TEAM: M

No. 16-9999

IN THE

Supreme Court of the United States

WASHINGTON COUNTY SCHOOL DISTRICT,

Petitioner,

KIMBERLY CLARK, a minor,
by and through her father, ALAN CLARK, in his official capacity.,
Respondent.

On Writ of Certiorari To
The United States Court of Appeals For The Fourteenth Circuit

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BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

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

2. Whether a public school district violated 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?

STATEMENT OF JURISDICTION

The United States District Court for the District of New Columbia issued its decision granting Petitioners' motion for summary judgment finding that the Respondent's speech was not entitled to First Amendment protection. R. 12. The United States Court of Appeals for the Fourteenth Circuit reversed the decision of the District Court. R. 39. Petitioner timely filed a petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1). R. 40. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Respondent, Alan Clark, on behalf of his daughter, Kimberly Clark, brought this action for declaratory relief against Petitioner, The Washington County School District, alleging that Ms. Clark's First Amendment rights were violated after the School District suspended Respondent based on comments she posted on her Facebook account off-campus. R. 1. The District Court for the District of New Columbia granted Petitioners' motion for summary judgment on April 14, 2016. R. 12. The District Court found that the school districts' actions did not violate Respondent's First Amendment rights. *Id*. Respondent filed an appeal in the in the United States Court of Appeals for the Fourteenth Circuit ("Fourteenth Circuit"). R. 25. The Fourteenth Circuit reversed the District Court's decision. R. 39. Petitioner filed a petition for writ of certiorari which this court granted. R. 40.

STATEMENT OF FACTS

Taylor Anderson is a fifteen-year-old sophomore at Pleasantville High School, a public school in the Washington County School District. R. 2. Ms. Anderson was born a member of the male sex, but identifies as female. R. 2. Ms. Anderson had been limited to participating on male-only sports teams, before, the school district adopted the "Nondiscrimination in Athletics Policy". The Policy allows students who are who identify as transgender to participate in school sports teams according to their gender identity. R. 2. Following the adoption of the school district's new policy Ms. Anderson joined the girl's basketball team. R. 2. Kimberly Clark, a fourteen-year-old freshman at the School, also played on the girl's basketball team. R. 2.

During a team practice on the afternoon of November 2, 2015, Ms. Clark and Ms. Anderson had a verbal argument on the court which resulted in both players being ejected from

the practice. R. 2. Prior to this, Ms. Anderson had a clean disciplinary record, without any disciplinary infractions or violent behavior. R. 2.

On the evening of November 2, 2015, immediately after the argument on the court, Ms. Clark posted on her Facebook about Ms. Anderson:

> 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…

R. 2 Two days later, on November 4, 2015, Ms. Anderson, along with her parents, joined by another transgender student, Josie Cardona, and her parents, went to the office of Principal Thomas James Franklin. R. 2-3. Both students were visibly distressed and provided Franklin with a copy of Ms. Clark's Facebook post. R. 2-3. The Anderson's and Cardona's told Principal Franklin that they were concerned that Ms. Clark may resort to violence against their children because of their gender identity. R. 3. The Andersons and Cardonas expressed concerns about continuing to allow their children to play on the girls' basketball team, and even to continue to attend school at the school district because of Ms. Clark's Facebook post. R. 3. In light of the Anderson's valid safety concerns, Ms. Anderson's parents did not allow her to go to school for two days. R. 3.

After being made aware of the Facebook post, Principal Franklin called Ms. Clark's parents on November 4, 2015 to request a meeting. On November 5, 2015 Principal Franklin met with the Clark's where he showed Ms. Clark's Facebook post and the school district's Nondiscrimination in Athletics Policy. R. 3. During the meeting Ms. Clark admitted to writing the Facebook post. R. 4. Ms. Clark further stated that she wrote the post for only her Facebook

friends to see, but was keenly aware that the post could be shared with others, including Ms. Anderson. R. 3.

After the meeting, Principal Franklin suspended Ms. Clark for three days per the School District's Bullying Policy. R. 3. Mr. Clark subsequently filed an appeal with the School Board who eventually upheld her punishment because the second portion of her Facebook post constituted a true threat and that her post had been "materially disruptive of the high school." R. 3.

SUMMARY OF THE ARGUMENT

Respondent's Facebook post constituted a true threat, which is unprotected by the First Amendment. This Court's jurisprudence before and after *Virginia v. Black*, 538 U.S. 343 (2003) indicates that a finding that a reasonable person would objectively be threatened by the speech is required to find that a speech act constitutes a true threat. The objective standard has been the dominate standard amongst circuit courts before and after *Black* was decided in 2003.

Respondent's Facebook post constituted a true threat because Respondent did not make it in response to a political debate and it was interpreted by the intended audience to be threatening under *Watts v. United States*, 394 U.S. 705 (1969). The Facebook post meets the objective test in *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004), and the true threat factors in *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996).

Applying a subjective intent standard to Respondent's speech would only diminish the school's ability to maintain a safe school environment and would perpetuate a hostile environment for transgender students despite a rule enacted which encourages the contrary.

Additionally, the public school district did not violate Respondent's First Amendment rights by disciplining her for a Facebook post written off campus and outside of school hours,

because school authorities reasonably concluded that the speech was a material disruption to school operations. It was reasonably foreseeable that Respondent's speech and threat of violence would come to the attention of school authorities. Finally, Respondent's speech act collided with the rights of other students, specifically, students who self-identity as transgender, to be secure at school, as the intentional direction of the speech towards the school community impinged on the school's interest in maintaining the order, safety, and well-being of its students.

I. THE RESPONDENTS FACEBOOK POST CONSTITUTES A TRUE THREAT OUTSIDE THE SCOPE OF THE FIRST AMENDMENT

A. Jurisprudence Before and After *Black* Indicates that an Objective Standard is Required to Constitute a True Threat

The First Amendment protects speech regardless of its offensive or disagreeable message. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989). However, the First Amendment's protections are not absolute, speech that constitutes a true threat is not protected by the First Amendment. *See Watts v. United States*, 394 U.S. 705 (1969). This Court has only addressed true threats twice, first in *Watts v. United States* and most recently in *Virginia v. Black* where it defined a true threat as:

> True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] 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.

Virginia v. Black, 538 U.S. 343, 359-360 (2003). The *Watts* Court focused on the context of the speech act but did not analyze the issue of intent. *See Watts*, 394 U.S. 705. In *Black* this Court defined and reaffirmed the unprotected nature of true threats. *Black*, 538 U.S. at 359-360. Subsequently, *Black* has been interpreted to either require a subjective intent by the speaker or an objective response by the audience. This disagreement ignores the precedent set by lower courts in the years between *Watts* and *Black* where the dominant approach was the objective standard.

PAUL T. CRANE, "True Threats" and the Issue of Intent, 92 VA. L. REV. 1225, 1243 (2006). The dominant objective standard has been applied in three ways, through either a reasonable speaker, reasonable listener or a reasonable neutral standard. *Id*; *see also* *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969); *United States v. Callahan*, 702 F.2d 964 (11th Cir. 1983); *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996); *United States v. Fulmer,* 108 F.3d 1486, 1491 (1st Cir. 1997); *United States v. Hart*, 457 F.2d 1087, 1090–91 (10th Cir. 1972); *United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986); *United States v. Johnson*, 14 F.3d 766, 768 (2d Cir. 1994); *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States v. Lincoln*, 462 F.2d 1368, 1369 (6th Cir. 1972); *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973); *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994); *United States v. Morales*, 272 F.3d 284, 287 (5th Cir. 2001) *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990). We urge this court to adopt the same reasonable listener standard as the District Court of New Columbia, and clarify once and for all that the intent required for a true threat is an objective intent. R. 7.

i. The *Black* Decision Reaffirms the use of the Objective Standard

A close reading of *Black* in light of the case law in the years between *Watts* and *Black* necessitates that this Court find that a true threat requires an objective intent. Had this Court intended to alter the landscape of the true threat analysis in *Black*, such a change would have been made explicitly. *United States v. Ellis*, CRIMINAL NO. 02-687-1, 2003 U.S. Dist. LEXIS 15543 at *4 (E.D. Pa. July 15, 2003). The language of *Black's* true threat definition does not signal such a drastic change in analysis, rather, it reinforces the fact that the speaker must have intended to communicate their speech. Supporters of the subjective intent standard read the following sentence as requiring a subjective intent on behalf of the speaker: "True threats

encompass those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence".[1] *Black*, 538 U.S. at 359 (emphasis added); *Kosma*, 951 F.2d at 557. However, this sentence is constrained when the Court stated that "the speaker need not actually intend to carry out the threat", meaning, that a subjective intent to threaten is not required. *Black,* 538 U.S. at 359. This Court then emphasized the importance of the audience when it states that the goal of the true threat doctrine is to "protect individuals from the fear of violence…from the disruption that fear engenders". *Id*. Thus, *Black* only requires that the speaker must have intended to communicate the speech act which is in line with the objective intent cases that proceeded it. *Id*. at 359-360.

ii. Courts Since *Black* Have Continued to Use an Objective Intent Standard

The majority of lower courts have continued to use an objective intent standard since *Black*, in line with the case-law since *Watts*. Crane, Paul. Note, "'*True Threats' and the Issue of Intent*," 92 Virginia Law Review (2006) at 1268; *Porter v. Ascension Parish School Board*, 393 F.3d 608, 616 (5th Cir. 2004); *United States v. Fuller* 387 F.3d 643, 646–48 (7th Cir. 2004). These courts have held that the *Black* decision "merely restates…the requirement that the speaker must have some intent to communicate the statement" and not that the intent be to threaten. *Ellis*, CRIMINAL NO. 02-687-1, 2003 U.S. Dist. LEXIS 15543 at *4. Despite the fact that majority of true threat cases decided prior to and after *Black* use an objective intent standard, the Ninth and Tenth Circuits in *United States v. Cassel* and *United States v. Magleby*,

[1] It is also important to note that the subjective intent of the speaker was considered in *Black* because the statute at issue in that case, 18 U.S.C.S. § 871, required a finding of subjective intent, whereas in this case there is no such statute requiring subjective intent. *United States v. Elonis*, 730 F.3d 321, 329 (3d Cir. 2013).

respectively, adopted a subjective intent standard based on their reading of *Black*. *United States v. Elonis*, 730 F.3d 321, 330 (3d Cir. 2013); *See United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005); *United States v. Magleby* 420 F.3d 1136, 1139 (10th Cir. 2005).[2]

Though *Cassel* established a post-*Black* subjective intent standard, shortly after it was decided the Ninth Circuit appeared to reverse its course in *United States v. Romo* where it applied a version of the objective intent standard instead of a subjective one. Crane, Paul. Note, "'*True Threats' and the Issue of Intent*," 92 Virginia Law Review (2006) at 1268; *United States v. Romo*, 413 F.3d 1044 (9th Cir. 2005). Lastly, in *United States v. Stewart*, 420 F.3d 1007, 1016–19 (9th Cir. 2005), the Ninth Circuit was unable to reconcile its contradictory decisions in *Cassel* and *Romo* and stated that the defendant's speech was a true threat under both standards. *Stewart*, 420 F.3d at 1016-19. This Court's definition of true threats in *Black* was not intended to require a subjective intent, as evidenced by circuit court decisions, both before and after *Black*, interpreting the true threat doctrine to require an objective intent. The lack of uniformity among circuit courts applying the subjective standard further indicates that this Court should reverse the holding of the Fourteenth Circuit because any use of the subjective intent standard is an exception and not the rule.

B. Respondent's Statement Is a True Threat Under the *Watts, Porter, and Dinwiddie* Tests

[2] The issue in this case, unlike in *Cassel*, is not whether the speech is criminally punishable; rather this court granted certiorari to consider whether respondent's speech is protected by the First Amendment. R. 40. *Cassel* held that only intentional threats are criminally punishable consistent with the First Amendment. *Cassel*, 408 F.3d at 631.

In *Watts* this Court stated that the perception of the audience matters when evaluating whether speech constitutes a true threat. *Watts*, 394 U.S. at 708. *Watts* held that political hyperbole is not a true threat. *Id*. In *Watts*, the speaker, when attending a political protest, stated that he would shoot the President if the government ever made him carry a gun. *Id*. at 706. This Court found that the defendant's threats to the President, when taken into context, especially focusing on the audience's reaction to the statement, was merely political hyperbole in response to the Vietnam War. *Id*. at 708. The Respondent's Facebook post is not political hyperbole because the statement was not made as part of a political debate, the statement was not conditional in nature and the context of statement indicates that it was a serious threat.

First, Respondent's Facebook post was not made as part of a political debate. In *Watts*, the statement in question was made in the context of a protest against the Vietnam War, whereas the Respondent's statement is not political speech because the principal point of her post was directed at Ms. Anderson and other transgender students to elicit fear. R. 5. Additionally, Respondent's threat was made at home following a violent incident and not in front of a politically charged crowd like in *Watts*. R. 4. The likelihood that the Respondent would interact with Ms. Anderson following her threat was greater than the chance that the defendant in *Watts* had to interact with the target of his threat. R. at 5.

Secondly, the statement was not conditional in nature because it was inevitable that the Respondent and Ms. Anderson would see each other again because they both attend the same school. R. 3. Third, the context of the speech indicates that the respondent's statement was a serious threat. *Watts,* 394 U.S. at 708. As previously stated, when the Facebook post is viewed in conjunction with the fracas on the basketball court, on same day, this suggests that the post was a

serious threat since Ms. Anderson knows that the Respondent is capable of resorting to violence. R. 6-7.

In addition to meeting the test for true threats under *Watts* a true threat may also need to have a degree of immediacy and specificity to be considered a true threat, although this too, in addition to intent, remains unresolved. Crane, Paul. Note, "'*True Threats' and the Issue of Intent*," 92 Virginia Law Review (2006) at 1228. Because Respondent's threat meets the *Watts* test, and because Ms. Anderson believed another attack was possible after reading the Respondent's Facebook post, the threat was an immediate threat. R. 3.

The lack of specificity of the Respondent's threat, specifically in regard to the the way in which she would 'more than just eject" Ms. Anderson, should not bar this Court from finding that it was a true threat. According to the First Circuit's holding in *United States v. Fulmer* the "the use of ambiguous language does not preclude a statement from being a threat". *Fulmer*, 108 F.3d at 1492.

i. A Reasonable Person Would Be Threatened by Respondent's Post under *Porter*

Respondent's Facebook post constitutes a true threat under the objective listener test used in *Porter v. Ascension School District* and the District Court because the Respondent intended to make a statement and the audience was fearful after hearing the threat. In *Porter*, speech constitutes a true threat "if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm". *Porter*, 393 F.3d at 616. In *Porter,* the court considered whether or not a student's drawing of a plan to attack his school constituted a true threat. *Id*. The drawing was found to not be a true threat since the student never knowingly communicated the threat to the object of the threat or a third person. *Id*. at 617.

First, the Respondent intended to communicate a threat. Unlike in *Porter*, where there was no intent to convey, the Respondent in this instant case posted her threat on Facebook where Respondent admits that her post could have been seen by Ms. Anderson. R. 3. Secondly, a reasonable person would interpret the Facebook post as a serious expression of intent to cause present or future harm because the post was preceded by a violent altercation. Thus, Ms. Anderson was aware of of Respondent's pugnacity. R. 4.

ii. The Respondent's Post Meets All of the Factors of the *Dinwiddie* Analysis

In addition to meeting both the *Watts* and *Porter* tests, Respondent's Facebook post also meets the elements of a true threat under the Eighth Circuit's five factor test outlined in *United States v. Dinwiddie*, 76 F.3d at 925. In *Dinwiddie*, a pro-life protester made verbal and physical threats against Planned Parenthood employees. *Id*. at 917. The court in *Dinwiddie* stated that the factors to be considered in determining if a speech act is a true threat is the reaction of the recipient of the threat and other listeners, whether the statement is conditional, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. *Id*. at 925.

The first factor the Court considered was the reaction of the recipient of the threat and of other listeners. In this case, Ms. Anderson was extremely concerned by the post. R. 2. Second, the Court considered whether the threat was conditional. The Respondent's statement was not conditional and, as the District Court stated, was predicated only on another meeting between the Respondent and Ms. Anderson (or other transgender students). R. 5. Third, the Court considered whether the threat was communicated directly to its victim. In this case the threat

was not communicated directly to Ms. Anderson, since Ms. Anderson is not Facebook friends with the Respondent. However, Respondent admits that she knew that it was likely that Ms. Anderson would see the post, and none the less proceeded to make the threat regardless of the consequences in an effort to intimidate Ms. Anderson. R. 7. Fourth, the Court considered whether the maker of the threat had made similar statements to the victim in the past and lastly whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. The Respondent engaged in an altercation with Ms. Anderson only hours before she posted written threats. R. 2.[3] When applied to the facts at hand, the *Dinwiddie* factors further show that Respondent's Facebook post constitutes a true threat.

C. Requiring Subjective Intent Would Hinder School Officials Ability to Maintain Discipline and Safety

True threats are not made in order to engage in a dialogue or to persuade or appeal to the recipient's intellect, rather, true threats are designed to release "primal" emotions such as fear and apprehension in the intended victim. Crane, Paul. Note, "'*True Threats' and the Issue of Intent*," 92 Virginia Law Review (2006) at 1231. Ms. Anderson's case is no exception. Should this court uphold the decision of the Fourteenth Circuit, the Court would strip Ms. Anderson of her right to go to school without the fear of being harmed, and would hinder Petitioners ability to maintain discipline and safety in the school environment.

[3] The Court should pay serious attention to the context in which the threats in this case were made under this Fourth factor, much like the *Dinwiddie* court did. Similarly in Dinwiddie, the defendant did not say "I am going to injure you" to the victim, but the manner and context in which those statements were made and the victim's reaction to them supported the conclusion that the statements *did* constitute a true threat. *Dinwiddie*, 76 F.3d at 925.

School officials, and the government, do not have the time or resources to consider the subjective intent of every speaker. Officials would be forced to examine the intricate details of a speaker's subjective intent while leaving the victims of the speech act vulnerable. For example, in *Dinwiddie*, the defendant made threats of force against Planned Parenthood doctors in an effort to halt abortions. *Dinwiddie*, 76 F.3d at 926. Had the Government been forced to examine the subjective intent of every pro-life protester after they made threatening statements to doctors and their staff, it would compromise the safety of Planned Parenthood employees and patients. The protesters, like Mrs. Dinwiddie, could easily say they never intended their speech and actions to be threatening. Under a subjective intent test the protesters would still be allowed to verbally and physically threaten Planned Parenthood employees.

The subjective intent standard used by the Ninth and Fourteenth Circuits allows someone who has communicated a threat to continue to make threatening statements by merely saying that they didn't mean to intend the speech as a threat. *See Cassel*, 408 F.3d 633; *Elonis v. United States*, 135 S. Ct. 2001 (2015). For example, the petitioner in *Elonis* was convicted by the Third Circuit of having made true threats to his estranged wife on Facebook and argued to this Court that his vulgar and violent posts were never intended to be threatening. *Elonis*, 135 S. Ct. 2001. The Respondent in this case, a high school student with their sights set on college, would never admit that they intended their statement to be a threat, they would use any effort to escape the consequences of their actions and can spin the truth to best suit their needs, just as the petitioner did in *Elonis*. *Id*.

i. <u>A Ruling in Favor of the Respondent Would Perpetuate a Hostile Environment for Transgender Students Despite A Rule Enacted to Encourage the Contrary</u>

The transgender community is marginalized and vulnerable. 75% of transgender youth feel unsafe at school and the students who are able to work through that fear have much lower GPA's and are more likely to miss school out of concern for their safety. National Center for Transgender Equality, *Issues: Youth and Students*, http://www.transequality.org/issues/youth-students (Last visited Jan.30, 2017). The Respondent's actions must be viewed with the totality of the circumstances and with a careful eye towards the environment for transgender students. The Court should not perpetuate the hostile environment faced by transgender youth in school's as a matter of public policy by adopting the subjective intent standard and allowing bullies like the Respondent to instill fear within transgender students and the school environment as a whole.

II. A SCHOOL DISTRICT MAY DISCIPLINE A STUDENT FOR OFF CAMPUS SPEECH PURSUANT TO TINKER

The First Amendment protects student First Amendment right. "Students [do not] shed their constitutional rights to freedom of speech or expression at the school house gates," however, conduct that "reasonably leads school authorities to forecast [a] substantial disruption" or "impinge[s] upon the rights of others" is subject to suppression. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969). This Court has also recognized that schools may restrict "lewd, indecent, or offensive speech;" *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675 (1986); "school-sponsored speech;" *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260 (1988); and "speech that advertises or promotes use of illegal drugs." *Morse v. Frederick,* 551 U.S. 393 (2007). Regardless, school officials may not punish student speech out of "the desire of school authorities to prohibit an unpopular viewpoint." *Tinker,* 393 U.S. at 508-09.

School officials may punish students for their off-campus speech pursuant to *Tinker* and its progeny. In the years since *Tinker* was decided courts have applied the substantial disruption

test to off-campus speech. *See Shanley v. Northeast Indep. Sch. Dist*., 462 F.2d 960 (5th Cir. 1972) (applying Tinkerer where an unauthorized student newspaper distributed off-campus with objectionable content appeared on campus); *Killion v. Frankling Reg'l Sch. Dist.,* 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (applying Tinker where student was disciplined for composing a kill list distributed it off campus); *Emmett v. Kent Sch. Dist. No. 415,* 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying Tinker to a website containing mock obituaries for students).

School officials must be able to guarantee the integrity of the school environment, however threats are not not confined to the school house gates., "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… [is] not immunized by the constitutional guarantees of freedom of speech." *Tinker,* 393 U.S. at 513 (emphasis added). This Court's decisions following *Tinker* further clarify that the power to prevent disruption and threats to the school environment does not end at the schoolhouse gates.

A. The School District Did Not Violate Respondents First Amendment Rights Because Respondent's Post Constituted a Material and Substantial Disruption to School Operations

The Fourteenth Circuit's holding should be reversed because It was reasonable for the school district to determine that respondent's speech was a substantial disruption. R. 12. School officials are not required to "wait until disruption *actually* occurs before they may act" *Lavine v. Blaine Sch. Dist.,* 257 F.3d 981, 989 (9th Cir. 2001) (emphasis added).

In *Kowalski v. Berkeley County Sch*., the Fourth Circuit held that a school district did not violate a student's First Amendment rights when it suspended that student for creating a malicious webpage outside school hours targeting a fellow classmate. 652 F.3d 565, 571 (4th Cir. 2011). The student who was the target of the speech met with her parents and the vice

principal the following morning where she indicated that she felt uncomfortable about going to class. *Id.* at 568. The student was "forced to miss school to avoid further abuse" and the Court stated that "had the school not intervened, the potential for continuing and more serious harassment of [students] was real" therefore validating the school's actions. *Id.* at 574.

The facts in *Kowalski* are similar to the facts in the instant case. Ms. Clark missed two days of school following Respondent's Facebook post in order to avoid further abuse following after the incident at basketball practice. R. 3. Both Ms. Anderson and Ms. Cardona became "visibly distressed," and concerns were expressed by both sets of parents about Respondent's ability to resort to violence, allowing their daughters to return to school, and continued participation in basketball. R. 3. Thus, Respondent's speech reasonably led the school district to forecast a substantial disruption and "colli[ded] with the rights of other students to be secure and to be let alone" and thereby satisfying the substantial disruption test under *Tinker. Kowalski,* 652 F.3d at 574 (quoting *Tinker,* 393 U.S 513.)

Burge ex rel. Burge v. Colton Sch. Dist. 53 is distinguished from the instant case because the statement posted on Facebook in *Burge* was more general in nature than the Respondent's Facebook post directed at Ms. Anderson. *Burge ex rel. Burge v. Colton Sch. Dist*. 53, 100 F. Supp .3d 1057 (D. Or. 2015). Therefore, the Court in *Burge* found that the school had violated the student's rights. Unlike *Burge*, the Respondent's First Amendment rights have not been violated and punishment for her off-campus Facebook post was appropriate. The school officials had reason to believe and forecast a substantial disruption could occur, and that basis is satisfied by the record. *J.C. v. Beverly Hills Unified Sch. Dist.,* 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

i. <u>It Was Reasonably Foreseeable That Respondent's Threatening Speech Would Come to the Attention of School Authorities</u>

Respondent's speech led school officials to reasonably forecast a substantial disruption based on the Second and Eighth circuit's reasonably foreseeable test. The Second and Eighth circuits look to "whether it [is] reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting." *D.J.M. v. Hannibal Pub. Sch. Dist.,* 647 F.3d 754 (8th Cir. 2011); *Donninger v. Niehoff,* 527 F.3d 41, 48 (2d Cir. 2008). In *D.J.M.,* a student sent threatening instant messages from home to a classmate where he expressed a desire to get a gun and shoot other students. *D.J.M.,* 647 F.3d at 756. The school became aware of the messages from another student who was concerned about student safety. *Id.* at 766. Despite the fact that the messages were between two students the Court found that it was reasonably foreseeable that the threats would be brought to the attention of school authorities and create a risk of substantial disruption. *Id.* at 757, 766.

It was reasonably foreseeable that Respondent's speech would reach the school district. The Respondent "*knew* that some of those who viewed her message were likely to alert Taylor Anderson or other transgender students to her post" and she was "*aware* that Facebook posts sometimes go beyond one's own friends. R. 4 (emphasis added). Thus, under the standard set by the Second and Eighth Circuits, it was reasonably foreseeable that respondent's speech would reach campus and cause a substantial disruption.

ii. Respondent's Speech Reflected an Identifiable Threat of Violence

The school district's actions were also appropriate under the Ninth Circuit's identifiable threat of violence test outlined in *Wynar v. Douglas Cnty. Sch. Dist.,* 728 F.3d 1062, 1069 (9th Cir. 2013). In *Wynar,* the Court held that schools may respond with disciplinary action that satisfies the *Tinker* standard "when [faced] with an identifiable threat of school violence, so long as the school can establish 'facts which might reasonably have led school authorities to forecast

substantial disruption of or material interference with school activities.'" *Lavine,* 257 F.3d at 989 (quoting *Tinker*, 393 U.S. at 514).

iii. Respondent's Speech Was Properly Punished Because it was Intentionally Directed to the School Community

Under the test recently adopted by the Fifth Circuit in *Bell v. Itawamba Cnty. Sch. Bd.*, *Tinker* is applicable when off-campus speech is "intentionally direct[ed] at the school [and] reasonably understood by school officials to *threaten, harass, and intimidate*." *Bell v. Itawamba Cnty. Sch. Bd.,* 799 F.3d 379, 396 (5th Cir. 2015) (emphasis added). In *Bell,* a student posted a rap recording on his Facebook page while off-campus. *Id.* at 383. The recordings included such language as, "I'm going to hit you with my Reuger," and "going to get a pistol down your mouth." Additionally, a written addendum to the posted recordings specifically referenced the student's coaches. *Id.* at 384. The student claimed the recording was meant to raise awareness of the alleged misconduct by the referenced coaches but also indicated that he was "*foreshadowing something might happen.*" *Id*. at 398. School officials interpreted the post as foreshadowing violence. *Id*. The Court noted that the speech "pertained to events directly occurring at school," "identified teachers by name," "was understood by one to threaten safety," and by "neutral, third parties, as threatening." *Id.*

The facts of *Bell* support the school district's response in this case. Respondent admitted that she intended her friends, and potentially third-parties, to see her post because it stated her views on an important school policy. R. 4. Additionally, Respondent's speech was related to events at school, including the the altercation during the basketball game. The speech was seen by targeted students and third parties to be threatening. *Id*. Thus, under *Bell* and the intent standard Respondent's speech was properly punished.

B. Respondent's Speech Intruded Upon the Rights of Others

The District Court correctly held that Respondent's speech intruded on the rights of others to feel safe in the school environment. R. 12. In *Wynar,* a student authored several threatening posts on social media expressing that he would "take out" other students during a school shooting. *Wynar*, 728 F.3d at 1065. School officials brought the posts to the attention of school officials. *Id*. at 1066. The Ninth Circuit stated that regardless of the student's "insistence he was joking," the messages "should have been taken seriously." *Id.* at 1071. The students who brought the posts to the attention of school officials were "vis[i]bly shaken," another student feared that her father would not let her return to school if the author of the post remained a student. *Id*. The Court in *Wynar* discredited the student's "*insistence that he was joking*" and found the school's response reasonable. *Id.* (emphasis added). It was reasonable for the school district in the instant case to punish the Respondent regardless of her jocular intent. Both Ms. Anderson and Ms. Clark were visibly shaken by respondent's comments, and each student's respective parents were concerned about their children returning to school. R. 4. Respondent's speech did not mention a specific reference to violence like the school shooting in *Wynar*. *Wynar*, 728 F.3d at 2071; R. 36. However, the Fourteenth Circuit's conclusion that the "air of apprehension" that the *Wynar* court found sufficient to invoke *Tinker* is missing here is incorrect. The Respondent's threats to the transgender community as a whole in addition to the threats directed at Ms. Anderson left students visibly upset. These threats "represent the quintessential harm to the rights of other students to be secure and let alone" and creates an "air of apprehension" as found in *Wynar*. *Wynar*, 728 F.3d at 1072.

i. Respondent's Speech Was Connected to the School's Interest in Maintaining the Order, Safety and Well-Being of its Students

In addition to the Second and Eighth Circuit tests, the school district's actions were also reasonable under the 4th Circuit's test, which states that school districts may suppress student

speech when the "[pedagogical] interest[s] of order, safety, and well-being of [the] students [and the] nexus of [her] speech was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being." *Kowalski*, at 573; *See also J.S. v. Bethlehem Area Sch. Dist.,* 807 A.2d 847, 865 (Pa. 2002) (concluding that there was "a sufficient nexus" between the website and school campus to warrant application of this Court's student speech precedents).

Under the facts of *Kowalski, supra*, the nexus between Respondent's speech and the pedagogical interests of the school district are even stronger in this case. As in *Kowalski,* one of the school districts priorities is "enabling students to feel safe in the learning environment," as evidenced by the adoption of a policy implicating approaches for the protection and safety of transgender students. R. 17. As a result of Respondent's speech, both Ms. Anderson and Ms. Cardona became "visibly distressed," and Ms. Anderson missed two days of school. R. 4. The concerns expressed by both the Andersons' and Cardonas' about Respondent potentially resorting to violence, allowing their daughters to return to school, and continued participation in basketball, provide further strength of the nexus between respondent's speech and the pedagogical interests of the school. Thus, under the standard adopted by the Fourth Circuit, Respondent's speech fails and "colli[ded] with the rights of other students to be secure and to be let alone." *Kowalski,* at 574 (quoting *Tinker, 393 US at* 513).

C. Applying Tinker to Off-Campus Speech Would Not Undermine Core First Amendment Principles

In this case, the Respondent's speech threatened the integrity of the school environment for transgender teens like Ms. Anderson. If Respondent's utterance is not deemed to be a substantial disruption, such a result would be contrary to the anti-bullying policy that the school issued to protect transgender students. R. 17. Students like Ms. Anderson may miss school,

perform poorly in classes and forfeit participation on the basketball team to avoid being physically harmed if school officials are unable to punish threats made against students.

Schools must address the multitude of threats to the school environment which originate from the internet. Online threats were inconceivable when this Court first addressed *Tinker* and the analysis must evolve with the times. With the pervasiveness of school violence such as the tragedies at Columbine, Santee and Newtown, school officials are faced with "evaluating potential threats of violence and keeping students safe without impinging on their rights." *Wynar,* 728 F.3d at 1064. If a school made an error in judgment in regard to evaluating threats it could result in tragedy. *Id*. Given the characteristics of the school environment, lower courts have followed this Court's reasoning that "school officials must have greater authority to intervene before speech leads to violence." *Id.* This Court has noted in other First Amendment contexts that a state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling" and "evident beyond the need for elaboration." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607 (1982); *New York v. Ferber,* 458 U.S. 747, 756 (1982).

Extending *Tinker* to off-campus speech would not "give school authorities virtually limitless authority to control the speech of their students at all times and in all places," rather it would give school's the tools they need to safeguard students and the learning environment. R. 37-38. Therefore, the Fourteenth Circuit's decision must be reversed.

CONCLUSION

This Court should reverse the Fourteenth Circuit's grant of summary judgment in favor of the Respondent and rule in favor of the Petitioner. The Respondent's First Amendment rights were never violated because her Facebook post constituted a true threat under the objective intent standard used by majority of federal circuit courts. Secondly, Pleasantville High School did not

violate Respondent's First Amendment rights by punishing Ms. Clark for her Facebook post, because her speech reasonably led school officials to determine that the post was a substantial disruption.

In order to find for the Petitioner, this Court need only find that either Respondent's Facebook post constituted a true threat *or* that it constituted a substantial disruption pursuant to *Tinker*. If this Court finds that the post was indeed a true threat, there is no requirement to demonstrate that it also caused a substantial disruption. James A. Rapp, Education Law §9.04 (Mathew Bender & Co. 2016).

APPENDIX

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I

Certificate

The work product contained in all copies of Team M's brief is in fact the work product of the team members.

Team M has fully complied with its school's governing honor code.

Team M has fully complied with all Rules of the Competition.

/s/ Team M