No. 16-9999

IN THE

Supreme Court of the United States

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 RESPONDENT

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. Whether a public high school student's post on her private Facebook page constituted a "true threat" beyond the protection of the First Amendment?

II. Whether a public school district violated a high school student's First Amendment rights when it disciplined her for an off-campus Facebook post written on her personal computer in the privacy of her home?

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The opinion of the United States Court of Appeals for the Fourteenth Circuit, *Clark v. Washington County School District*, No. 17-307, is not published in the Federal Reporter but is set forth at R.24-39. The opinion of the United States District Court for the District of New Columbia, C.A. No. 16-9999, is not published but is set forth at R.1-12.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourteenth Circuit was entered on January 5, 2017. By unanimous vote, it reversed the United States District Court for the District of New Columbia, which denied respondent's summary judgment motion on April 14, 2016. The Petition for a Writ of Certiorari was entered on January 16, 2017. The Writ was granted on January 23, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The First Amendment to the United States Constitution is reproduced as Appendix A. Relevant provisions of the Anti-Harassment, Intimidation, & Bullying Policy are reproduced as Appendix B. Relevant provision of the Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students Policy are reproduced as Appendix C.

STATEMENT OF THE CASE

A. Factual Background

Kimberly Clark ("Ms. Clark") focused on maintaining an excellent record of performance, both on and off the court. R.23. As a well-behaved student with no history of any school disciplinary actions or violent behavior, the Washington County School District ("School District") improperly disciplined Ms. Clark when she exercised her right to freedom of speech by writing a Facebook post in her home. R.24.

Ms. Clark, then a fourteen-year-old freshman at Pleasantville High School, played for the Pleasantville Girls' Basketball Team. R.23. On November 2, 2015, she participated in an intrasquad basketball game. R.23. Following an adverse call by the referee, Taylor Anderson ("Ms. Anderson), a member of the opposing team, engaged Ms. Clark in a heated, verbal argument on the court. R.23. Consequently, both students were removed from the game. R.23.

When she got home from the game, Ms. Clark voiced her opinions and concern with the School Districts's Nondiscrimination in Athletics Policy on her private Facebook page using her personal computer. R.24. She expressed, "This new school policy is the dumbest thing I've ever heard of! It's UNFAIR." R.18. Upset about Ms. Anderson causing her removal from the game, Ms. Clark also complained about Ms. Anderson playing on the girls' basketball team.[1] R.18.

While Ms. Clark is a female by birth and identifies as a member of the female gender, Ms. Anderson is a transgender student who was born male but identifies as female. R.23. The School District had, on August 1, 2015, recently enacted a Nondiscrimination in Athletics Policy that allowed Ms. Anderson, and other members of the transgender community, to play on the athletic team of her chosen gender identity. R.15. Ms. Clark's post stemmed from the moral and religious beliefs she was raised with—that "it is immoral and against God's law for people to change their God-given gender," and her belief that it was unfair and dangerous for the school to allow transfemale students born biological males to play on a girls' basketball team. R.23. Only *two* students out of the entire Pleasantville High School student body found the post concerning enough to warrant notifying school administrators. R.14. Ms. Anderson was the *only* student who

[1] Ms. Clark's Facebook post stated:
"I can't believe Taylor was allowed to play on a girls' 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 IT gets more than ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too…" R.18.

stayed home for two days following the post. R.14. The other student, Josie Cardona ("Ms. Cardona")—also transgender—was not explicitly mentioned in Ms. Clark's post. R.14. Both students' parents brought a printout of Ms. Clark's post to show Mr. Franklin, the Principal of Pleasantville High School, on November 4, 2015. R.13-14. Only the Cardonas and Andersons expressed concern regarding their transgender children's safety. R.14.

Despite no history of violent behavior or past disciplinary actions to substantiate the Cardonas' and Andersons' concerns, Mr. Franklin contacted Ms. Clark and her parents to arrange a meeting. R.14,23. On November 5, 2015, the Clarks met with Mr. Franklin. R.14. Ms. Clark told Mr. Franklin she wrote the Facebook post "because it stated her views on an important school policy." R.19. Sharing her parents' beliefs, Ms. Clark "expressed her view that the School District's policy regarding transgender students is unfair, immoral, and dangerous." R.19,24. Ms. Clark mentioned that she is "not friends with Taylor Anderson or any other transgender student on Facebook." R.23. While Facebook posts sometimes go beyond just one's friends, Ms. Clark "meant only for [her] own friends to see [the] Facebook post." R.23. Moreover, Ms. Clark only intended her remarks "about 'IT' and other 'TG's 'getting it' . . . as jokes." R.23.

Nevertheless, Mr. Franklin suspended Ms. Clark for three days, claiming that she violated the Anti-Harassment, Intimidation & Bullying Policy ("Bullying Policy"). R. 27. He concluded "that the second part of Ms. Clark's post . . . was materially disruptive . . . and collided with the rights of . . .other . . . students to feel safe at school" because two students were upset following the post. R.14. Meanwhile, the Bullying Policy *only* covers conduct at school, stating: "[h]arassment, intimidation, bullying, and threats are inappropriate in public school environments.," and had just been adopted three months prior to the incident. R.17. This suspension will remain a part of her permanent academic record and negatively impact her college prospects. R.19.

Finding Mr. Franklin's disciplinary actions "completely inappropriate," Mr. Clark appealed his daughter's suspension to the Washington County School Board ("School Board"). R.20. Ms. Clark's family believes that it is her right to say what she thinks about important public policy matters such as sexual orientation and rules governing high school athletics. R.24. On November 13, 2015, the School Board decided to uphold Ms. Clark's suspension. R.21. Both Mr. Franklin and the School Board focused only on the second portion of Ms. Clark's post. R.21. Not only did the School Board agree with Mr. Franklin's conclusion, they also found that the second portion of her post constituted a "true threat." R.21.

On December 7, 2015, Mr. Clark filed an action against the School District in the United States District Court for the District of New Columbia, asserting that the School District violated Ms. Clark's First Amendment right to the freedom of speech. R.27.

B. District Court Proceedings

On January 10, 2015, Ms. Clark and the School District filed cross motions for summary judgment. R.1. Ms. Clark sought a declaratory judgment that her suspension was not constitutional, and an order requiring the School District to remove the suspension from her record. R.1. On April 14, 2016, Judge Warren Kellogg granted summary judgment in favor of the School District. R.12. Judge Kellogg emphasized restricting student speech in certain circumstances, and concluded that the School District did not violate Ms. Clark's rights. R.1,4.

First, applying the "true threat" definition from *Virginia v. Black*, the court found Ms. Clark's speech was a "true threat." R.5. The court disregarded the first portion of the post that mentioned Ms. Clark's political views on the school policy. R.5. Using an objective approach, the court determined the speech a "targeted attack." R.7. Though Ms. Clark "did not directly communicate those statements to Ms. Anderson or any other transgender student," the tone and context of the speech led the court to its conclusion. R.7.

Second, the district court applied the *Tinker* framework to the off-campus speech, concluding the speech materially disrupted the school environment and collided with the rights of other students. R.8. The court said "language that attacks individual students and school communities can substantially impact classwork and lead to social disorder," and Ms. Clark knew, or should have known, that her offensive statements would be seen by fellow students and thereby cause a material disturbance. R.10. The court acknowledged the speech "was less detailed and less patently violent," but still held a vague threat of violence that collides with students' rights. R.12.

C. Court of Appeals Proceedings

On January 5, 2017, the Fourteenth Circuit reversed. R.25. The court recognized "the First Amendment and its guarantee of free speech are at the core of the freedoms we enjoy as Americans." R.28. The court of appeals held that the School District violated Ms. Clark's First Amendment rights. R.28.

First, the court of appeals found Ms. Clark's speech did not constitute a "true threat" because "the record reflects a lack of evidence…that she had a subjective intent" to threaten Ms. Anderson. R.30-31. The court acknowledged "context is crucial is here, as is common sense." R.31. The court evaluated the speech as a whole, finding the "first portion of her post [to be] a political statement." R.31. The court held the "language is not comparable to the specific threats of physical harm or property found in a number of other cases;" the language "could as readily imply social ostracism as violence, particularly when one considers that they were posted by a fourteen-year-old-girl with no known propensity to violence." R.31,32. The court of appeals concluded the district court erred in finding Ms. Clark's speech a "true threat." R.32.

Second, the court of appeals declined to extend the *Tinker* framework to off-campus speech, asserting that Ms. Clark's speech did not meet either aspect of *Tinker* because "there is insufficient evidence in the record of an actual or foreseeable disruption to the school environment

to justify her suspension." R.36. The court held Ms. Clark's post did not intrude on rights of others because it "did not refer to violence" or "reflect the kind of specificity in time and manner likely to create [an] air of apprehension . . ." R.36. The court warned against that "to extend *Tinker* to off-campus speech, particularly internet speech, would be to give school authorities virtually limitless authority to control the speech of their students at all times and in all places." R.37. Such an extension creates "a dangerous precedent with the very real risk of chilling *all* off-campus speech." R.39. Though communication means have changed since *Tinker*, the court stated "[a]pplying *Tinker* to off-campus student speech undermines the core principles of the First Amendment." R.39. The 14th Circuit unanimously granted summary judgment in favor of Ms. Clark. R.39.

SUMMARY OF ARGUMENT

This case raises fundamental First Amendment issues concerning the attempt of school administrators to police student conduct beyond the limits of their authority by reaching into a student's private home. While the educational mission of schools constitutes an essential aspect of American society, school officials should not be granted authority to censor off-campus student speech just because that speech disagrees with the school's policies. Here, a progressive school policy spurred a student to express her opposing viewpoints. The school should not have punished her for expressing opinions because freedom of speech protects even distasteful, offensive words.

Ms. Clark made a hurtful, insensitive post expressing her moral and religious beliefs, but she did not make a "true threat." Her speech does not satisfy the subjective standard because she did not intend to threaten and only meant the "better watch out" remark as a joke. Her speech does not meet the objective standard because she did not intentionally or knowingly communicate the speech to any transgender student, since her Facebook where she made the post was private and limited to her close friends. Besides not communicating this message to Ms. Anderson or Ms.

Cardona, a reasonable objective person would not believe that a fourteen-year-old girl with no disciplinary sanctions would act on these vague comments, especially because she did not have access to a weapon and did not make specific threats with a date or time when she would carry out any harmful actions towards any transgender student. Since the lower courts are split on how to analyze "true threats" and have expressed confusion on the subject—based on thorough analysis, case precedents, practicality and common sense, and due to the potential gravity of harm that could come from punishing students for vague, unintentional, meaningless threats—Respondent urges this Court to adopt a clear subjective standard that considers the speaker's intent.

Ms. Clark's Facebook post, generated off-campus in the privacy of her home, is protected because public school students' First Amendment rights can only be limited in school. *Tinker* allows schools to discipline students should not go past the school property. Extending *Tinker* to off-campus speech will unjustly limit student speech beyond the schoolhouse gate, and set an unbounded, dangerous precedent. The record contains a lack of evidence to substantiate petitioner's claims because Ms. Clark's speech did not cause a commotion at school, did not lead to an interruption of normal school activities, only two students notified the school of Ms. Clark's post, and only one student was kept home for two days following the post. Ms. Clark did not intend to interfere with the educational process at her school or for her speech to reach the school's notice. She did not disseminate her message to multiple people, but rather took steps to limit her audience to just her friends, none of whom are members of the transgender student body. With no history of violence, Petitioner failed to evaluate the totality of the circumstances before suspending Ms. Clark. Therefore, Ms. Clark's speech did not satisfy the *Tinker* standard.

The Fourteenth Circuit properly granted summary judgment in favor of Ms. Clark to protect her speech as the School District cannot prove Ms. Clark's off-campus speech constituted a "true threat," that it was materially disruptive or collided with the rights of other students.

ARGUMENT

I. Based on the "True Threat" Precedents of this Court, Ms. Clark's Facebook Post Does Not Constitute a True Threat and Should Not Be Exempt from First Amendment Protection.

The First Amendment protects every American's core, fundamental right to voice his or her opinions and express his or her beliefs—*without fear of punishment*. In 1789, the Founding Fathers decided and declared, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech…" U.S. Const. amend. I. However, the right to free speech is "not absolute at all times and under all circumstances." *Chaplinsky v. N.H.,* 315 U.S. 568, 571 (1942). This Court established certain well-defined, narrowly limited classes of speech that the government may regulate consistent with the Constitution. *Id.* at 572. Over time, these categories came to include obscenity[2], child pornography[3], defamation[4], true threats[5], and fighting words[6] that inflict injury or incite an immediate breach of the peace.[7]

"True threats" must not be mistaken with offensive, hateful remarks because individuals have a right to speech that listeners disagree with, and to speech that is offensive, even repulsive. While it is inevitable that people are going to disagree, argue, offend, insult, and criticize others, "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989). The best way to

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[2] *Miller v. California*, 413 U.S. 15 (1973).
[3] *United States v. Williams*, 553 U.S. 285 (2008).
[4] *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974).
[5] *Virginia v. Black*, 538 U.S. 343 (2003).
[6] *Chaplinsky v. N.H.,* 315 U.S. 568, 571 (1942).
[7] These category restrictions were narrowly tailored and were not set in place to selectively chill speech or to prevent hate speech. There is no hate speech exception to the First Amendment. Hate speech is defined as speech that offends, threatens, or insults groups, based on race, color, religion, national origin, sexual orientation, or other traits. Students in Action: Debating Hate Speech, http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action.

fight hateful speech is with good speech and exposure.[8] Constitutional protection was never necessary to protect someone stating an uncontroversial opinion that everybody agrees with—the equivalent of "kittens are cute" or "apple pie is good." Progressive, controversial policies, like the Athletics Policy and Bullying Policy in this case,[9] involving issues that society does not unanimously agree on, are bound to fuel contentious public debate; "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Snyder v. Phelps,* 562 U.S. 443, 458 (2011).

In a landmark First Amendment case, this Court found that "debate on public issues should be uninhibited, robust, and wide-open, and…may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). Even though this case was in the context of the press, media, and public officials, the underlying First Amendment principle is the same. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *Id.* at 269. The constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Id.* For the "marketplace of ideas" to grow and flourish, individuals, including students must not only be permitted to express themselves without fear of punishment, but should be encouraged to do so. People grow by developing thick skins, defending themselves, and learning how to tolerate others who think differently. It is not feasible or realistic for the courts to act as babysitters to shield

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[8] Toni M. Massaro, Equality and Freedom of Expression: The Hate Speech Dilemma, 32 Wm. & Mary L. Rev. 211, 216 (1991). (The attempt to control hate speech may be manipulated to attempt to enforce "politically correct" attitudes…Many people argue that no workable solution to hate speech is possible. Any regulation would be either too chilling of good speech or so narrow as to be purely symbolic and likely unenforceable.)

[9] R.15-17. Appendix B, C.

every person from another's hurtful and repulsive remarks. This Court has an important role here today in preventing the destruction of words and the free flow of communication on the Internet. With the advent of the Internet and social media, there simply is no way for the courts, or for schools, to monitor every post that an opinionated teenage girl decides to type on her Facebook at home after school. Additionally, this Court has expressed support for First Amendment protection of Internet speech.[10]

This Court first analyzed an alleged "true threat" in *Watts v. United States,* 394 U.S. 705, 707 (1968). In *Watts*, at a peace rally protesting war and police brutality, an eighteen-year-old boy who did not want to get drafted exclaimed to a crowd, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. This Court considered the context of the boy's speech, expressly conditional nature of the statement, and reaction of the listeners who laughed when they heard the comment, and held that the speech was a "very crude offensive method of stating a political opposition to the President," but not a true threat. *Id.* at 707.

The Court did not directly address a "true threat" case again until *Virginia v. Black*, where Justice O'Connor defined "true threats" as "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." *Black,* 538 U.S. at 359. The Court held a state may ban cross burning carried out with intent without violating the First Amendment, however the

[10] This Court held that the Internet is entitled to the highest level of First Amendment protection, akin to the print medium. In Reno, this Court protected "indecent" and "patently offensive" material on the Internet. The Court found that "the growth of the Internet has been and continues to be phenomenal" and "as a matter of constitutional tradition, in the absence of evidence to the contrary, presume[d] that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 868 (1997).

statute in question was facially unconstitutional because it did not account for the contextual factors necessary to decide if a particular cross burning is intended to threaten. *Id.* at 367.

Recently, this Court analyzed "true threats" in the context of Facebook posts in *Elonis v. United States,* 575 U.S. ___ (2015). Elonis was arrested for making threats on Facebook after his wife left him in 2010.[11] *Id.* This Court asserted "[t]he fact that the statute does not specify any required mental state does not mean that none exists." *Id.* The Court held that it was "error" for the jury to be instructed that the government need only prove that "a reasonable person" would regard Elonis's posts as threats, and mental state of the person making the threat must be considered. *Id.* This Court made clear that negligence is insufficient to support a conviction, contrary to the view of nine Courts of Appeals. *Id.* Justice Thomas's Dissent stated, "Adopting the minority position, Elonis urges us to hold that…the First Amendment require proof of an intent to threaten. All lower courts know after today's decision is that the requirement of general intent will not do." *Id.*

In all three of these cases—*Watts, Black,* and *Elonis*—this Court leaned towards a subjective standard that requires specific intent.[12] Ms. Clark's Facebook post should not have been interpreted as a true threat because it was nothing more than an expression of her honest moral and religious beliefs. She did not intend to injure or kill Ms. Anderson or anyone else. R. 23. While she may have hurt two transgender students' feelings, simply voicing her frustration, anger, opinions, bigotry, and values, without any harmful threatening intent, does not make her Facebook post a "true threat" under the holdings of *Watts, Black,* and *Elonis.*

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[11] He vented his frustration online and his language was laced with brutally violent images. *Id.* His ex-wife was "extremely afraid for [her] life", but Elonis said he did not intend his statements as threats. *Id.* The lower courts held that his subjective intent did not matter and all the Prosecution had to prove was that a "reasonable person" would view his statements "as a serious expression of an intention to inflict bodily injury or take the life of an individual." *Id.*

[12] While these cases all involved criminal statutes, and the Bullying Policy in question is merely a School District regulation, the standard should be the same because of the potential "triple threat of redress" that would unfold on the student. "Triple threat of redress" will be discussed in part II.

A. Ms. Clark's Post Is Not A True Threat Under A Subjective Or Objective Analysis.

In applying either standard from the lower courts, the speech at issue does not satisfy the requirements to constitute a true threat.

1. Under a subjective test, Ms. Clark's Facebook post did not constitute a true threat because she did not intend to commit an act of unlawful violence to harm Ms. Anderson or any other student.

A subjective test requires that the speaker have a serious expression of intent to commit an act of unlawful violence against a particular individual or group of individuals.[13] The speaker must subjectively intend that his or her comments be interpreted as a true threat.[14] In *U.S. v. Cassel*, the Ninth Circuit acknowledged that the Supreme Court has decided very few cases directly addressing what constitutes a "true threat," and even within its own Circuit cases have not been clear on what standard to apply. *United States v. Cassel*, 408 F.3d 622, 628 (9th Cir. 2005). Despite limited precedents, the *Cassel* court found clarity in *Virginia v. Black*. *Id.* at 631. In analyzing Justice O'Connor's definition of "true threats," the Ninth Circuit determined the clear interpretation is that only intentional threats are criminally punishable under the First Amendment. "It requires that the speaker means to communicate…an intent to commit an act of unlawful violence." *Id.* A natural reading of this language embraces the requirement that the speaker intend for his language to threaten the victim. *Id.* The court wrote in a mens rea element though the language did not contain one, holding subjective intent to threaten as a necessary element to punish threats. *Id.* at 632-634.

Applying the *Black* and *Cassel* subjective standard to Ms. Clark's speech, it is evident that her speech was not a true threat because she did not intend to harm or commit an act of unlawful violence against Ms. Anderson or any other student. R. 23. Ms. Clark said, "My remarks about

[13] *Black*, 538 U.S. at 359.
[14] David Hudson, True Threats, First Amendment Center (May 12, 2008), http://www.firstamendmentcenter.org/true-threats/.

"IT" and another "TGs" "getting it" were intended merely as jokes." R. 23. She made no "serious expression of intent to commit violence." Considering she was a fourteen-year-old girl who has no history of violent behavior or past school disciplinary actions, applying pure common sense, it is logical and believable that she was joking rather than making "true threats."

2. Under an objective test, Ms. Clark did not intentionally communicate her post to Ms. Anderson, which precludes the "true threat" analysis.

While the Circuits have applied a variety of objective "true threat" tests, the fundamental objective question that they all share in common is whether the speaker knowingly communicated his or her statement in a way that a reasonable recipient could find to be a serious expression of intent to cause a present or future harm. *Porter v. Ascension Parish School Bd.,* 393 F.3d 608, 616 (5th Cir. 2004). The objective test entails a two-part determination: first, whether the speaker intentionally communicated the speech to the recipient, and second, whether an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm. *Id.* Both of those prongs must be met for the speech to lose First Amendment protection. *Id.* Differentiating this test from the subjective test, the protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat, but rather whether the speaker intentionally communicated the threat. *Id.* "Whether a speaker intended to communicate a potential threat is a threshold issue, and a finding of no intent to communicate obviates the need to assess whether the speech constitutes a "true threat"." *Id.* In Porter, a fourteen-year-old boy made a violent sketch of a violent siege on his school, with obscenities, and a brick being hurled at his principal. *Id.* at 609. His brother accidentally and unintentionally brought the sketchpad containing the threatening sketch to school two years later, upon which a faculty member saw it and presented it to the principal. *Id.* The Fifth Circuit held

that the student did not intentionally or knowingly communicate his drawing to the school in a way sufficient to remove it from the protection of the First Amendment. *Id.* at 622.

Like in *Porter*, where the boy's drawing was not an intentionally communicated threat to the school, Ms. Clark's post was not an intentionally communicated threat to Ms. Anderson or any other transgender student. Ms. Clark wrote the post in the privacy of her home just like the boy in *Porter*.[15] The only significant difference is that she posted her speech on social media, which ultimately is a public forum. However, her Facebook page was private, meaning that only her close friends could see her postings. Since she was not friends with any transgender student on Facebook, she did not intentionally or knowingly communicate her message to Ms. Anderson or Ms. Cordona, the students who claimed to have felt threatened. There was no direct way for those students to even see the post. Ms. Clark's speech does not satisfy the intentional communication step that precludes the application of the objective "true threat" analysis.

In *Doe v. Pulaski*, a boy in junior high school drafted two letters to his former girlfriend containing violent rants expressing a desire to assault and murder her. *Doe v. Pulaski County Special School District*, 306 F.3d 616, 619 (8th Cir. 2002). The boy allowed his best friend to read the letters, knowing he was a close friend of the former girlfriend and likely would tell her. *Id.* Additionally, the writer discussed the violent letters on the phone to his former girlfriend. *Id.* at 620. To determine if the statements were true threats of physical violence, the Eighth Circuit applied the objective test it had established in *U.S. v. Dinwiddie*.[16] *Id.* at 622. As a result of the

[15] Based on its language, the Bullying Policy should not even apply to the speech Ms. Clark wrote in her bedroom because in its first line, the policy expressly states: "Harassment, intimidation, bullying, and threats are inappropriate in public school environments." R.17. The "public school environment" does not include students' homes. Ms. Clark's home, in her private bedroom, is where she wrote her speech that the School District is attempting to regulate. R.23.

[16] The 8th Circuit analyzed its reasonable listener's evaluation given the "entire factual context" and "whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." Five factors to aid in determining a

letter containing specific language about sexually assaulting and murdering a specific classmate, which the author shared with the potential victim, the court held the letter was a true threat. *Id.*

The letter in *Doe* can be distinguished from Ms. Clark's Facebook post because, unlike the letter that contained specific language about sexually assaulting and murdering a specific student, Ms. Clark's post merely contained vague, abstract language, saying that Ms. Anderson "better watch out" and "that goes for the other TGs crawling out of the woodwork lately too." R.18. This speech does not talk any actual planned potential violence such as threatening to assault or murder someone, the way the letter in *Doe* did. Whereas the boy in *Doe* knowingly communicated the contents of the letter to the potential victim directly, Ms. Clark did not share her post with any transgender student and "meant only for her own friends to see [it]." R.23.

Applying the *Dinwiddie* factors to Ms. Clark's speech, her post still does not satisfy the objective test requirements. R.18. There is no evidence of any upset or concerned reaction by Ms. Clark's Facebook friends who saw the post. R.13. Once Ms. Anderson and Ms. Cardona eventually saw it, they were upset by it, but just making one or two students upset and having one student stay home from school for two days by choice is not enough to warrant disciplinary action that can potentially ruin an otherwise good student's future college applications and career. R.13. All the school did here was suspend Ms. Clark for three days, which is a temporary punishment, after which she could return to school. R.14. If the school was genuinely concerned that this speech was a "true threat" with potential for violence or concern for the victim's safety, it would have taken more serious action, like expulsion, as the school did in *Doe*, to ensure the two students

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true threat: 1. The reaction of the recipient of the threat and of other listeners, 2. Whether the threat was conditional, 3. Whether the threat was communicated directly to its victim, 4. Whether the maker of the threat had made similar statements to the victim in the past, and 5. Whether the victim of the threat had reason to believe that the maker of the threat had a propensity to engage in violence. *United States v. Dinwiddie,* 76 F.3d 913, 925 (8th Cir. 1996).

would no longer be in the same school environment. The speech was not communicated directly to its "victim". R.23. Ms. Clark has never made any past threats to Ms. Anderson before. R.23. Ms. Anderson did not have a reason to believe that Ms Clark had any propensity to engage in violence, as Ms. Clark has no history of disciplinary actions or past violent behavior. Additionally, Ms. Anderson instigated their verbal disagreement on the basketball court, not Ms Clark. R.23.

While Ms. Clark's case should lead to the same result under a subjective or objective test, on behalf of Ms. Clark and all students, this brief prospectively strongly urges the Court to adopt a subjective analysis standard for off-campus Internet speech that poses an alleged threat. The lower courts have expressed the desire for a clear precedent on the issue,[17] in light of the significant constitutional freedoms at stake here. Considering the delicate nature of regulating pure speech, the standard should include: 1) Consideration of the speaker's intent, 2) Whether the speech was directly communicated to the person it addresses, and 3) Whether it is feasible for the speaker to carry out the alleged threat. This would take into account and combine the most frequently applied tests from lower courts. It would be far more risky for this Court to implement a test that is over-protective of speech than under-protective; a more constricting rule could be added down the road. The possibility of restricting offensive speech just because people don't approve of it is the core concern and freedom at stake. The objective standard based on negligence, as noted in *Elonis,* has and will continue to impede the freedom of speech.

[17] In a 2015 case about a threatening Facebook post, Judge Simon wrote: "A lot of people spout off online via Twitter, Facebook and other social media…determining when the comments cross the line from permissible First Amendment expression to true threats is difficult. The line is hazy, and the question becomes does speech have to be threatening to a reasonable person who may hear or read the comment or is it the intent of the person making the statement that matters? In other words, is the standard an objective or subjective one? The Supreme Court is grappling with those very questions right now in the case of Elonis…Until the Supreme Court says otherwise, perhaps through Elonis, I am bound to follow and apply an objective standard when determining whether a statement constitutes a threat…whether the standard is a subjective or objective one could be answered any day now in Elonis." *United States v. Bradbury,* 111 F.Supp.3d 918, 921 (2015).

II. PETITIONER VIOLATED MS. CLARK'S FIRST AMENDMENT PROTECTIONS WHEN DISCIPLINING HER FOR AN OFF-CAMPUS FACEBOOK POST BECAUSE THE *TINKER* STANDARD WAS NOT SATISFIED.

In his famous novel,[18] *1984*, George Orwell wrote, "It's a beautiful thing, the destruction of words." Much like a logocratic government censoring speech to prohibit people from thinking individually, the extension of the *Tinker* standard beyond the schoolhouse gate will result in the destruction of words–the ugly termination of free and individual thought. This case exemplifies what is at stake if our legal system, founded on the important principle of free speech, granted school officials the unfathomable authority to censor student speech anywhere and anytime. Without a doubt, such a consequence will not be a beautiful thing.

First Amendment protection of free speech constitutes one of the core values in American society. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Given the crucial role of educators to cultivate a learning environment conducive to *all* students, courts have long recognized the "authority . . . of school officials . . . to prescribe and control conduct in the schools." *Id.* at 507. Therefore, certain speech "school officials may lawfully punish some forms of unprotected student speech."[19] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012).

Nevertheless, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. Though any word may invoke such fear, our Constitution embraces this risk because "this sort of hazardous freedom . . . is the basis of our national strength and of the independence and vigor of Americans who grow up

[18] George Orwell, 1984 (1949).

[19] Similar to this Court's decision in Tinker, this Court later concluded the rights of public school students are not coextensive with the rights of adults. Students enjoy First Amendment protections, but not to the same degree as adults, as a result of being inside of a school environment. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

and live in this relatively permissive, often disputatious, society." *Id.* at 508. To sanction student speech, the school must prove "its action was caused by something more than mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

Under the *Tinker* standard, speech that "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." *Tinker*, 393 U.S. at 513. Therefore, schools may properly restrict student speech when it falls into either or both of these categories. *Id.* Even if speech is not disruptive within the meaning of *Tinker*, schools may also limit student speech in certain circumstances: if it is lewd or vulgar[20], if the restriction is related to an educational interest[21], or if the speech is viewed as encouraging illegal drug use[22]. Nevertheless, none of these exceptions apply in this case.

Tinker's applicability to off-campus, Internet speech has yet to be determined. The advent of the Internet and social media platforms has only made it more difficult to apply *Tinker* to off-campus speech. Lower courts have taken two approaches: Applying *Tinker* if material disruption (1) actually occurred; or (2) was reasonably foreseeable. As a threshold matter, this Court must first determine whether the *Tinker* standard applies to off-campus speech at all.

The speech at issue in this case does not fall within the two categories set forth in *Tinker*. Although Ms. Clark's speech was unkind and cruel to transgender students, the *Tinker* standard does not justify the disciplinary actions taken against her. Petitioner's actions violated Ms. Clark's First Amendment rights. As elaborated below, the court of appeals' grant of summary judgment to Ms. Clark should be affirmed.

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[20] *Id.*at 685.
[21] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).
[22] *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

A. The *Tinker* standard does not apply to Ms. Clark's off-campus speech.

The application of the *Tinker* standard to off-campus speech would unreasonably restrict student speech.[23] The *Tinker* opinion suggests its application[24] only to "in-school student speech…that would not be constitutional in other settings." *Morse*, 551 U.S. at 422 (Alito, J., concurring). While students' First Amendment rights may not be coextensive with those of adults, students' "First Amendment rights [are only] circumscribed 'in light of the special characteristics of the school environment.' " *Id.* at 405 (quoting *Tinker*, 393 U.S. at 506). Student speech outside the school context, no matter how inappropriate or lewd, is protected. *Id.*

Furthermore, extending[25] *Tinker* to off-campus speech "would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's

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[23]Public school students who speak outside of school, particularly on the Internet, face a triple threat of redress should *Tinker* apply to off-campus speech. By extending *Tinker*, not only are students penalized at school for off-campus speech, but they are also subject to criminal and civil penalties as well. *Shanley v. Ne. Indep. Sch. Dist., Bexar Cty., Tex.*, 462 F.2d 960, 974 (5th Cir. 1972); *See* Clay Calvert, *Off-Campus Speech, on-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 251 (2001); *see also* Lee Goldman*, Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395 (2011) (using the *Tinker* standard off-campus covers too many forms of student expression).

[24] Applying the *Tinker* standard to off-campus speech would also extend judicial oversight of schools, creating further consequences for both school administrators and students. Judge E. Grady Jolly of the Fifth Circuit cautioned against the application of *Tinker* to off-campus speech, especially with the prevalent use of the Internet as a mode of communication amongst students. *Bell v. Itawamba Cty. Sch. Bd*., 799 F.3d 379, 401 (5th Cir. 2015) (Jolly, G., concurring). Instead, "Judges should view student speech in the further context of public education today—at a time when many schools suffer from poor performance, when disciplinary problems are at their highest, and when schools are, in many ways, at their most ineffective point." *Id.*

[25] Extending *Tinker* off-campus would "[allow] schools to police their students' Internet expression anytime and anywhere—an unprecedented and unnecessary intrusion on students' rights." *Bell*, 799 F.3d at 405 (Dennis, J., concurring). Though off-campus speech does not always create in-school disturbances, the consequence of extending the *Tinker* standard will make it "as if a school principal were living in each student's home, monitoring personal Web pages and doling out punishment for anything emotionally or physically disturbing to teachers or that may affect negatively other students' opinions of teachers." Calvert, *supra* note 2 at 451. "When minors are engaged in off-campus, non-school-related activities during non-school hours, they are not students. They are, instead, people – people outside the control of the school. As the Tinker Court observed, students are "'persons' under our Constitution." *Id.* (quoting *Tinker*, 393 U.S. at 511).

home and control her actions there to the same extent that it can control that child when she participates in school sponsored activities." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (student's online "fake" profile of school principal, created on his personal computer off-campus was not subject to the *Tinker* standard). Such an extension of the *Tinker* standard would then likely not "prevent school officials from regulating *adult* speech uttered in the community," resulting in an overall suppression of speech in our society. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring). However ridiculous that notion may be, the "absurdity stems not from applying Tinker to off-campus speech uttered by adults and students alike, but from the antecedent step of extending Tinker beyond the public-school setting to which it is so firmly moored." *Id.*

Most importantly, should the *Tinker* standard extend to off-campus speech, courts will then have to determine whether speech occurred on-campus or off-campus, a difficult line to draw in the digital age. *See Blue Mountain*, 650 F.3d at 940 (Smith, J., concurring). With society's prevalent use of smartphones[26] and social media[27], Internet communications can be sent from any location, so the speech's origin cannot be the standard. *Id.* "Speech originating off campus does not mutate into on-campus speech simply because it foreseeably makes its way onto campus." *Id.* Certain circuits[28] have rightfully refused to apply the *Tinker* standard to speech that originated off-

[26]Approximately 75% of teenagers own a smart phone with 91% of teens going online from mobile devices occasionally. Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEWRESERACHCENTER (Apr. 9, 2015), http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/.

[27] 71% of teenagers, between the ages of 13 and 17, use more than one social network site. *Id.*

[28] Recently, the Fifth Circuit in *Porter,* 393 F.3d at 617 declined to apply *Tinker* to speech generated off-campus. In *Porter*, the court held *Tinker* did not apply because the image was created away from school grounds. *Id.* at 620. The Second Circuit also refused to apply *Tinker* to off-campus student speech in *Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1045 (2d Cir. 1979). There, students created a satirical newspaper where most of the publication process took place away from school grounds. The court held that the *Tinker* standard did not apply because the newspaper was deliberately designed to be off-campus. *Id.* at 1050.

campus. Ms. Clark's speech does not meet either element because her speech was neither materially disruptive to the school environment nor did it collide with rights of other students.

1. Ms. Clark's speech was not a material disruption.

In the case where the *Tinker* standard extends to off-campus speech, Ms. Clark's speech still did not materially disrupt the school environment. Conduct[29] qualifies as "materially disruptive" when it "interrupt[s] school activities [or] . . . intrude[s] in the school affairs or the lives of others." *Tinker*, 393 U.S. at 514. As previously stated, circuits have applied *Tinker* outright to off-campus speech when a material disruption in fact occurred, or when material disruption is reasonably foreseeable occur within the school.

In certain circuits, the *Tinker* standard is satisfied when actual disruption occurs inside the school environment as a result of off-campus student speech. The fact disruption transpired on-campus constitutes "an important element for evaluating the reasonableness of . . . punishing student expression." *Shanley*, 462 F.2d at 970. When student speech caused a commotion, disrupted classes or "hamper[ed] the school in carrying on its regular schedule of activities," then material disruption[30] occurred within the meaning of *Tinker*. *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966). As a repercussion of off-campus speech, a student's intentional interference with the educational process will not be protected by the First Amendment. *Augustus v. Sch. Bd. of Escambia Cty., Florida*, 507 F.2d 152, 156 (5th Cir. 1975). A student deliberately intends to cause a material disruption on- campus when she admits to "produc[ing] and disseminat[ing] the

[29] In *Tinker*, only five students were suspended for wearing the black armbands. There is no indication that the work of the schools or any class was disrupted. A few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises." 393 U.S. at 508. This Court held there was no material disruption.

[30] The Third Circuit found "general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist [an official] in dealing with the profile" to not constitute a material disruption. *Blue Mountain,* 650 F.3d at 929. There, the student created an online parody profile of her school principle, which was brought to the attention of the school's authorities at the principle's request. *Id.*

[speech] knowing students, and hoping administrators, would listen to it." *Bell,* 799 F.3d at 396. However, evidence of "off-campus speech brought on-campus without the knowledge or permission of the speaker" indicates the student had no intent[31] to deliberately interfere with the school environment. *Porter,* 393 F.3d at 619.

In other circuits, the *Tinker* standard is met upon the school "demonstrat[ing] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. As such, the school bears the burden of proving material disruption was reasonably foreseeable "*before* expression may be constitutionally restrained." *Shanley*, 462 F.2d at 974 (emphasis added); *see also Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998) (holding off-campus newspaper with instructions on how to "hack" school computers on-campus justified a reasonable belief of substantial disruption). However, school officials cannot justify a forecast of material disruption on a mere expectation of one; the school "must base their decisions 'on fact, not intuition' " *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 221–22 (5th Cir. 2009). In addition to off-campus speech becoming common knowledge at school, off-campus speech that has a "nexus" to the school community may justify a forecast of material disruption. *See Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2011) (holding a nexus existed when the speech, a website, only included several posts ridiculing a fellow student). However, when a student deliberately acts to limit the audience of her off-campus speech, such as making a profile "private," then a risk of material disruption is not reasonably foreseeable. *See Blue Mountain*, 650 F.3d at 929 ("[Student] created the profile as a joke, and she took steps to make it "private" so that access was limited to her and her friends").

[31] Off-campus speech does not transform into on-campus speech when another student brings the speech to the attention of the school officials. *See Blue Mountain,* 650 F.3d at 932 (holding the school violated student's First Amendment rights).

Here, there is insufficient evidence in the record of an actual or foreseeable disruption to the school environment. Though the school was notified of the post, there was no commotion, interruption of classes, or any kind of "disruption" that would have prevented the school from carrying out its normal activities. *Burnside*, 363 F.2d at 748. Only two students notified the school, and only one student was kept at home for two days following the post. R.14. Aside from Mr. Franklin, no other administrators or teachers were pulled away from their duties to address Ms. Clark's post. R.14. No evidence exists to indicate Ms. Clark sought to intentionally interfere with the educational process. *See generally Augustus* 507 F.2d at 156. Ms. Clark just intended the post to "[state] her views on an important school policy." R.19. Her remarks "expressed her view that the school board's policy regarding transgender and gender nonconforming students is unfair, immoral, and dangerous." R.19. She only meant for her own friends to see the post, and did not intend for school administrators or other students at school to know of her off-campus speech. *Bell*, 799 F.3d at 396. R.23. Additionally, Ms. Clark's off-campus speech was only brought on-campus by the parents of Ms. Anderson and Ms. Cardona. R.14. Without the knowledge or consent of Ms. Clark, the two students notified the school of Ms. Clark's off-campus speech. *Bell*, 799 F.3d at 396. R.23. Had these students not done so, it is doubtful if the school would have heard about Ms. Clark's off-campus speech at all.

The record does not contain any facts that may have reasonably led the school to forecast substantial disruption on-campus. *Tinker*, 393 U.S. at 514. Ms. Clark did not send her off-campus speech to other members of the student body nor was her speech a matter of common knowledge at school. *Wisniewski*, 494 F.3d at 39. R.23. While Ms. Clark's off-campus speech explicitly named Ms. Anderson, the record lacks any information showing Ms. Clark had previously singled out Ms. Anderson online. R.23. Thus, Ms. Clark's off-campus possesses a minuscule nexus to the school community. *See generally Kowalski*, 652 F.3d at 577. Ms. Clark is not friends with Ms.

Anderson or any other transgender student at her school on Facebook. R.23. Ms. Clark deliberately acted to restrict the audience of her speech. *Blue Mountain*, 650 F.3d at 929. Ms. Clark's off-campus speech was offensive but did not cause a material disruption under *Tinker*.

2. Ms. Clark's speech did not intrude upon the rights of others.

Under *Tinker*, schools may restrict speech that "intrudes upon . . . the rights of others" or "collides with the rights of other students to be secure and be let alone." *Tinker*, 393 U.S. at 508. Although "[t]he precise scope of *Tinker's* 'interference with the rights of others' language is unclear," student speech insinuating school violence most certainly infringes upon the right of others. *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 217 (3rd Cir. 2001). Student speech[32] that "threaten[s] the student body as a whole and target[s] specific students by name . . . represent[s] the quintessential harm to the rights of other students to be secure." *Wynar v. Douglas Cty. Sch. Dist*., 728 F.3d 1062, 1072 (9th Cir. 2013). To properly discipline a student for speech, the school must look to the totality of the circumstances. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 990 (9th Cir. 2001) ("We look not only to [the student's] actions, but to all of the circumstances"). The school should evaluate circumstances such as whether the student has a history of violent behavior or a record of disciplinary problems. *Id.* The school's actions must be "no more than necessary to prevent the intrusion on the rights of other students." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1183 (9th Cir. 2006). In addition, the disciplinary measures are "limited to conduct that occurs in public high schools." *Id.* at 1182–83. This aspect of the *Tinker* standard has not applied to off-campus student speech.

[32] The Ninth circuit found "messages that could be interpreted as a plan to attack the school, written by a student with confirmed access to weapons and brought to the school's attention by fellow students" to constitute speech with invaded the rights of other students to be secure. *Wynar,* 728 F.3d at 1070.

While Ms. Clark's off-campus speech caused concern by two students, her post did not collide with the rights of others. Her off-campus speech did not insinuate school violence. *Saxe*, 240 F.3d at 217. The post did not threaten the student body nor did it name any other students aside from Ms. Anderson. *Wynar*., 728 F.3d at 1072. R.18. The record contains no evidence to show Ms. Clark could have carried out any act of violence. She had no access to any weapons and has never physically assaulted anyone. Petitioner improperly disciplined Ms. Clark because of failing to evaluate the totality of the circumstances. R.14,21. *LaVine*, 257 F.3d at 990. Petitioner should have considered Ms. Clark's lack of violence before suspending her for three days. R.24. Petitioner only focused on the second portion of Ms. Clark's off-campus speech, failing to consider the political nature of the post as a whole. R.14,21. Most importantly, disciplinary measures are limited to on-campus speech that has collided with the rights of other students. *Harper*, 445 F.3d at 1182-83. This aspect of *Tinker* does not apply to Ms. Clark's off-campus speech; hence it did not collide with the rights of other students.

CONCLUSION

Based upon the foregoing argument and citations of authority, Respondent respectfully requests this Court to affirm the judgment of the Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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Team I

Counsel for Respondent

Certificate of Compliance

Pursuant to the rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, we hereby certify that this brief, in all its copies, is the work product of the members of Team I. We certify that this brief has complied fully with the governing honor code of Team I's law school. Furthermore, the members of Team I acknowledge that they have complied with all Rules of the Competition.

Per the rules of the Competition, the members of Team I certify this brief by signing the cover page of the measuring brief and signing below, postmarked no later than January 31, 2017.

Respectfully submitted,

Counsel for Respondent

January 31, 2017

Appendix A

First Amendment to the United States Constitution

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.

Appendix B

School District of Washington County, New Columbia
Anti-Harassment, Intimidation & Bullying Policy

Harassment, intimidation, bullying and threats are inappropriate in public school environments. It is the policy o the Washington County School District to prohibit harassment, intimidation, bullying and threats communicated by any means, including but not limited to electronic, oral, written, or physical acts, contacts, messages, or other communications that constitute any and all of these practices (hereafter referred to as "prohibited practices") whenever the prohibited practices actually or reasonably could be expected to (1) harm a student, teacher, administrator, or staff member, (2) substantially interfere with a student's education, (3) threaten the overall educational environment, and/or (4) substantially disrupt the operation of the school.

Prohibited practices include, but are not limited to, all forms of harassment, intimidation and/or bullying based on race, national origin, skin color, physical appearance, ancestry, gender, sexual orientation, gender identity, pregnancy, marital status, economic status or physical, mental or sensory disability.

This policy applies to all School District employees, students, parents/guardians and family members of students, and volunteers with respect to conduct and contact of any kind between or among adults and minors. Violators will be sanctioned pursuant to applicable school district disciplinary policies.

Approved by School Board of Washington County on August 1, 2015

Effective Date: August 1, 2015

Appendix C

School District of Washington County, New Columbia
Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students

The purpose of this policy is to advise staff on issues relating to transgender and gender nonconforming students, in order to create a safe, inclusive learning environment for all students and to ensure that all students have equal access to each component of their educational programs.

…

SUMMARY
This policy requires all athletics programs and activities be conducted without discrimination based on sex, sexual orientation, gender expression, or gender identity in the following areas:

- Official Records
- Names and Pronouns
- Restroom Accessibility
- Locker Room Accessibility
- Physical Education, Clun Sports, and Interscholastic Athletics

…

Physical Education, Club Sports, and Interscholastic Athletics:
Students shall be allowed to participate in physical education, club sports, and interscholastic athletics consistent with the gender identity they consistently assert at school.

…

Approved by School Board of Washington County on August 1, 2015

Effective Date: August 1, 2015