NO. 16-9999

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2016

WASHINGTON COUNTY SCHOOL DISTRICT,

Petitioner,

v.

KIMBERLY CLARK, a minor,
by and through her father ALAN CLARK,

Respondent.

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

BRIEF FOR PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Should courts employ a reasonable-person, objective inquiry to determine if threats are true threats so as to categorically exempt them from First Amendment protection?

II. Does the *Tinker* substantial-disruption standard apply to a student's Internet posts made from a personal computer when those messages are likely to cause material and substantial disruptions because they discuss controversial school events and threaten another student with violence?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment in this matter on January 5, 2017. R. at 25. Petitioner timely filed a petition for writ of certiorari, which this Court granted. R. at 40. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

STATEMENT OF THE CASE

In August of 2015, the Washington County School District (the "School District") adopted a policy entitled "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" ("Nondiscrimination Policy"). R. at 15. The School District had an "unfortunate trend of students bullying other students based on their gender identity." R. at 21. Among other things, the policy allowed students to participate in athletics based on the gender identity they consistently asserted at school. R. at 15. The School District also adopted an "Anti-Harasment

[sic], Intimidation & Bullying Policy" ("Anti-Harassment Policy"), prohibiting "harassment, intimidation, bullying and threats communicated by any means . . . ." R. at 17.

In the fall of 2015, Kimberly Clark was a freshman at Pleasantville High School ("Pleasantville") R. at 13. Taylor Anderson was a sophomore, who was born a biological male, but identified as a female. R. at 13. Both Clark and Anderson were members of the Pleasantville girls' basketball team. R. at 23. During an intrasquad game, Clark and Anderson "engaged in a loud disruptive verbal argument on the court. R. at 1, 2. As a result of the incident, both students were ejected from the game. R. at 23. Later that evening, Clark made the following post on her Facebook page:

> Kimberly Clark
> I can't believe Taylor was allowed to play on a gils' team! That boy (that IT!!) should never be allowed to play on a girls' team. TRANSGENDER is just another word for FREAK OF NATURE!!! This new school policy is the dumbest thing I've ever heard of" It's UNFAIR. It's IMMORAL. And it's AGAINST GOD'S LAW!!!
> Taylor better watch out at school. I'll make sure that IT gets more than just ejected. I'll take IT out one way or another. That goes gor the other TGs crawling out of the woodwork lately too . . .

R. at 18.

On November 2, 2015, the parents of Anderson and Josie Cardona ("Cardona"), another transgender student, met with Pleasantville Principal Thomas Franklin to show him Clark's post. R. at 13. Principal Franklin observed that Anderson and Cardona "were visibly distressed." R. at 13. Anderson and Cardona's parents expressed concern that Clark would resort to violence. R. at 13. They also had doubts about continuing to allow their children to participate in girls' basketball. R. at 13. Additionally, other students complained about the post and Principal Franklin observed that a few of them were "visibly upset." R. at 13. As a result of Clark's post, Anderson's parents kept her home from school for two days following the incident. R. at 13.

In a meeting with Principal Franklin, Clark admitted to authoring the post. *Id.* She explained that, although she thought only her friends would see the post, she knew that it might be passed on to others. *Id.* Clark believed that allowing students born as males to play on the girls' basketball team was "unfair and dangerous" and that it was "immoral and against God's law for people to try to change their God-given gender." R. at 23. Clark also said that her remarks about "IT" and other "TGs" "getting it" were intended as jokes. R. at 21.

Principal Franklin suspended Clark from school for three days pursuant to the Anti-Harassment Policy, which Clark appealed. R. at 21–22. The Washington County District Disciplinary Review Board ("Review Board") upheld the suspension, finding that Clarks post was offensive, threatening, and made with knowledge that some of Clark's friends "were likely to pass on her remarks to transgender students." R. at 22. The Review Board also found that the post had been materially disruptive of the high school learning environment and collided with the rights of other students to be secure. Additionally, the Review Board found that the portion of Clark's post which stated, "Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take it out one way or another. That goes for the other TGs crawling out of the woodwork lately too . . ." constituted a true threat. R. at 22.

Clark's father filed suit seeking a declaratory judgment that her suspension was unconstitutional and an order requiring the school district extinguish any record of her suspension. R. at 3. On cross motions for summary judgment, the district court ruled in favor of the school district, finding the second portion of Clark's post constituted a true threat. R. at 3. Further, the court held that even if the post was not a true threat, it was materially disruptive and collided with the rights of other, subjecting it to school regulation. R. at 3.

The Fourteenth Circuit reversed and remanded with instructions that judgment be entered in favor of Clark. R. at 1, 15. The court found that Clark's post was not a true threat and that it was not subject to regulation under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 343 (1969); R. at 15. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

I.

The court of appeals erred in finding that Clark's Facebook posts were not a true threat. While it is well settled that the First Amendment does not protect speech that is a true threat, application of the true threat doctrine remains in flux. This Court should adopt a two-prong, objective standard to determine when speech is a true threat, which falls outside of the First Amendment. The first prong should require, as a threshold issue, that the "threat must be intentionally or knowingly communicated to either the object of the threat or a third person." The second prong should require, when evaluating a whether a statement is a threat, courts should ask whether the recipient of the alleged threat could "reasonably conclude that it expresses a determination or intent to injure presently or in the future." Adopting this objective approach affords proper deference to school administrators, who serve on the front lines of combating increasing school violence.

Additionally, the School District should prevail under either the objective recipient or objective speaker tests. Clark's post would constitute a true threat under either test because it specifically targeted Anderson by threatening to "take IT out" and telling her to "watch out at school" on the same day the two students engaged in a heated argument. While some courts have chosen to engage in a "largely academic debate" over which objective approach to adopt, Clark's specific threats against Anderson, as a transgender student, constituted a true threat.

II.

The court of appeals also erred in concluding that *Tinker*'s substantial disruption standard does not apply to Clark's speech simply because the speech originated off campus. The advent and expansion of the Internet requires that schools have the authority to sanction speech that causes substantial disruption to the educational environment. Applying *Tinker* to off-campus speech that will reach campus with reasonable foreseeability and causes disruption, strikes the appropriate balance between the constitutional rights of students and the school's duty to safeguard the educational environment.

Applying *Tinker* in this way, this Court should find the District did not violate Clark's First Amendment rights. Based on the threatening nature of the post, the amount of time school officials spent mitigating the effects of the post, and the risk of future violence and harassment on campus, the post caused substantial disruption and collided with the rights of other students to be secure and let alone at Pleasantville High School. Accordingly, the School District had the authority and the duty to discipline Clark for her speech.

This Court should reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit and reinstate the judgment of the district court.

ARGUMENT AND AUTHORITIES

The district court granted summary judgment on legal questions. R. at 3. This Court reviews questions of law de novo. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

I. CLARK'S STATEMENTS THAT CONSTITUTED A "TRUE THREAT" WERE NOT ENTITLED TO THE PROTECTION OF THE FIRST AMENDMENT.

This case implicates the "true threat" exception to the First Amendment. This Court has held that "threats of violence are outside the First Amendment," and that a legislature

accordingly may "ban a 'true threat,'" *Virginia v. Black*, 538 U.S. 343, 359 (2003) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)). "[A] prohibition on true threats," the Court has stated, "'protects individuals from the fear of violence' and 'from the disruption that fear engenders.'" *Id.* at 360 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)). Although this Court created the "true threat" doctrine, the Court has not explained precisely how to determine if a statement constitutes a true threat.

This Court first recognized the true threat exception in *Watts v. United States*. There, Robert Watts was convicted for violating a federal statute that prohibited "knowingly and willfully" making a threat "to take the life of or to inflict bodily harm upon the President of the United States." *Watts*, 394 U.S. at 709. In 1966, during a political debate at a public rally, Watts made the following statement regarding the receipt of his draft classification: "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 707. In a short per curiam opinion, the Court held that "the statute initially requires the Government to prove a 'true 'threat.'" *Id.* at 709. Because the Court did not "believe that the kind of political hyperbole indulged in by [Watts] fits within that statutory term," it reversed the conviction. *Id.* at 708. The Court relied on three factors to reach its conclusion that the statement was not a true threat, including that the statement (1) was made during a political debate, (2) was expressly conditional in nature, and (3) caused the listeners to laugh. *Id.*

Thirty-seven years later in *Virginia v. Black*, this Court provided further guidance on the "true threat" exception. The *Black* decision was based on three separate criminal prosecutions. 538 U.S. at 359. Each defendant was charged with, and later convicted of, violating Virginia's cross-burning law. *Id.* at 364. The statute, prohibited the burning of a cross "with the intent of intimidating any person or group of persons." *Id.* It also had a provision which stated that "[a]ny

such burning of a cross shall be prima facie evidence of an intent to intimidate." *Id.* at 366. Barry Black was convicted under the statute for burning a cross at a Ku Klux Klan rally that he led. *Id.* at 361. The cross was burned on private property with the owner's permission but could be seen from a public highway nearby. *Id.* The two other defendants, Richard Elliott and Jonathan O'Mara, were convicted for attempting to burn a cross in the yard of an African American neighbor. *Id.* at 363. All three defendants appealed, arguing that the cross-burning statute was unconstitutional under the First and Fourteenth Amendments. *Id.* at 367.

This Court defined true threats in *Black*. Writing for a five-Justice majority, Justice O'Connor held that "'[t]rue threats' encompass those 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. *Id.* at 359. The speaker need not actually intend to carry out the threat. *Id.* She also explained that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. *Id.*

Two years ago, this Court had another opportunity to provide clarity to the "true threat" analysis when it considered *Elonis v. United States*, 135 S. Ct. 2001, 2025 (2015). That case involved a conviction for making harassing Facebook posts. *Id.* at 2004. The defendant made numerous postings with threatening messages concerning his ex-wife. *Id.* Based on those postings, he was charged and convicted of interstate communication of threats in violation of 18 U.S.C. § 875(c) (2012). Although he challenged his conviction on statutory and First Amendment grounds, the Court chose not to reach the First Amendment issue. In construing the statute, the Court held only that a negligence standard could not sustain a conviction for threatening language posted on Facebook. *Id.* at 2011–12 ("Given our disposition, it is not

necessary to consider any First Amendment issues."). The decision was based purely on statutory grounds and the Court did not even address whether a reckless standard would satisfy the *statutory* requirements. *Id.* at 2012 (emphasis added).

This case squarely presents the issue not addressed in *Watts*, *Black*, and *Elonis*. This case necessarily requires a determination of the appropriate standard for defining a "true threat" within the meaning of the First Amendment exception.

A. This Court Should Adopt the Objective Approach Used in the Majority of Circuit Courts to Determine the Existence of a "True Threat."

This case addresses a circuit split regarding the proper approach to identifying statements that qualify as "true threats." The district court adopted the objective approach employed in a majority of circuits.[1] R. at 6 (citations omitted). Under this approach, the inquiry focuses on whether the speaker knowingly communicated a statement in a way that an objective, reasonable person could find threatening. R. at 6 (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004)). The only intent requirement is a general one, requiring that the speaker knowingly made the statement. The court of appeals applied the subjective-intent analysis employed in the Ninth Circuit.[2] Under this subjective-intent approach, the speaker must have a subjective intent to intimidate before liability can attach for making a "true threat." R. at 29–30.

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[1] *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617 (5th Cir. 2004) (adopting an objective approach); *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002) (same); *United States v. Malik*, 16 F.3d 45, 48 (2d Cir. 1994) (same); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990) (same); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) (same); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992) (same); *United States v. Welch*, 745 F.2d 614, 619 (10th Cir. 1984) (same).

[2] *See United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (adopting a subjective approach); *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (same).

The district court's objective approach is the better standard, particularly in the school setting. This Court should adopt a two-prong, objective standard in the school setting. First, as a threshold issue this Court should require that the "threat must be intentionally or knowingly communicated to either the object of the threat or a third person." *Porter*, 393 F.3d at 616; *see Doe v. Pulaski Cty. Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002) (citing *Planned Parenthood of the Columbia Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1057 (9th Cir. 2002) (en banc)). Second, when evaluating a whether a statement is a threat, the court should ask whether the recipient of the alleged threat could "reasonably conclude that it expresses a determination or intent to injure presently or in the future." *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 369 (9th Cir. 1996). Adopting such a framework gives proper deference to the decisions of school administrators in the face of increasing school violence. Further, such an approach prevents school districts from having to endure protracted and costly litigation that would result from requiring a subjective inquiry into students' minds.

The court of appeals erred when following the rationale of the Ninth Circuit's decision in *United States v. Cassel*. 408 F.3d 622, 631 (9th Cir. 2005). *Cassel* misreads *Black* as mandating a subjective approach under the First Amendment. *Id.* However, *Black* was a plurality opinion in a criminal case decided primarily on statutory grounds.[3] Not only did the Fourteenth Circuit make the same mistake, but it also confused the prevailing cases and tests when it stated, "Consequently we disagree with the District Court that the *'objective approach' articulated by*

[3] *See Black*, 538 U.S. at 359–60; *Elonis*, 135 S. Ct. at 2025 (Thomas, J., dissenting) ("Neither [*Watts* nor *Black*] addresses whether the First Amendment requires a particular mental state for threat *prosecutions*."); Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1254 (2006) ("[T]he scope and contours of the true threats doctrine was not the focus of the parties or Justices involved.").

the Ninth Circuit in Porter . . . . The *Fifth Circuit's subjective approach* seems to be more faithful to *Virginia v. Black*, and that is the standard we apply in the case before us." R. at 6 (emphasis added). In reality, the Fifth—not the Ninth—Circuit decided *Porter*. *See Porter*, 393 F.3d 608–25. Additionally, the Fifth Circuit uses an objective, as opposed to subjective approach. *See id.*

In *Porter*, a fourteen-year-old student sketched his school under attack by armed persons. 393 F.3d at 611. The drawing, which was made in the privacy of the student's home, also contained disparaging remarks about the school's principal and depicted a brick being hurled at him. *Id.* Over two years later, the student's brother took the drawing to school and showed it to others. The student was expelled and eventually placed in an alternative school. *Id.* at 612. His mother brought suit, alleging First Amendment violations under 42 U.S.C. § 1983. *Id.* The district court granted summary judgment in favor of the school board, concluding that the drawing was not entitled to protection under the First Amendment. *Id.* at 613.

The Fifth Circuit framed the intent necessary for a true threat as a threshold issue. *Id.* at 617. The court held that because the drawing was taken to the school without the student's knowledge, it was not "intentionally or knowingly" communicated and the student did not lose his First Amendment protections. *Id.* Thus, under this framework, the speaker must intentionally or knowingly communicate the alleged threat before the court turns to whether the statement "constitutes a true threat in the eyes of a reasonable and objective person." *Id.* at 616. This threshold inquiry serves to protect truly innocent conduct.

This two-pronged objective standard better addresses the concerns of threatening conduct in the school setting and is not without support. As Justice Thomas has noted: "[A] high-school student who sends a letter to his principal stating that he will massacre his classmates with a

machine gun, even if he intended the letter as a joke, cannot fairly be described as engaging in innocent conduct." *Elonis*, 135 S. Ct. at 2023 (Thomas, J., dissenting).[4]

By focusing on whether the speech at issue constitutes a true threat in the eyes of a reasonable and objective person, the *Porter* approach better addresses the unique concerns at play in a true threat case. "A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation." *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring and dissenting). The danger of a threat is not only that the violence may be carried out; it is that when faced with the fear a threat imposes, people act unpredictably. Thus, by focusing on how a reasonable person would view the threat, the approach of *Porter* better addresses the reactionary concerns that make true threats dangerous.

The use of a subjective approach also creates serious issues concerning its application by school administrators. As courts have recognized "we live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis." *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001). "School administrators must be permitted to react quickly and decisively to address a threat of physical violence . . . without worrying that they will have to face years of litigation second-guessing their judgment . . . ." *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 772 (5th Cir. 2007). The subjective standard articulated in *Cassel*, was drafted with criminal burdens in mind, making it too high of a standard for the special circumstances of school discipline.

[4] Justice Thomas also further rejected a subjective standard, "It also cannot be determined solely by the reaction of the recipient, but must instead be 'determined by the interpretation of a *reasonable* recipient familiar with the context of the communication.'" *Elonis*, 135 S. Ct. at 2019 (Thomas, J., dissenting) (quoting *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994)) (emphasis in original).

Additionally, if this Court were to adopt a subjective standard, it would result in the costly and lengthy need to try school discipline cases to a jury. To adopt a subjective approach, this Court would have to ignore the fact that it was crafted in a criminal context, where the defendants are entitled to a jury trial. Additionally, a subjective standard would increase the potential for factual issues by asking courts and juries to determine the mental state of school children, a complicated task.

Unconstrained by this Court's previous criminal statutory interpretation, this Court should adopt the objective approach as articulated by *Porter* to evaluate what constitutes a true threat under the First Amendment. The *Porter* standard better addresses the unique reactionary problems that threats create and would not subject school districts to protracted and extensive jury-trial litigation. Further, even the Ninth Circuit has recognized the usefulness of an objective approach. *See Cassel*, 408 F.3d at 629–630 ("On one occasion, we seemed to advocate both positions within the confines of a single opinion.") (citing *Planned Parenthood of the Columbia Willamette*, 290 F.3d 1058). Thus, this Court should reject a subjective intent approach in favor of the *Porter* standard when evaluating what constitutes a true threat in a civil context.

The district court's objective standard clearly distinguishes between protected speech and true threats. It weighs the value of the speech to society and considers the impact on the target. In this manner, the objective standard serves the goal underlying the true-threat doctrine—deterring those who target and cause fear with true threats.

B. Under the Objective Approach Used in the Majority of Circuit Courts, Clark's Statements Constituted a "True Threat" Because She Knowingly Communicated the Statements in a Way That a Recipient Could Reasonably Find Threatening.

While some courts disagree on the form of the objective standard for true threats, the debate is "largely academic because in the vast majority of cases the outcome will be the same

under both tests." *Doe*, 306 F.3d at 623 ("[T]he result will differ *only* in the extremely rare case when a recipient suffers from some unique sensitivity *and* that sensitivity is unknown to the speaker.") (emphasis in the original). Thus, whether the court adopts the reasonable speaker, reasonable recipient, or declines to specify an objective standard, Clark's statements constitute a true threat that is not subject to the protection of the First Amendment. Clark specifically threatened to harm Anderson when she said, "Taylor better watch out at school . . . ." and that "I'll take IT out one way or another. That goes for the other TG's . . . ." Before the Ninth Circuit improperly reacted to this Court's holding in *Black*, even its precedent shows that Clark's statements constitute a true threat.

In *Lovell*, the court examined two statements made by a high school student to a guidance counselor. 90 F.3d at 369. The student became upset after being told changes might not be made to her schedule. *Id.* The student's exact response was disputed. *Id.* The student claimed she said, "I'm so angry, I could just shoot someone." *Id.* Meanwhile, the guidance counselor claimed the student said, "If you don't give me this schedule change, I'm going to shoot you!" *Id.* The student admitted to making her version of the statement but claimed she did not "mean anything by it." *Id.* After the counselor reported the incident and the fact that she felt threatened, the student was suspended for three days. *Id.* Applying an objective, reasonable speaker standard to the guidance counselor's version, the court found the threats were not entitled to First Amendment protection in any forum. *Id.* at 370. The statement was "unequivocal" and specific enough to constitute a true threat, particularly "when considered against the backdrop of increasing violence among school children today." *Id.* at 372. Additionally, when considering the student's contention that she said, "I could just shoot someone," the court noted that when the "evidence is evenly balanced . . . the party with the burden of persuasion loses." *Id.* at 373. Thus,

as the plaintiff, the student had the "ultimate burden of proving [the school district] violated her First Amendment rights." *Id.* Accordingly, the court reversed the district court and upheld the suspension. *Id.*

Clark's post threatening that: "Taylor better watch out. I'll make sure IT gets more than just ejected. I'll take IT out one way or another . . ." constitutes a true threat outside of the protection of the First Amendment. R. at 18. The post clearly passes the threshold issue of intentional communication because Clark admitted that she authored the post and knew that it might be passed on to others. R. at 13; *see Doe*, 306 F.3d at 624 (holding a student intentionally communicated a threat when he "permitted" a friend to read a letter knowing there was a "possibility" threatening statements about an ex-girlfriend would be disclosed to the ex-girlfriend).

Like in *Lovell*, using either the perspective of the speaker or recipient, a reasonable person would conclude that Clark's post was a serious threat of harm or assault. Earlier that day, Clark had been involved in an altercation with Anderson. *Clark I*, C.A. No. 16-9999, at 2. While the full context of the altercation is unknown, the district court found the need to characterize it as "a loud disruptive verbal argument on the court" in which both students were ejected. *Id.*

Following time to cool down from the initial frenzy of the argument, a reasonable speaker or listener would conclude that Clark's post referring to Anderson as "IT" and threatening to "get" and "take out" Anderson was a serious threat of harm. Further, the fact Clark specifically targeted Anderson by name makes the threat all the more worrisome. R. at 13. As Justice Alito has noted, "Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously." *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring and dissenting). Anderson, her parents, and the school district found Clark's statements threatening.

As a result of the post, Anderson stayed home from school for two days. R. at 13. Even students who were not mentioned by name found the post threatening and were "visibly distressed." R. at 13. Thus, the Fourteenth Circuit's judgment should be reversed because under either the objective recipient or speaker standard, Clark's threats to "get" and "take" out Clark constituted a true threat outside the protection of the First Amendment.

II. EVEN IF THE FIRST AMENDMENT APPLIES, THE SCHOOL DISTRICT MAY CONSTITUTIONALLY DISCIPLINE CLARK FOR HER INTERNET SPEECH THAT MAY REASONABLY LEAD TO A SUBSTANTIAL DISRUPTION OF, OR MATERIAL INTERFERENCE WITH, SCHOOL ACTIVITIES OR THAT INVADES THE RIGHTS OF OTHER STUDENTS.

This case also implicates the delicate balance that must be struck between students' First Amendment rights in the school setting and administrators' latitude to maintain an educational environment that teaches the "habits and manners of civility essential to a democratic society." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Despite this language, this Court has recognized that in light of the "special characteristics of the school environment," public schools must be able to punish certain types of student speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Although this Court has developed a body of jurisprudence that addresses the contours of a student's right to freedom of speech, the Court has not yet delineated the limits of school regulation of student Internet speech.

This Court first recognized students' right to free speech in *Tinker*, where a group of students planned to express their objections to the Vietnam War by wearing black armbands to school. *Id.* at 505. Upon learning of the plan, officials adopted a policy that any students wearing such armbands must remove them or face suspension. *Id.* The students pursued their plan and were suspended from school until they agreed to return without the armbands. *Id.* Their parents

then filed suit asking that the school officials be restrained from disciplining the students on the ground that such discipline violated their children's constitutional right to free speech. *Id.*

Tinker evaluated "the area where students in the exercise of First Amendment rights collide with the rules of the school authorities." *Id.* at 507. Recognizing the tension that exists in this area, Justice Fortas famously wrote that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. But the Court also "emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." *Id.* at 507. Concluding, however, that the students' plan to wear armbands did not "concern speech or action that intrudes upon the work of the schools or the rights of other students," the Court ultimately held that the suspension of the students was unconstitutional. *Id.* at 508. This conclusion was based on the fact that there was nothing in the record that "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." *Id.* at 514.

Although the Court in *Tinker* held that the school lacked a constitutionally valid reason to restrict the students' freedom of expression, the decision acknowledged that student speech is not absolutely protected. *Id.* at 512. As the Court aptly noted, "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513.

This case presents a circumstance where the *Tinker* analysis is appropriate and met. Clark engaged in a practice that is becoming all too familiar with students—cyberbullying. By its very

nature, the bullying involved in this case created a palpable concern that school officials needed to address. They constitutionally did so.

A. The First Amendment Does Not Categorically Insulate Off-Campus Speech Posted to the Internet by a Student Using a Personal Computer in Her Own Home.

The initial inquiry is a purely jurisdictional one, considering if the School District has the authority over the speech and, if so, this Court's school-speech precedent applies. The answer to both questions is yes. The court of appeals held that "*Tinker* does not apply to Internet speech originating off campus from a personal computer." R. at 13. This holding creates a categorical exemption for all off-campus speech and ignores the reality of modern communication. Given modern technological advances, students may disrupt the educational mission with the click of a button, regardless of where they may be physically located. To stay true to the deliberate balance this Court struck in *Tinker* in the age of the Internet, school officials must be given the discretion to respond to on-campus problems created by off-campus speech.

1. This Court has never drawn a geographic boundary limiting the reach of school authority under *Tinker*.

When this Court decided *Tinker*, it had no occasion to elaborate on the specific scope of its holding because the speech involved there occurred on campus, having crossed the proverbial "schoolhouse gate." 393 U.S. at 506. Indeed, all of this Court's school-speech cases, thus far, have involved speech occurring on campus or at school-sponsored activities. *Tinker*, 393 U.S. at 506 (addressing students wearing arm bands on campus); *Bethel Sch. Dist.*, 478 U.S. at 677 (addressing vulgar speech at school assembly); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988) (addressing speech in school newspaper); *Morse v. Frederick*, 551 U.S. 393, 401 (2007) (addressing sign at school-sponsored attendance at Olympic Torch relay). And when asked, this Court expressly rejected an attempt to categorically exempt off-campus speech from

school discipline. *See Morse*, 551 U.S. at 400–01. Once again, this Court should refuse to draw bright lines based on where speech originated.

A bright-line, geographical rule is unworkable in the digital age. Speech on the Internet is both everywhere and nowhere at the same time. Bryan Starett, Tinker*'s Facebook Profile: A New Test for Protecting Student Cyber Speech*, 14 Va. J. L. & Tech. 212, 225 (2009). While the speaker may be off campus when delivering the message, others can contemporaneously receive the message on campus. *Id.* When online speech is received at school, it has the same propensity to interfere with the school environment as messages originating on campus. Thus, it undermines the fundamental premise of the school-speech jurisprudence—that school officials have the right and responsibility to maintain a safe educational environment—to shield all messages originating off campus from the school's authority.

2. This Court should adopt the "reasonable foreseeability" analysis employed in the Fourth Circuit and permit public schools to discipline students for Internet speech that could reasonably be expected to reach the school environment and cause a disruption within it.

The rule in *Tinker* should be applied to this Internet speech because Clark could reasonably expect her statements on Facebook to reach the school environment. Rather than the categorical, bright-line geographic rule used by the court of appeals, this Court should rely on the standard used in the Fourth Circuit to qualify a student's off-campus speech for on-campus punishment. *See Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011).

In *Kowalski*, a school punished a student for creating a MySpace webpage called "S.A.S.H.," which stood for "Students Against Slut Herpes" and which was largely dedicated to ridiculing another student. *Id.* at 567. Other students viewed the webpage and posted comments. *Id.* at 572. In upholding the school's discipline of the student, the Fourth Circuit determined it

was reasonably foreseeable that the student's speech, which originated off-campus, "would reach the school via computers, smartphones, and other electronic devices, given that most of the S.A.S.H. members and the target of the group's harassment were Musselman High School students." *Id.* at 574. The appellate court rejected the student's argument that the First Amendment protected her Internet speech published from her home computer and explained:

> Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment. . . . There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by the school officials in carrying out their role as the trustees of the student body's well-being.

Id. at 573. Other courts have followed similar approaches to reach the same conclusion.[5]

The reasonable foreseeability standard is a threshold inquiry that asks if "it is reasonably foreseeable that the speech would come to the attention of the [school] administration." *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007). If it is reasonably foreseeable that

[5] *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 384 (5th Cir. 2015) (en banc) (applying *Tinker* to discipline of student for Internet posting of video of rap recording made off campus containing threatening language against two coaches), *cert. denied*, 136 S. Ct. 1166 (2016); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013) (applying *Tinker* to student's off-campus MySpace post that discussed shooting fellow students); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011) ("Assum[ing] without deciding that *Tinker* applies to J.S.'s off campus speech" stemming from creation of a disparaging, fake MySpace profile for principal); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011) (applying *Tinker* to off-campus Instant Messaging posting that mentioned a gun and shooting other students); *Doninger v. Niehoff*, 642 F.3d 334, 346 (2d Cir. 2011) (applying *Tinker* to off-campus blog post designed to reach fellow students); *Boim v. Fulton Cty. Sch. Dist.*, 494 F.3d 978, 982 (11th Cir. 2007) (applying *Tinker* to essay written off campus describing a dream about shooting math teacher); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007) (applying *Tinker* to an off-campus Instant Messenger transmission with a small drawing suggesting that a named teacher be shot and killed); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (applying *Tinker* to poem written off campus and later brought onto campus by the student).

speech will reach the school, the school has disciplinary authority over the speech. If it is not reasonably foreseeable, the school does not.

This reasonable foreseeability standard is the best approach because the Internet has made the on-campus/off-campus distinction meaningless. The analysis best accounts for the unique nature of the Internet, social media, and its increasing power to permit off-campus speech to reach the school environment quickly and effortlessly. A threshold of reasonable foreseeability maintains *Tinker*'s focus on harm to the educational mission. The *Tinker* standard is met when speech "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." 393 U.S. at 514. Because school officials can lawfully punish students for speech that results in a reasonable forecast of disruption, *Tinker* applies to speech that originates off campus but will reach the educational environment with reasonable foreseeability. Applying *Tinker* in this manner accounts for the new difficulties school officials face in keeping order due to the expansion of the Internet. Of course, "*Tinker*'s simple armband, worn silently and brought into [the] classroom, has been replaced by . . . complex multi-media web site[s], accessible to fellow students, teachers, and the world." *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 863–64 (Pa. 2002). This reasonable foreseeability threshold adapts *Tinker* to the changing technological environment. *See* James M. Patrick, *The Civility Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. Cin. L. Rev. 855, 886 (2010).

Relying on a geographic boundary of a school campus to determine when a school can sanction speech would undermine the intended goal of *Tinker*. Under the court of appeals' rule, a student could freely send a message to students encouraging disruptive events at a school on an electronic device a few feet, or a few blocks, away from school. Disruptive speech, "whether it

stems from time, place, or type of behavior," should not be "immunized by the constitutional guarantee of free speech" merely because the speaker stood one foot off campus and shouted, or sent a social media message, into the school. *See Tinker*, 393 U.S. at 513. As Judge Jordan of the Third Circuit Court of Appeals explained:

> It is, after all, a given that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic" . . . and no one supposes that the rule would be different if the man were standing outside the theater, shouting in. Thus it is hard to see how words that may cause pandemonium in a public school would be protected by the First Amendment simply because technology now allows the timing and distribution of a shout to be controlled by someone beyond the campus boundary.

Layshock ex rel. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 221 (3d Cir. 2011) (Jordan, J., concurring) (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

Clark's Facebook post meets the reasonably foreseeability standard employed in the Fourth Circuit. There are significant connections between Clark's speech and the school. Though the record reflects that she posted the online message for her friends to see, she conceded knowing that social media messages were likely to spread beyond the intended audience. R. at 23. She also admitted knowing that the message would eventually reach the target's attention. R. at 3; *compare J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010) (holding that, because the student posted her video to YouTube and it was publicly available, a nexus existed between the Internet speech and the school), *with Porter*, 393 F.3d at 616 (holding that school could not punish student who drew picture at home depicting violence at school and left it in a drawer a his home for two years after another student brought the drawing to school because the author did not intend for the speech to reach campus).

By using the reasonably foreseeable analysis, the Court would be applying *Tinker* in light of the technological realities of our society and ensuring that school officials are not helpless in

preserving order so teachers can accomplish their mission of educating students. The facts of this case illustrate why this standard is desperately needed. Clark's speech was inherently school related, antagonistic toward a group of students, and was publicly disseminated to other students at the school. The School District not only has the right to address Clark's speech but also has the responsibility to do so.

B. The Harm Caused by Clark's Internet Speech Meets the *Tinker* Standard.

After the Court concludes that the School District has authority over the speech at issue, it must determine if the School District may discipline Clark for her speech without offending the First Amendment. It may. The *Tinker* standard, as originally articulated, provides that a school may discipline student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 513. The district court correctly applied the *Tinker* standard to the facts of this case, finding two separate grounds for finding the School District had met the *Tinker* standard. Clark's online Facebook post created a material and substantial disruption of the work and discipline of the school. Clark's online Facebook post also targeted a specific student and therefore invaded the rights of others. Either basis supports the School District's actions in disciplining Clark.

1. Clark's Internet speech materially and substantially disrupted the work of the school by requiring school authorities to expend time and energy to remedy the harm created on-campus by the threatening and offensive posts.

Tinker permits public schools to regulate a student's Internet speech if the speech "materially and substantially disrupt[s] the work and discipline of the school." 393 U.S. at 513. But a school need not wait for an actual disruption. *Id.* A school may regulate student speech if facts arise "which might reasonably have led school authorities to forecast" a material and substantial disruption. *Id.* at 514. Several relevant factors determine when a substantial

disruption occurred, including if there was a disruption in school activities, if the student sought to intrude in school affairs or the lives of others, and if the speech caused more than discussion outside of the classroom. *Id.* at 514. All are present here.

The significant emotional harm to Anderson was reasonably foreseeable and caused a substantial and material disruption within the meaning of *Tinker*. The Facebook post itself targeted Anderson by issuing a threatening warning that "Taylor better watch out at school" and that she would "take [Taylor] out one way or another." R. at 18. The post also included a threat directed towards other transgender students at school. R. at 18. As a direct result of the post, Ms. Anderson missed two days of class before Ms. Clark was suspended. R. at 14. The School District's discipline of Clark is not only permitted under *Tinker* but encouraged as well. "[T]he language of *Tinker* supports the conclusion that public schools have a 'compelling interest' in regulating speech that interferes with or disrupt the work and discipline of the school, including discipline for student harassment." *Kowalski*, 652 F.3d at 572 (quoting *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008)). School administrators had an "affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them in the first place." *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007).

The time and energy of school authorities required to address the harm caused on campus was reasonably foreseeable and caused a substantial and material disruption within the meaning of *Tinker*. Principal Franklin also spent a significant amount of time responding to concerns regarding Ms. Clark's post. In particular, Franklin met with the parents of Ms. Anderson and Ms. Cardona, another transgender student who identified as female. R. at 13. During the meeting, the Andersons and the Cardonas conveyed their worries about the possibility of violence against their children. R. at 14. The parents also voiced their concern about their children attending

school or continuing to participate on the girls' basketball team in light of Clark's Facebook post. R. at 14. Principal Franklin also received complaints from other students concerning the Facebook post. R. at 14.

The forecast of future disruption was reasonable in light of the language used in the Facebook posts. Clark called Anderson a "freak of nature." R. at 18. Clark claimed that the new school policy was "IMMORAL and . . . AGAINST GOD'S LAW." R. at 18. She ended her post with a threat against Anderson and other Transgender students. R. at 18. It was foreseeable that if Anderson's Transgender status became a topic of ridicule it would cause greater disruption.

But a forecast of disruption was unnecessary under the circumstances. Clark actually had an altercation with Anderson—the student she targeted with a threatening Facebook post—at a basketball game that caused her to be ejected from the game. R. at 23. These facts, taken together, were more than sufficient to support the School District's action in disciplining Clark for creating a material and substantial disruption.

2. Clark's Internet speech collided with the rights of other students to feel secure in the school environment.

In addition to *Tinker*'s foreseeable substantial disruption standard, this Court created a second and often overlooked analysis, which provides that First Amendment protection does not extend to school speech that involves "invasion of the rights of others." *Tinker*, 503 U.S. at 513. School speech that "inva[des] . . . the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. The Court elaborated on this standard, explaining that school speech which "coll[ides] with the rights of other students to be secure and to be let alone" is not protected. *Id.* at 508. The "right to be secure and let alone" is broad. *See, e.g.*, *Harper v. Poway*, 445 F.3d 1166, 1178 (9th Cir. 2006) (holding speech invading another student's "right to learn" not protected by First Amendment).

The Facebook post itself targeted Anderson by issuing a threatening warning that "Taylor better watch out at school" and that she would "take [Taylor] out one way or another." R. at 18. The post also included a threat directed towards other transgender students at school. R. at 18. As a direct result of the post, Ms. Anderson missed two days of class before Ms. Clark was suspended. R. at 14. The School District's discipline of Clark is not only permitted under *Tinker* but encouraged as well. "[T]he language of *Tinker* supports the conclusion that public schools have a 'compelling interest' in regulating speech that interferes with or disrupt the work and discipline of the school, including discipline for student harassment." *Kowalski*, 652 F.3d at 572 (quoting *DeJohn*, 537 F.3d at 319). School administrators had an "affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them in the first place." *Lowery*, 497 F.3d at 596.

CONCLUSION

This Court should reverse the judgment of the court of appeals and reinstate the judgment of the district court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

BRIEF CERTIFICATE

Team E certifies that the work product contained in all copies of Team E's brief is in fact the work product of the members of Team E only; and that Team E has complied fully with its law school's governing honor code; and that Team E has complied with all Rules of the Competition.

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TEAM E