Brief on the Merits

No. 16-1999

IN THE

Supreme Court of the United States

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

Respondent

v.

WASHINGTON COUNTY SCHOOL DISTRICT,

Petitioner

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

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BRIEF FOR THE PETITIONER

Oral Argument Requested

Team K
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

i. The work product in all copies of Team K's brief is in fact the work product of the members of Team K.

ii. Team K has fully complied with the Honor Code of the University of Team K.

iii. Team K has fully complied with all Rules of the Competition of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.

QUESTIONS PRESENTED

1. Whether a public high school student's Facebook post constitutes a "true threat" beyond the protection of the First Amendment.

2. Whether a public school district violates a high school student's First Amendment rights by disciplining her for a Facebook post initiated off-campus on her personal computer where school authorities conclude that the post was materially disruptive and collided with the right of other students to be secure at school.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Other Cases

Other Court Documents

Secondary Sources

STATEMENT OF THE CASE

On August 1, 2015, the Washington County School District enacted a new policy binding on all of its schools entitled "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" (hereinafter referred to as "Nondiscrimination in Athletics Policy"). Franklin Aff., Ex. A. The Nondiscrimination in Athletics Policy requires all Washington County schools' athletic programs, including Pleasantville High School, to "be conducted without discrimination based on sex, sexual orientation, gender expression, or gender identity." *Id*. As a result of this policy, Taylor Anderson, a 15-year-old sophomore at Pleasantville High who was born male but identifies as female, was allowed to play on the Pleasantville High School Girls' Basketball team. R. at 2. Kimberly Clark, a 14-year-old freshman at Pleasantville High, was also a member of the Girls' Basketball team. *Id*. During a practice game held on November 2, 2015 at school Ms. Clark and Ms. Anderson engaged in a "loud and disruptive verbal argument on the court" that resulted in both players being ejected. *Id*. Later that evening, Ms. Clark wrote a Facebook post in which she 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 just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too…

Franklin Aff., Ex. C.

On November 4, 2015, Ms. Anderson's parents and the parents of Josie Cardona, another transgender student at Pleasantville High, met with Thomas Franklin, principal of Pleasantville High. R. at 3. The parents gave Mr. Franklin a copy of Ms. Clark's Facebook post and expressed

concerns regarding the safety of their children at school. *Id*. The Andersons informed Mr. Franklin that they had kept Ms. Anderson home from school for two days after seeing the post. Franklin Aff. ¶ 9. Mr. Franklin stated in his affidavit that both Ms. Anderson and Ms. Cardona were "visibly distressed" at the meeting. *Id.* at ¶ 7.

On November 5, 2015, Mr. Franklin met with Ms. Clark and her parents to inquire about the post. *Id*. at ¶ 12. During the meeting, Ms. Clark stated that she had written the post and that she believed allowing transfemales to compete on the girls' basketball team is "unfair," "dangerous," and "immoral." Kimberly Clark Aff. ¶ 5. Ms. Clark stated that she was joking when she posted that she would "take 'IT' out one way or another" and that she believed only her Facebook friends would see the post. *Id*. at ¶ 6-7. However, Ms. Clark acknowledged that Ms. Anderson and other transgender students were likely to be notified about the post by other students. *Id*. at ¶ 6.

On the same day, Mr. Franklin suspended Ms. Clark from school for three days pursuant to the Bullying Policy. Franklin Aff. ¶ 15. Alan Clark, Ms. Clark's father, filed an appeal with the Washington County School Board, which was rejected. Alan Clark Aff. ¶ 14. Mr. Clark was informed by letter on November 13, 2015 from the Washington County School District that the second paragraph of the Facebook post constituted a "true threat" and that the suspension was appropriate because the post was "materially disruptive of the high school learning environment" and "clearly collide[d] with the rights of other students to be secure in the school environment." Alan Clark Aff., Ex. A.

On December 7, 2015, Mr. Clark filed a complaint in the United States District Court for the District of New Columbia seeking declaratory relief and alleging that Ms. Clark's First Amendment freedom of speech rights had been violated. R. at 1. On April 14, 2016, the district

court entered summary judgment in favor of the Washington County School District. *Id*. at 2. On January 5, 2017, the United States Court of Appeals for the Fourteenth Circuit reversed the district court's ruling and found for Ms. Clark. *Id*. at 25. After the Washington County School Board appealed, this Court granted certiorari to answer the questions presented. *Id.* at 40.

SUMMARY OF THE ARGUMENT

The Washington County School District respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit and find that Kimberly Clark's Facebook post constituted a true threat beyond the protection of the First Amendment.

The Fourteenth Circuit incorrectly held that Ms. Clark's Facebook post did not constitute a true threat that is not entitled to First Amendment protection. First, Ms. Clark's Facebook post satisfies the three true threat factors enunciated by this Court in *Watts v. United States* and constitutes a true threat under this Court's opinion in *Virginia v. Black*. After *Watts* and *Black*, lower courts have developed differing tests for true threats. The Fourteenth Circuit incorrectly held that a true threat analysis requires a showing of the speaker's subjective intent to threaten. Under *Watts* and *Black*, the speaker's subjective intent to threaten is not required. The appropriate test is the objective test established in the majority of lower courts, including the Fifth Circuit in *Porter v. Ascension Parish School Board*. Under the objective test, this Court should find that an objectively reasonable person would interpret Ms. Clark's post to be a serious expression of an intent to cause present or future harm such that the post constitutes a true threat that is not protected by the First Amendment.

The Fourteenth Circuit also incorrectly determined that *Tinker* does not apply to any speech that originates off-campus. Many circuits such as the Second, Fourth, Fifth, Eighth, and Ninth have all extended *Tinker* to apply to threatening and disruptive speech that originates off-campus, so long as it meets the requirements of *Tinker*. Ms. Clark's Facebook post meets these requirements in that certain speech should be prohibited when it is reasonably forseeable to cause a material and substantial disruption that would interfere with the school environment. Further, Ms. Clark specifically targeted and threatened a specific student and group of students at the

school, which is of the type of speech said to be unprotected in *Bell v. Itawamba Cty. Sch. Bd.*, regardless of its origin. Lastly, Ms. Clark's Facebook post collided with Ms. Anderson's as well as other students' rights to be secure and let alone in their education, therefore it is unprotected by the First Amendment and subject to discipline by school officials.

ARGUMENT

I. MS. CLARK'S FACEBOOK POST CONSTITUTES A "TRUE THREAT" THAT IS NOT ENTITLED FIRST AMENDMENT PROTECTION.

In its decision, the Fourteenth Circuit chose to apply the subjective test for the determination of whether Ms. Clark's Facebook post constituted a true threat. R. at 30. The court concluded that the post failed to constitute a true threat under the subjective test because the "record [reflected] a lack of evidence of . . . subjective intent to intimidate." *Id.* This Court should overturn the Fourteenth Circuit's decision because under previous Supreme Court true threat cases the Facebook post unequivocally constitutes a true threat. Further, as a majority of lower courts have stated, the objective true threat test is the more appropriate test. Under the objective test, a reasonable person would consider Ms. Clark's Facebook post to be a true threat and is thus not entitled to First Amendment protection.

A. Under Supreme Court jurisprudence, Ms. Clark's Facebook Post Constitutes a "True Threat."

Freedom of speech is a fundamental right guaranteed by the Constitution to all Americans. Justice Thurgood Marshall expressed the importance of this foundational right when he wrote, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). However, this right is not unlimited, and the Supreme Court has carved out various exceptions that limit the right to freedom of speech in areas of speech "which are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992) (internal citations omitted). These exceptions include obscenity, *Miller v. California*, 413 U.S. 15 (1973), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), defamation, *Gertz v. Robert Welch, Inc.*,

418 U.S. 323 (1974), and child pornography, *United States v. Williams*, 553 U.S. 285 (2008). Speech that constitutes a "true threat" is another exception to First Amendment protection. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

The "true threat" exception to First Amendment protection was first recognized in *Watts v. United States*. 394 U.S. 705 (1969). In *Watts*, a man was arrested at a protest for violating a federal statute that prohibited making threats against the President after he stated, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 705-06. The Court noted the key issue in a true threat analysis is determining whether a communication is "constitutionally protected speech" or a true threat. *Id.* To aid in this determination, the Court looked at three factors: (a) the context of the statement, (b) whether the statement was conditional, and (c) the reaction of the listeners. *Id.* Applying the factors, the Court found that the defendant's statement (a) was made during a political debate akin to "political hyperbole," (b) was made conditional upon the man's induction into the armed services, and (c) was met with laughter from the crowd and the man making the statement. *Id.* at 707-708. As such, the Court concluded that this statement was not a true threat and was protectable expression. *Id.* at 708.

The Supreme Court further expanded on the doctrine of the true threat exception in *Virginia v. Black*. 538 U.S. 343 (2003). The Court in *Black* defined a true threat 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." *Id.* at 359. The Court stated that the focus of prohibiting true threats is to "[protect] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 360 (internal quotations omitted). The Court then held that "intimidation" is one type of true threat. *Id.* at 359-360. The Court defined

intimidation as a communication "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.* at 360. *Black* provides more clarification on the definition of true threats, as well as defining a class of true threats (intimidation) that requires a finding of the speaker's subjective intent to threaten.

Under *Watts* and *Black,* Ms. Clark's Facebook post is a true threat. Applying the *Watts* factors, the Facebook post clearly constitutes a true threat. First, the Facebook post was made in the context of Ms. Clark and Ms. Anderson having previously engaged "in a loud and disruptive verbal argument" at a practice basketball game. R. at 2. This context is clearly distinguishable from *Watts* where the statement was made during a protest in which, the Court noted, language can often be "vituperative, abusive and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969). Further, the Facebook post was written hours after the altercation in which Ms. Clark had time to reflect on the situation, unlike in *Watts* where the statement was made in the midst of a political protest. Ms. Clark's language, chosen not in the heat of the moment but after hours of reflection, shows a deliberate attempt at threatening Ms. Anderson and other individuals. The Fourteenth Circuit emphasized that Ms. Clark was only fourteen years old and had no previous disciplinary record. R. at 7. However, treating Ms. Clark's speech as that of a naïve teenager ignores "the special characteristics of the school environment" and could place schoolchildren in danger. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506 (1969). These special characteristics make it important that student speech, especially threats against other students, are taken seriously, which requires a finding that the post was a true threat. Further, while recognizing a student's previous disciplinary violations is important, situations involving literal and legitimate threats against other students should be treated seriously regardless of any previous disciplinary record. Applying the second *Watts* factor, the post was unconditional.

Unlike in *Watts* where the threatened shooting of the President was conditioned upon the speaker being enlisted in the armed services, Ms. Clark threatened to "take IT out one way or another." Franklin Aff., Ex. C. Finally, the reaction of the listeners shows that the post was a true threat. Mr. Franklin testified in his affidavit that Ms. Anderson and Ms. Cardona, two targets of the post, "were visibly distressed" after seeing the post. Franklin Aff. ¶ 7. Unlike in *Watts* where the statement was met with laughter from the listeners, this post was met with shock and dismay. According to the *Watts* factors, Ms. Clark's Facebook post constituted a true threat that was punishable by the school.

Applying *Black*, the post constituted a true threat because Ms. Clark intended to "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Ms. Clark intended to express a threat to commit an act of unlawful violence on both Ms. Clark and other transgenders by ensuring that they would get "more than just ejected" and "[taking them] out one way or another." Franklin Aff., Ex. C. The Fourteenth Circuit chose to give Ms. Clark the benefit of the doubt and treated this language flexibly by concluding that the post "could as readily imply social ostracism as violence." R. at 32. However, this reasoning is contrary to the purposes of a genuine true threat analysis, which is to protect the recipients of communications from the disruptions and anxiety that stem from threatening language. *Black* 538 U.S. at 360. It is clear that both Ms. Anderson and Ms. Cardona understood this post to be one that threatened physical violence, as they were still "visibly distressed" the next morning after viewing the post the previous evening. Franklin Aff. ¶ 7. The *Black* Court does not require any finding of subjective intent by the speaker to threaten. *United States v. Nicklas*, 713 F.3d 435, 439 (8th Cir.

2013). Accordingly, the post is not entitled to First Amendment protection because it is a true threat.

B. The Objective Test is the Appropriate "True Threat" Test.

Lower courts have attempted to clarify the true threat analysis in greater detail. The Supreme Court's decision in *Black*, however, has "spawned as many questions as answers." Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1226 (2006). Therefore, there is currently no uniform test for the determination of a true threat other than what this Court has provided in the *Watts* and *Black* opinions. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J. L. & Pub. Pol'y 283, 366 (2001).

The Ninth Circuit in *Cassel v. United States* introduced the subjective test by holding that a true threat may only be found if it can be shown that a speaker had a subjective intent to threaten. 408 F.3d 622 (9th Cir. 2005). In *Cassel*, the defendant was charged under a criminal statute with interfering with a federal land sale. *Id.* at 625. The court held that in *Watts* the Supreme Court "declined to address . . . whether intent to threaten is a necessary part of a constitutionally punishable threat." *Id.* The *Cassel* court found that "speech may be deemed unprotected by the First Amendment as a 'true threat' *only* upon proof that the speaker subjectively intended the speech as a threat." *Id.* at 633 (emphasis added).

Other courts have employed an objective test for the determination of what communication constitutes a true threat. The Fifth Circuit in *Porter v. Ascension Parish School Board* looked to whether an objectively reasonable person would interpret the communication as a threat. 393 F.3d 608 (5th Cir. 2004). In *Porter*, a student was placed in jail for drawing a violent picture that was discovered two years after he drew it. *Id.* at 611. The Fifth Circuit determined that the threshold issue in the determination of whether speech is a true threat is whether the communication was "intentionally or knowingly *communicated* to either the object

of the threat or a third person." *Id.* at 616 (emphasis in original). The court then adopted an objective test for the determination of true threats focusing on "if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause present or future harm." *Id.* at 616 (internal quotations omitted). Presently, a "vast majority of courts" use an objective test rather than a subjective test in the determination of true threats. Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1261 (2006).

This Court should apply the objective true threat test. First, as the district court stated, the subjective test used in *Cassel* was applied in a criminal context, while the objective test has been used in the context of school discipline. *See Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002). Further, the subjective test fails to honor the purposes of prohibiting true threats. These purposes include "[protecting] individuals from the fear of violence and from the disruption that fear engenders." *Virginia v. Black*, 538 U.S. 343, 360 (2003) (internal quotations and citations omitted). The subjective test is inappropriate because "the harms that true threats inflict - fear and disruption . . . - take place regardless of the speaker's unexpressed intention." Br. for the United States at 35, *Elonis v. United States*, 2014 WL 4895283 (2014). Analyzing only the speaker's subjective intent would be "dangerously underinclusive with respect to" the purposes of true threat exceptions, which is to protect society from the fear that results from threats. *New York ex rel. Spitzer v. Cain*, 418 F.Supp.2d 457, 479 (S.D.N.Y. 2006). Requiring a speaker's subjective intent to threaten would allow true threats that put individuals in fear of violence to go unpunished, which is contrary to *Black*. The objective test honors the goals of prohibiting true threats by looking at how a reasonable person would perceive a communication to protect society from threats and fears that accompany threats.

Further, this Court should apply the objective test because the Bullying Policy does not require proof of subjective intent to threaten. In *Watts* and *Black*, the statutes in question both required proof of subjective intent. The Bullying Policy prohibits, without regard to intent, "harassment, intimidation, bullying and threats . . . whenever the prohibited practices actually or reasonably could be expected to . . . (3) threaten the overall educational environment." Franklin Aff., Ex. B. Requiring subjective intent would be reading nonexistent language into the Bullying Policy under which Ms. Clark was punished. The subjective test applied in *Cassel*, and relied upon by the Fourteenth Circuit, is limited in application to "intimidation," which is only one category of true threats. *Virginia v. Black*, 538 U.S. 343, 360 (2003). In *Cassel*, the statute under which defendant was convicted only proscribed "intimidation" and not all other types of threatening communications. *United States v. Cassel*, 408 F.3d 622, 626 (9th Cir. 2005). At best, the subjective test applied in *Cassel* is limited in application to threats involving "intimidation." In *Black*, the Court considered subjective intent only because the statute in question required intent to intimidate, which shows that *Black* does not suggest that subjective intent to threaten would be required for all true threat cases. *Black*, 538 U.S. at 348; *see also United States v. Nicklas*, 713 F.3d 435, 439 (8th Cir. 2013). The Bullying Policy generally prohibits all "threats" and not just intimidation. Franklin Aff., Ex. B. If the Washington County School District intended to require a speaker's subjective intent to threaten to punish that student under the Bullying Policy, the district may have only prohibited intimidation. Applying the subjective test would serve two unintended purposes: reading a subjective intent requirement into the Bullying Policy and protecting threatening statements that place others in fear. As such, the objective test is the most appropriate way to protect the public from the fears that true threats create and will ensure that threatening statements like the one made by Ms. Clark will not go unpunished.

The objective test allows more flexibility in the determination of true threats, which ultimately protects the public in a better way than the subjective test. Under the objective test, a fact finder has the ability to consider the speaker's subjective intent, while ensuring that this factor will not be dispositive. Br. Amicus Curiae of the Anti-Defamation League in Supp. of Resp't at 14, *Elonis v. United States*, 2014 WL 4978892 (2014). A speaker's subjective intent is "particularly difficult" to discern in electronic communications. *Id.* at 7. Requiring proof of subjective intent in electronic communications would require "a great amount of speculation and inference," which would allow true threats to go unpunished under the subjective test. *Id.* at 15. Further, requiring a finding of subjective intent would allow defendants to provide post hoc excuses for threatening language. The objective test strikes an appropriate balance in distinguishing true threats from protected speech by "[taking] into account the impact on the target and society at large." *Id.* at 16.

C. Ms. Clark's Post Constitutes a "True Threat" Under the Objective Test.

Under the objective test, Ms. Clark's Facebook post was a communication of a true threat. The threshold issue for the objective test is whether the speaker intended to communicate a threat. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617 (5th. Cir. 2004). The court held that "something more than . . . accidental and unintentional exposure to public scrutiny must take place." *Id.* at 618. Ms. Clark stated that she knew the Facebook post would be seen by her friends and others, while also conceding that it was likely that Ms. Anderson and other transgender students would possibly become aware of the post. Franklin Aff. ¶ 14. Therefore, the Facebook post satisfies the threshold issue of being an intentional communication made by Ms. Clark.

The Eighth Circuit has applied the objective true threat test to a case similar to the case at bar. *See Doe v. Pulaski Cnty. v. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002). In *Doe*, a student wrote a letter that stated he would kill a classmate. *Id.* at 619. Applying the objective test,

the court found the letter to be a true threat because, among other things, "the violence described in it was directed unequivocally at" the target of the threat. *Id.* at 625. Further, the speaker did nothing to "alleviate [the target of the threat's] concerns about the letter." *Id.* As in *Doe*, Ms. Clark's Facebook post was directed squarely at Ms. Anderson. Franklin Aff., Ex. C. ("Taylor better watch out at school."). A reasonable person would feel more threatened by a communication when it specifically names that person as the potential subject of violence. Second, Ms. Clark failed to alleviate any concerns Ms. Anderson may have had after she published the post. If Ms. Clark would have taken some steps at the time to tell Ms. Anderson that she intended the post as a joke, whether it be talking to her directly or otherwise, Ms. Anderson may have felt less threatened. The fact that Ms. Clark took no such precautionary steps shows that Ms. Anderson was justified in perceiving the post as a true threat. As in *Doe*, a reasonable person would feel threatened by the language in Ms. Clark's post. As such, the post constitutes a true threat.

The district court correctly noted that the issue in this case under the objective test is "whether a reasonable person would feel threatened by the language in Ms. Clark's post." R. at 7. When considering the context of a statement, all facts should be considered, "including the surrounding events and reactions of the listeners." *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1075 (2002). Under the facts, a reasonable person would feel threatened by Ms. Clark's post. Ms. Clark stated that the post was intended "merely as [a joke]." Kimberly Clark Aff. ¶ 7. A threatening statement is not a true threat if made in such a way that a reasonable person would perceive it as a joke. *Roy v. United States*, 416 F.2d 874, 878 (9th Cir. 1969). However, Ms. Clark's Facebook post, made without any suggestion of jest, was not made in such a way that a reasonable person would believe it to be a

joke. Ms. Clark's statement over a month after the post was made public that she was merely joking does nothing to dispel the apprehension that caused Ms. Anderson, Ms. Cardona, and their parents to feel threatened. The reactions of Ms. Anderson and Ms. Cardona shows that the post was a true threat under the objective test and not made in a joking manner. Both students felt threatened by the language as they appeared "visibly upset." Franklin Aff. ¶ 7. Further, the parents of the students felt that their children were so threatened that they had a meeting with Mr. Franklin, while Ms. Anderson's parents even held her out of school for two days. *Id.* at ¶ 9. These fears and apprehensions were not an overreaction. The post announced a clear threat of danger ("I'll make sure IT gets more than just ejected. I'll take IT out one way or another.") after Ms. Clark had announced her disdain for Ms. Anderson and other transgender individuals ("TRANSGENDER is just another word for FREAK OF NATURE!!!"). Franklin Aff., Ex. C. A Facebook post threatening to injure or kill another made in the context of a fight between two students is objectively threatening and should be treated as a true threat.[1] The students and their parents were justified in their fears, as a reasonable person would feel threatened by the Facebook post that seemed in all facets to be a legitimate threat.

True threats pose many dangers to society, especially in the context of the school environment. Under the Supreme Court's true threat jurisprudence, Ms. Clark's Facebook post constituted a true threat. Further, *Black* does not require a finding of a speaker's subjective intent to threaten. As such, this Court should analyze the post by determining whether an objectively reasonable person would feel threatened by the post. Under this test, Ms. Clark's Facebook post constitutes a true threat that is not subject to First Amendment protection.

[1] The Supreme Court of Massachusetts has noted that the context of school violence is one important consideration to make when threatening statements are made by schoolchildren. *Commonwealth v. Milo M.*, 740 N.E.2d 967, 973-74 (Mass. 2001).

II. THE COURT OF APPEALS INCORRECTLY DETERMINED THAT *TINKER* DOES NOT APPLY TO SPEECH THAT ORIGINATES OFF-CAMPUS.

In its decision, the Court of Appeals held that applying *Tinker* to speech that did not originate on campus or at a school sponsored event would unduly limit student speech in a manner that would be inconsistent with the First Amendment. R. at 39. However, school officials must have the ability to maintain a safe school environment for its students. In order to do so, officials must be able to punish certain speech that, even if it originates off-campus, would cause a substantial disruption on campus. Further, school officials must be able to prohibit speech by a student that directly targets and threatens a specific student or group of students. Lastly, not creating a clear precedent and standard to apply to off-campus speech that violates the First Amendment would in fact have an unintended chilling effect on student's speech. Therefore, this Court should overturn the Court of Appeals decision and find that *Tinker* is in fact applicable to off-campus speech that violates the First Amendment.

A. School Authorities May Punish Off-Campus Speech That Meets the Requirements of *Tinker*.

It is longstanding legal precedent that students do not shed their First Amendment constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). However, certain areas of speech lack value and are so harmful that they are not afforded First Amendment protections. These types of speech include fighting words and threats. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Virginia v. Black*, 538 U.S. 343 (2003). In *Tinker,* several students wore armbands to school in order to protest the Vietnam War, so the Court was not forced to address any off-campus speech issues. *Tinker*, 393 U.S. at 508. However, the Court did lay the framework for when a student's speech

materially disrupts the school environment, and thus allows school officials to punish those students.

The *Tinker* Court stated that in order for school officials to justify prohibition of an expression, officials "must show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint." *Id.* at 509. Further, school officials must show that the speech or conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* (quoting *Burnside v. Byars*, 363 F.2d at 749 (5th Cir. 1966)).

B. Ms. Clark's Speech was Reasonably Foreseeable to Reach the *Tinker* Standard of a Substantial Disruption Because She Targeted a Specific Student at the School.

"The internet has become a school's new bathroom wall, where students take to complain, talk about, and threaten other students and teachers." Evie Blad, *Networking Web Sites Enable New Generation of Bullies*, ARK. DEMOCRAT GAZETTE (Little Rock, Ark.) Apr. 6, 2008, at A1. Ms. Clark's speech was reasonably foreseeable to cause a substantial disruption because she intentionally targeted Ms. Anderson in her Facebook post. Franklin Aff. Ex. C. It was also highly likely to reach the school because she intentionally posted her comment online. Although Ms. Clark did not intend for Ms. Anderson to see the post, she later admitted that she knew Ms. Anderson and other transgender students would more than likely discover the post from other students. Kimberly Clark Aff. ¶6. Further, Ms. Clark and Ms. Anderson had already had a heated verbal altercation; therefore, the school officials had reason to believe a substantial disruption would likely ensue when the two interacted again. *Id.* at ¶4.

Bell v. Itawamba Cty. Sch. Bd. is the most recent example of when a school may apply *Tinker* to off-campus speech. 799 F.3d 379 (5th Cir. 2015). In *Bell*, the court focused on the

nature of the language of the student and found that because the student's speech was intentionally directed toward the school and a member of the school faculty and was understood to threaten or harass that faculty member, the speech was not protected, regardless of its origin. *Id. Bell* is directly applicable to the case at hand in that a student made threatening comments and statements off-campus that the student knew or should have known would have a reasonable foreseeability of reaching the school and causing a substantial disruption.

The Ninth Circuit has also recently applied *Tinker* to off-campus speech in *Wynar v. Douglas Ct. Sch. Dist. 11*. 738 F.3d 1062 (9th Cir. 2013). In *Wynar*, the school expelled a student for 90 days when he made threatening comments to other students about committing a school shooting on a specific day. *Id.* The court reasoned that it was certainly appropriate to apply *Tinker* to off-campus speech when the school is faced with the "possibility of on campus violence." *Id.* This is exactly what is at hand in the present case. Ms. Clark's comments are of a threatening nature that could certainly lead to the type of substantial disruption to the learning environment that the majority of circuits have held a school should take action to prevent. While Ms. Clark did not expressly threaten to shoot Ms. Anderson and others, she unequivocally made threats that insinuated bodily harm or death to those students. These types of scenarios are a distraction to not only the students immediately involved, but also the vast majority of other students at the school who are frightened and nervous about some impending danger or altercation that is reasonably foreseeable to occur. Justice Alito, in his concurrence in *Morse v. Frederick*, discussed that schools can be a place of special danger because students "may be compelled, on a daily basis to spend time at close quarters with other students who may do them harm." 551 U.S. 393, 424 (2007). He goes on to say that the First Amendment, in normal settings, limits the government's ability to suppress speech on the ground that it presents a threat

of violence. *Id.* at 425. However, due to these special features of the school environment, school officials must have greater authority to intervene when it is reasonable that speech, like the speech in the case at hand, leads to actual violence. *Id.*

The Eighth Circuit in *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.* held in 2012 that "under *Tinker*, 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 … not immunized by the constitutional guarantee of freedom of speech." 696 F.3d 771, 776-77 (8th Cir. 2012). *S.J.W.* went on to discuss *D.J.M. v. Hannibal Public School District #60* where messages were sent between classmates about hurting other students at their school. 647 F.3d 754 (8th Cir. 2011). Both of the above cases properly relied on the reasonable foreseeability standard that the speech would cause a material disruption at the school. *D.J.M.* held that because it "was reasonably foreseeable D.J.M's speech would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment, and because the speech did actually cause a substantial disruption, the school could lawfully punish." *Id*. Ms. Clark's statements, directed at Ms. Anderson, clearly had a high foreseeability of reaching Ms. Clark and causing the substantial disruption that *S.J.W.* and *D.J.M.* have held the school has the authority to prevent.

In *Kowalski v. Berkeley County Schools*, the Fourth Circuit held that the school did not violate the student's First Amendment rights when the student was punished for creating a website where other students could post defamatory information about a classmate. 652 F.3d 565 (4th Cir. 2011). Again, much like Ms. Clark, Kowalski created the website off-campus, at her home. *Id.* However, the court opined,

> "She knew the electronic response would be, and in fact was, published beyond her home and could reasonably be expected to reach the school or impact the

> environment. She also knew that the dialogue would and did take place among Mussleman High School students whom she invited to join [the online group] and that the fallout from her conduct and the speech within the group would be felt in the school itself."

Id. at 573. This case, along with the following decision, is directly paralleled to Ms. Clark's actions on her Facebook page. She not only knew that other student's would see and interact with her post, its reasonable that she intended for people to do so because that is the very basis and purpose of having and posting on one's Facebook page.

Along with the Fourth, Fifth, Eighth, and Ninth Circuits, the Second Circuit has recently addressed this issue. In *Doninger v. Niehoff*, the Second Circuit refused to enjoin the punishment of a student who used her home computer to post rude comments about an administrator online. 527 F.3d 41 (2nd Cir. 2008). Much like Ms. Clark's comments, the student in *Doninger* directed her speech toward a member of the school. *Id*. Therefore, the Second Circuit concluded that her speech was "purposefully designed" to reach the schools campus because the speech directly pertained to events at Doninger's high school and it was her intent for other students to read it and respond. *Id.* This is directly applicable to Ms. Clark's speech because not only did her speech directly pertain to events that had recently occurred at her high school, but she also made the post on Facebook in which the purpose of postings are for other users to read the comments and interact. The Second Circuit concluded by saying "a student may be disciplined for expressive conduct, *even conduct occurring off school grounds*, when this conduct would foreseeably create a risk of substantial disruption within the school environment, at least when it was similarly foreseeable that the off-campus expression might also reach campus." *Id.* at 48 (emphasis added) (internal citations omitted).

On the other hand, in 2004 the Fifth Circuit ruled in *Porter v. Ascension Parish School Board* that *Tinker* did not apply when a student painted pictures and representations of his school

being attacked by missiles, helicopters, and various armed people. 393 F.3d 608 (5th Cir. 2004). The reason *Tinker* did not apply was because the student had no intention for his drawings to reach the school or to become known by anyone there. *Id*. In fact, the only way the school was made aware of the depictions was when a family member unwittingly brought them to the school. *Id.* This distinction of when *Tinker* does apply and when it does not is important to show that many circuits both look at the "target" of the speech, as well as the reasonable foreseeability that the speech would cause a substantial disruption when it reaches the school. Ms. Clark's comments differs from the paintings in *Porter* in that the student never intended for anyone aside from himself to see the paintings, whereas Ms. Clark absolutely knew that at least a certain amount of her friends at her high school would see her comments. Kimberly Clark Aff. ¶6.

In *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, a student created a fake profile of a school official and made lewd and offensive comments and posts about him. 650 F. 3d 915 (3rd Cir. 2011). The court ruled that the school's punishment was unfounded. *Id*. However, Justice Fisher's dissent stated that creating a fake MySpace profile poses a reasonably foreseeable threat of interference with the educational environment. *Id*. at 941. Further, if this type of speech were to go unpunished, it would undermine the principal's authority as well as disrupt the educational process. *Id*. Students, as well as school officials, may become distracted, fearful, anxious, and nervous when another student they are forced to share a learning environment with directly attacks them. *Id*. It is therefore reasonable that comments such as Ms. Clark's would cause a substantial disruption at school.

Lastly, applying the *Tinker* standard has support from science. The adolescent is a vulnerable and at a difficult age. During this age, the frontal lobes are last to develop. Francis E. Jensen, MD., *The Teenage Brain* 3 (2015). Coincidentally, the frontal lobe is what controls self-

awareness, general insight, judgment and abstraction. *Id*. Given these facts, it is understandable why adolescents often act irrationally and without notice. *Id.* They may be unable to assess risks and therefore act unpredictably in situations like the one at hand. Therefore, off-campus student speech that targets and distresses another student or group of students should be of special concern and should warrant the school's attention and action.

C. Ms. Clark's Facebook Post Collided with the Rights of Other Students to be Secure and Let Alone in Their Education.

According to *Wynar v. Douglas County School District*, *Tinker* allows school officials to prohibit speech that can both reasonably cause a substantial disruption, as well as speech that will collide with the right of other students to be secure and let alone. 728 F.3d 1062 (9th Cir. 2013). Not only was Ms. Clark's Facebook post likely to cause a substantial disruption in the school, it also collided with Ms. Anderson and other student's right to be safe in their educational environment. In fact, as stated earlier, the two students already had a confrontation that resulted in a substantial disruption that obviously had a negative effect on Ms. Anderson, and it is reasonable to conclude that a subsequent interaction after Ms. Clark's Facebook post would have resulted in a much more intense altercation. Kimberly Clark Aff. ¶4.

In *LaVine v. Blaine School District*, a student wrote a poem at home about a school shooting. 257 F.3d 981, 988 (9th Cir. 2001). The student then brought the poem to class and showed his English teacher. *Id*. Looking at the totality of the circumstances, the school, in expelling the student for his poem, was correct in doing so under the *Tinker* standard. *Id*. The court opined that the school could have "reasonably forecast […] material interference with school activities – specifically that the student was intending to inflict injury upon himself or others." *Id*. Ms. Clark's statements that Ms. Anderson "better watch out at school" and that Ms. Anderson would get "more than just ejected" and "[taken] out one way or another" can

reasonably be seen to be interfering with Ms. Anderson and other transgender student's right to feel safe and secure at school. Franklin Aff., Ex. C. Therefore, the *LaVine* decision is directly in line to support the suspension of Ms. Clark.

Justice Fisher, in his dissent in *J.S. ex rel. Snyder,* stated "Allowing for the expression of beliefs and opinions in a robust but respectful environment encourages engagement, promotes self-improvement, and furthers the search for truth. 650 F.3d 915 (3rd Cir. 2011). Freedom of speech is an essential component of the educational system. *Id*. "When he is in the cafeteria, or on the playing field, or on campus… he may express his opinions… if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school *and without colliding with the rights of others*." 89 S.Ct. at 740 (emphasis added) (internal quotations omitted). Looking at Justice Fisher's application of *Tinker*, as well the many other circuits that have held origin of speech of the type of Ms. Clark's is immaterial, it is persuasive that school authorities should be able to take action to prohibit certain off-campus speech that is disruptive and collides with the rights of others.

D. Without a Firm and Consistent Precedent, There Will Likely be a Chilling Effect on Student Speech.

Lastly, dissenters of applying the *Tinker* standard to off-campus speech claim that doing so would have a chilling effect on student speech. For example, the court in *Thomas v. Board of Education, Granville Central School District* stated that if school officials were allowed to condone speech made off-campus, it could be within their discretion to "suspend a student who purchases an issue of National Lampoon, the inspiration for Hard Times, at a neighborhood newsstand and lends it to a school friend." 607 F.2d 1043 (2nd Cir. 1979). The court in *Thomas* goes on to say the chilling effect on speech would be intensified because the punished student

and his family are unlikely to challenge a punishment through judicial process and the school officials can more easily punish a student than any court could. *Id*.

However, without a consistent precedent in place, students would fear voicing their opinions on controversial issues both at school as well as online in fear they could be punished due to lack of legal guidance. Further, teachers would refuse to address and discuss any controversial issues for the same reason, thus having an even more dangerous chilling effect on speech than any dissenters of applying *Tinker* could imagine. This Court should therefore establish this legal precedent, and allow our teachers and our youth to discuss and debate heated issues of our society, without fear of students instead immediately taking to the internet or other public forum and causing the very uproar courts are attempting to avoid.

Ms. Clark's speech not only constituted a true threat to Ms. Anderson, her speech also is not protected under the First Amendment according to *Tinker* and its progeny. Ms. Clark's Facebook post, albeit orchestrated off-campus, was likely to cause a substantial disruption at school due to the fact that she specifically targeted both a student and a group of students with her threats. Franklin Aff. Ex. C. This type of behavior and speech must be freely acted upon by school officials in order to foster a safe and secure educational environment for every student. Also, it is this Court's duty to hand down consistent and fair legal precedent in order for school officials, in the ever increasing technological age, to be able to differentiate when they can act and prohibit speech that constitutes a threat and falls outside of First Amendment protection. For these reasons, this Court should overturn the Court of Appeals and hold that school officials did not violate Ms. Clark's First Amendment rights in suspending her for her Facebook post.

CONCLUSION

For the reasons stated therein, the Washington County School District respectfully requests that this Court reverse the decision below.

Respectfully Submitted,

/s/
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