at its zenith. Nothing in *Tinker* indicates that the same level of control could or should apply to a student's off-campus speech. After students were disciplined for wearing armbands to protest the Vietnam War, this Court said clearly that students may express their opinions on campus if they do so without "materially and substantially" interfering with the educational functions of the school. *Tinker* at 509. The Fifth Circuit imprudently manipulated this Court's ruling on student free-speech rights in its opinion declaring that *Tinker* applies whenever a student "intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher," regardless of whether the speech originated on or off campus. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (*en banc).*

Such a standard, if allowed to stand, would seriously abuse *Tinker* and drastically extend a school's punitive authority over its students when they are beyond the schoolhouse gate. To apply *Tinker* to this case would be to treat the Petitioner as if he wrote his rap lyrics in class, used school equipment to produce the song, and then skipped down the hallways performing it. This Court has indeed recognized that the constitutional rights of students attending school functions are not "automatically coextensive with rights of adults in other settings." *Bethel Area Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). However, the Court has also been

purposeful in restricting intrusions on students' rights to behavior that occurs on school property, at school-sponsored events, or when engaged in school-sponsored activities. *Accord, Morse v. Frederick*, 551 U.S. 393 (2007).

In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 US. 260, 261 (1988), this Court held that a school principal can censor stories in a high school-sponsored student newspaper if the censorship is "reasonably related to legitimate pedagogical concerns." The holding turned on the finding that the newspaper was a part of the educational curriculum that, when disseminated, could be perceived to bear the school's stamp of approval. Despite this holding, this Court took that opportunity to acknowledge that the government could not censor similar speech outside of the school. *See Hazelwood* at 266. While *Hazelwood's* facts are inapposite to the present case – Petitioner was neither using a school-provided forum to convey his speech nor speaking in way that carried the imprimatur of the school – the principle for which *Hazelwood* stands applies here as well: that a school's authority over speech is dependent on the use of school resources, premises or events as the means of communication.

In another case involving student speech in a school-sponsored forum, this Court held that a student could be disciplined for giving a lewd, sexually suggestive speech at a school assembly. *Fraser*, 478 U.S. 675 (1986). However, the Court emphasized the setting of the speech, which was a mandatory-attendance, school-supervised event during the school day. The distinction between speech at an official school assembly and speech on a student's personal social media account could not be more apparent, and a

school's authority in those disparate settings simply cannot be equated.

And as recently as 2007, this Court reaffirmed that school administrators have the power to punish student speech that occurs during a school-sponsored event during school hours. In *Morse v. Frederick*, 551 U.S. 393 (2007), the Court held that a principal could suspend a student who held up a sign interpreted as promoting drug use at a school-sanctioned event. The Court said his conduct, while across the street from the public high school, was considered on-campus speech because it occurred during school hours, was at a school-organized event, and teachers and other school personnel were supervising the students. *See Morse* at 401. The Court was careful to reiterate that restrictions placed on student speech occurring during school hours or at school-sponsored events do not hold when the speech takes place away from school. Referring to *Fraser*, the *Morse* court said that had *Fraser* delivered his same speech in a "public forum outside the school context, it would have been protected." *Morse* at 405.

In sum, this Court has never held that *Tinker* applies to speech taking place completely off campus and outside the educational environment. It has been careful to carve out only a few specific exceptions to *Tinker*: lewd, vulgar speech occurring at a school-sponsored event or speech interpreted to promote illegal drug use at a school sanctioned event. To attempt to stretch *Tinker* and its progeny to fit a situation where a student is using his creative talent off-campus to bring attention to a social issue off-campus would be to renege on the promise of protecting those who followed in the *Tinker* students' footsteps. *Tinker* specifically points out the "special

characteristics" of a school environment. *Tinker* at 506. In *no other setting* does the government attempt to assert jurisdiction over otherwise-lawful speech in a public setting because of how people on government property might react to that speech, and to give sanction to such a principle invites terrifyingly un-American implications – for instance, that speech *about* a prison could be censored because it might incite prisoners who read it. To allow the Fifth Circuit's ruling to stand would give schools *carte blanche* to punish students whenever they express an unpopular viewpoint. In fact, *Tinker* warns against the very outcome of the lower court's opinion: "Any variation from the majority's opinion may inspire fear. Any word spoken... that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk…" *Tinker* at 508, 509.

The advent of social media does not "change the game" in a way that requires discarding decades of First Amendment jurisprudence. That a speaker might theoretically reach a larger public audience using Facebook or YouTube than could have been reached previously is of no legal significance (and the reach *is* purely theoretical, as there is no evidence in this case that the Petitioner reached a widespread audience beyond his immediate circle of friends). *The Wall Street Journal* and *USA Today* do not have diminished First Amendment rights as compared with a street-corner pamphleteer because their audiences are 200,000 times larger. Indeed, the fact that a student is speaking to a public audience, only a fraction of whom are fellow students, demonstrates why off-campus speech is qualitatively different from in-school speech; a school has minimal legitimate interest in interfering with the way its students

communicate with people outside of the school (an audience that may include family members, public officials and the news media) on their own time.

Nor is there any evidence that social media has categorically changed the ability of students to "bring" off-campus disputes onto school premises and to react to those disputes in disruptive ways. Ideas have always been portable. A student who attacks another student in the cafeteria on Monday for a remark made at the playground on Sunday has always been subject to school disciplinary authority, and it is that on-campus behavioral spillover – not the off-campus expression – over which schools have legitimate disciplinary interests.

The Fifth Circuit's standard – which appears to require only that speech be *about* the school and not a wrongful intent to cause a disruptive reaction – is untenable and dangerous, placing students under the chilling cloud of school punishment just for blowing the whistle on their schools' shortcomings. If this Court does not correct the Fifth Circuit's rationale, and place a sensible limit on the reach of *Tinker* authority, this Court will be clearing the way for school officials to silence students who speak up about concerns the officials may disagree with or that may reflect poorly on the school. Riding on this case are the fates of all the well-intentioned students in the future who dare take on the role of calling attention to wrongdoing within the school.

This Court has said that speech concerning matters of public concern is and should be highly protected even when presented in an offensive way. *Snyder v. Phelps*, 562 U.S. 443 (2011). In *Snyder*, this Court said that the government could not punish inflammatory hate speech advanced by a religious group protesting

military funerals. Although the picketers were extremely offensive to some, the Court said that they were speaking on "matters of public concern" and therefore the speech received special protection under the First Amendment. *Id*. at 458. Speech receives special protection as addressing a matter of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id.* at 453 (internal citations omitted). This type of speech is "at the heart of the First Amendment's protection." *Id.* at 452 (internal citations omitted). That Petitioner, like the speakers in *Snyder*, used outrageous and hyperbolic language to attract attention does not deprive his message of First Amendment protection merely because the message was about a school.

The elegant compromise of *Tinker* – that students enjoy diminished First Amendment rights during the school day – makes no sense when applied to speech outside of school, because in that setting, the student stands on equal footing with any other member of the public. An adult citizen watchdog could create and distribute a rap video critical of a public school secure in the knowledge that the video is protected speech, and it would be held accountable for that speech by the civil- and criminal-justice system just as Petitioner could have been. The non-student citizen watchdog would face no punishment even if people within the school overreact to the video in a disruptive way. In fact, students are arguably more well-positioned than outside watch groups to speak on matters within the school, so subjecting them to harsher standards makes little to no sense. Singling out students to be uniquely disadvantaged in speaking about school policies or

personnel in all settings and locations raises significant Equal Protection Clause issues in addition to the obvious First Amendment ones.

Tinker has never been applied to speech that occurs purely or substantively off-campus and outside the school's nexus of responsibility for education and citizen growth. This Court should grant Petitioner's writ in order to reverse the notion that a student's intent to "direct at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher" may suddenly transfer off-campus speech to on-campus speech. The speech and potential actions of innumerable public school students across this country will be chilled without action and consequence from this Court.

II. SCHOOL CENSORSHIP AUTHORITY HAS BEEN FREQUENTLY ABUSED AND MUST BE CONSTRAINED.

It is sadly commonplace for school authorities to use their censorship authority over their students' in-school speech for illegitimate purposes of image control. *See, e.g.*, Sarah Nolan, *Northern Highlands student pushes ahead after board censored article*, NORTHJERSEY.COM (May 15, 2014) (*available at* http://www.northjersey.com/news/education/student-appeals-censored-article-1.1016455) (school district censored high school student journalist to cover up superintendent's checkered record of facing employee grievances); Courtney Thompkins, *Documents show Alhambra Unified School District administrator violated state law, censored student media*, THE PASADENA STAR-NEWS (July 26, 2015) (high school principal censored student newspaper to downplay controversy over firing of popular teacher).

Because schools so avidly use their in-school censorship authority to suppress criticism of school policies, or to dissuade students from discussing issues of social or political concern, it is especially essential that young people have some opportunity to speak out about issues such as sexual harassment by coaches without fear of school retaliation.

Petitioner's case exemplifies the type of case in which a school is facing a potential image crisis that might provoke a community outcry. If Petitioner's information proved to be correct and coaches at Itawamba High School were sexually harassing students, the school would have been criticized for placing students at risk and perhaps even exposed to civil liability. The decision below empowers schools to "kill the messenger" so as to discredit revelations that their students make in *any* off-campus setting – even a speech to the school board, for instance.

"Violence prevention" has become a meaningless catchphrase that can be applied to legitimize virtually any school's punitive decision without regard to the facts. *See, e.g.*, *Cuff v. Valley Central Sch. Dist.*, 677 F.3d 109 (2d Cir. 2012) (school suspended 10-year-old elementary-school student because he drew a crayon picture of a spaceman telepathically making the school explode); *Lavine v. Blaine School Dist.*, 257 F. 3d 981 (9th Cir. 2001) (high school student expelled as a safety risk after showing his teacher a poem about violence, even though police found that he had no access to weapons and was not dangerous). For example, the president of a public university in Georgia, in an effort to silence a student environmentalist critical of the university's planned parking garage, had the student summarily expelled without process on the unfounded rationale that the student might attempt a

repeat of the Virginia Tech campus shootings. See *Barnes v. Zaccari*, 699 F.3d 1295, 1300-01 (11th Cir. 2012). Because "safety" has proven to be such an easily manipulated rationale to which courts defer uncritically when applying *Tinker*, something more must necessarily be required before a school can reach into a student's off-campus life.

Because *Tinker* has proven to be an inadequately protective standard for students' artistic and editorial speech, inhibiting them from expressing themselves at school and subjecting them to at-times capricious punishment when they do, it is essential for the Court to clarify that schools do not have the same level of control over what students say and write on their personal time as they do during school time.

III. STUDENTS USE SOCIAL MEDIA AVIDLY TO ADDRESS IMPORTANT SOCIAL ISSUES.

This Court recognized nearly two decades ago that the Internet is "a unique and wholly new medium of worldwide human communication" that needs vigorous First Amendment protection to thrive. *Reno v. ACLU,* 5321 U.S. 844, 850 (1997) (internal quotation marks and citation omitted). Since this Court recognized the uniqueness of the Internet, it has become a pervasive feature of daily American life – and because of that fact, giving school authorities the power to regulate speech just because it is communicated through electronic means is to give schools unlimited control over all student expression. There is no such thing in the life of the American teen as "non-electronic speech" anymore; there is only "speech." And *all* student speech that is readable on a smartphone may foreseeably be read at (or transported into) a school – as in this case, where the speech was read at school only because a school employee *asked to be*

shown the website – so a standard based on foreseeability provides no rational stopping point to school authority.

Today, 96% of 18-29 year olds use the Internet. *Americans' Internet Access: 2000-2015,* Pew Research Internet Project, http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/ (last visited Dec. 3, 2015). Social media, which allows individuals of all ages to join in networks of users and communicate, has increasingly engulfed the average American's time online. Well-known examples of social media such as Facebook, Twitter, and YouTube "have grown in expanse, complexity, popularity, and recognition, even beyond the realm of internet-savvy users." Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741, 742 (2008). Social media has revolutionized the way Americans communicate, particularly for the younger generation, with 90% of 18- to 29-year-old Internet users reporting that they are active on social networks. *Social Networking Fact Sheet,* Pew Research Internet Project, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Dec. 3, 2015).

The data shows that the younger the user, the more likely that user is to be a prolific user of the Internet and social media. A staggering 92% of teens go online "daily" and 24% of teenagers are online "almost constantly." *Teens, Social Media & Technology Overview 2015,* Pew Research Internet Project, http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/ (last visited Dec. 3, 2015). Furthermore, 57% of teens have started a friendship with someone they met online. *Teens, Technology and*

Friendships, Pew Research Internet Project, http://www.pewinternet.org/2015/08/06/teens-technology-and-friendships/. 91% of teenagers have reported that they use the Internet from their smartphones at least occasionally. *See Teens, Social Media & Technology Overview 2015.* The Pew Center reports that teens are "enthusiastic users of social media sites and apps," with 76% of teens using at least one social media site. *Id.* 71% of all teens use Facebook, as the Petitioner did in this case. *Id.*

This data confirms an increasingly self-evident fact of modern American life: a growing majority of people of all age groups, particularly younger Americans, communicate regularly and extensively through online social networks. And this is unsurprising, because Americans' use of social networking technologies is related to core values: trust, tolerance, social support, community, and political engagement. *See* Keith N. Hampton, Lauren Sessions Goulet, Lee Rainie, & Kristen Purcell, *Social Networking Sites and Our Lives,* PEW RESEARCH INTERNET PROJECT (June 16, 2011), http://www.pewinternet.org/files/old-media//Files/Reports/2011/PIP%20%20Social%20neworking%20sites%20and%20our%20lives.pdf. Regardless of advent of these new means of communication, this Court has continually made clear that "whatever the challenges of applying the constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2733 (2011).

Prior to the advent of the Internet, "individuals lacked the technological megaphone to broadcast their story to the world." Lauren Gelman, *Privacy, Free*

Speech, and "Blurry-Edged" Social Networks, 50 B.C. L. REV. 1315, 1333 (2009). In this way, social media has empowered people who lack the money and social standing to get their messages in front of a public audience – in particular, students who are already in an intimidating relationship of power with their schools. Taylor Bell's whistleblowing speech exemplifies how young people can use this megaphone to reach out for help to a public audience when they fear that their message will be prohibited or ignored by their schools. The Petitioner found that his friends felt uncomfortable around certain coaches and used the Internet to express his concern, much like an earlier generation might have used paper pamphlets

The Petitioner's speech addressed a subject important to the community at large: inappropriate behavior by a public employee toward students. The song lyrics describe the allegations of sexual misconduct at Bell's school and go on to ridicule the coaches for ogling and other inappropriate behavior. The song, as Judge Dennis noted in his dissent below, prominently features public employees and is undoubtedly "socio-political commentary." As this Court noted in *Snyder v. Phelps, supra,* "[t]he arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Snyder,* 562 U.S. at 453. *Snyder* also noted "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight . . . are matters of public import." *Id.* at 454. Petitioner's speech was clearly on a matter of public importance– that of inappropriate behavior by coaches with students. Speech addressing matters of public importance does not lose its constitutional protection because it is insulting or profane. If Taylor Bell was a more traditional commentator using a more traditional method – *i.e.*, a

pamphlet of political cartoons – to make the same point using comparably crude language, it would be readily recognized as absurd for a school to assert punitive authority over his off-campus pamphleteering on the same terms as on-campus speech merely because he was speaking about, and attempting to bring about change within, the school.

Importantly, the disciplinary action being challenged here was *not* a spur-of-the-moment safety decision necessary to remove a person from school to prevent imminent harm. School authorities investigated fully and concluded that no harm was intended or imminent, and that Petitioner committed no crimes necessitating police involvement. Only then – *after* concluding that there was no imminent safety reason to remove Petitioner from school – did the district then impose a semester-long suspension. After-the-fact discipline of *non*-dangerous people is calculated not to make schools safer but to deter the Petitioner and others like him from future whistleblowing. If that censorship is allowed to stand, other students will be unable to utilize this important megaphone for whistleblowing speech about issues of public concern.

IV. SOCIAL MEDIA IS UNIQUELY SUSCEPTIBLE TO MISINTERPRETATION.

Young people who use social media are particularly at risk of misunderstandings as to their views and opinions on the Internet. The instant reblogging and re-contextualizing of information, which often involves multiple rounds of republishing to larger and more diverse audiences, implicates corresponding risks for misunderstanding. Teens themselves are sharing more information than ever on social media. *See* Mary Madden, et al., *Teens, Social Media, and Privacy,* Pew

Research Ctr.(May 21, 2013), http://www.pewinternet.org/files/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf (reporting results of six-year survey of teen online behavior). As noted above, an overwhelming percentage of teenagers use social media regularly.

To begin with, the original context of a message, understandable and benign to an intended set of initial recipients, may be misunderstood when republished to a different audience that is unaware of the message's original context. Therefore, even when people say exactly what they mean online, their words can be misunderstood. As a result, speech authored by public school students like Taylor Bell is being read by older audiences who may not understand the vocabulary, cultural references and other context. Danah Boyd, IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS 30 (2014) (hereafter referenced as "IT'S COMPLICATED") ("Unfortunately, adults sometimes believe they understand what they see online without considering how teens imagined the context when they originally posted a particular photograph or comment."). The record reflects that the Petitioner was punished for the method as much as the content of his speech. A rap song posted on the Internet was as foreign to Petitioner's school board as was contemporary video gaming culture to the California legislators who enacted the unconstitutional statute struck down by this Court in *Brown, supra.*

Many teens post information on social media that they think is witty, relevant or intended to give a winking impression to a narrow audience, without considering how this same content might be read out of context. Boyd, IT'S COMPLICATED 44. In this regard, "[t]he intended audience matters, regardless of the actual audience." *Id*. at 30. By example, simply

posting, "What a fair test! Prof. Smith is really a great teacher," an authority figure might see that quotation and perceive that the student did, in fact, love Prof. Smith. Or, the facts may reflect that Prof. Smith is an antagonistic person that the student decided to sarcastically post about for the benefit of other social-media users who shared the same view and were knowledgeable of the back-story. For this reason – because words on social media may mean what they say, may mean *exactly the opposite* of what they say, or may mean something in between – empowering schools to throw students out of school based on an adult authority figure's perception of how others might react to remarks on a social-media page is plainly too much authority.

A recent real-life situation offers a startling example of the danger of social media misinterpretation. A Texas student spent months in jail after making a sarcastic comment online in relation to a video game. Doug Gross, *Teen in Jail for Months Over 'Sarcastic' Facebook Threat,* CNN TECH (July 3, 2013), http://www.cnn.com/2013/07/02/tech/social-media/ facebook-threat-carter/. Although the student immediately followed up his comment with "LOL" and "J/K" – commonly known Internet terms indicating that a person is not being serious – another Internet user saw the comment, took it seriously and reported it to police, resulting in felony charges. *Id*. This case starkly illustrates the risk of a foreseeability-based standard that places a student's entire future in jeopardy for what may be a single careless joke uttered in an unguarded setting away from "best-behavior" school functions. In the online forum of the 21st century, it *is* foreseeable that speech may be forwarded endlessly until it reaches someone with unusually thin skin or an unusually literal sense of humor – but speakers (in

particular, youths) cannot be held liable for the unanticipated overreactions of total strangers who may not share the same cultural vocabulary.

In comparison to more traditional forms of communication, a person publishing a social media message generally has far less control over the scope of his audience. Using online social networks can lead to an undefined circulation and distribution of shared content, making it difficult for speakers to limit their audiences. Gelman, *Privacy*, *Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. at 1329. Of course, for many social network users, the benefit of making information available to any interested individual outweighs the cost of allowing access to an undefined group of people. *Id*. at 1317-18.

Further, the interactivity of the Internet allows receivers to use their own volition to "pull" speech, rather than having it "pushed" at them from speaker-initiated sources like the mail or the telephone. Kathleen Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1668. When communicating through the mail, for example, the speaker has substantially more control over where the communication ends up and can intentionally direct the message toward a particular target. *See id*. ("[E]ven a speaker who tries to confine access to information on the basis of the geographical origin of the audience may be foiled because cyberspace addresses do not now exist in territorial domains."). In contrast, online social network users often cannot control or do not appraise their degree of control over their situation. Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. at 1328-29.

Art, literature and music often use images of violence, as Petitioner did in this case, to figuratively make a point. The fact that rap music itself often uses violence as a metaphorical tool, combined with the hyper-sensitivity to perceived threats of violence on school campuses, invites misunderstandings with tragic consequences for students' academic careers and life prospects. Suspension or expulsion from school are now proven beyond dispute to be life-altering events that can change the trajectory of a student's future for the worse. *See, e.g.,* Donna St. George, *Study shows wide variety in discipline methods among very similar schools*, THE WASHINGTON POST (July 18, 2011) (describing results of two-year study tracking 1 million Texas students that demonstrated even a single school suspension "greatly increased" the odds that a student would enter the criminal justice system). A court would never afford limitless deference to a government agency to run roughshod over constitutional rights because the penalty was "only" a ticket or "only" a fine. Given the growing scholarly consensus over the lifelong "school-to-prison pipeline" implications of being removed from school, courts can no longer shrug off constitutional overreaching because the result is "only" a suspension or "only" an expulsion. A school cannot be allowed to impose such ruinous consequences on the basis of what may be no more than a cultural miscommunication.

In sum, the stark practical differences between speech inside the school building versus speech on off-campus personal Internet accounts[2] counsels in favor

[2] To be clear, Amici do not urge that schools are powerless to reasonably regulate the use of the schools' own computers or Internet service, and a student who used class time to create the Taylor Bell rap video on a school computer could be subject to

of a two-tiered standard with greater protection for the latter.

CONCLUSION

For the foregoing reasons, the Student Press Law Center respectfully urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

SCOTT STERNBERG
Counsel of Record
BALDWIN HASPEL BURKE & MAYER, LLC
1100 Poydras St. Suite 3600
New Orleans, LA 70163
(504) 569-2900
sls@bhbmlaw.com

FRANK D. LOMONTE
THE STUDENT PRESS LAW CENTER
1608 Rhode Island Ave. NW
Suite 211
Washington, DC 20036
(202) 785-5450

Counsel for Amicus

December 21, 2015

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discipline to the same extent as a student in an earlier era who used class time to doodle a cartoon on his exam paper. Nor do Amici urge that schools lack the power to punish "true threats" or other acts of constitutionally unprotected speech that are transmitted from an off-campus location with the wrongful intent of disrupting school. A student who used Twitter to transmit a realistic bomb threat to his school would be subject to discipline and without constitutional recourse just as, in an earlier era, a student would have been disciplined for using an off-campus payphone to transmit a threat.