No. 16–9999

IN THE
SUPREME COURT OF THE UNITED STATES

WASHINGTON COUNTY SCHOOL DISTRICT,

Petitioner,

VS.

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

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT

Team R

Counsel for the Respondent

STATEMENT OF THE ISSUES

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 rights of other students to be secure at school?

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OPINIONS BELOW

The opinions of the United States District Court for the District of New Columbia and the United States Court of Appeals for the Fourteenth Circuit are unreported.

STATEMENT OF JURISDICTION

The United States District Court for the District of New Columbia properly exercised jurisdiction in this matter under 28 U.S.C. § 1331. The United States Court of Appeals for the Fourteenth Circuit had jurisdiction under 28 U.S.C. § 1291. Petitioner subsequently filed a timely petition for certiorari, which this Court granted. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL PROVISIONS INVOLVED

The text of U.S. Const. Amend. I. is set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

The primary issue presented is whether school officials can punish fourteen-year-old Kimberly Clark for statements she made on Facebook. Specifically, the two questions before this court are: (1) whether Clark's post was a "true threat" and (2) whether this Court's decision in *Tinker* allows school officials to punish off-campus student speech.

Clark is a female student who plays on her high school girls' basketball team. A newly enacted school policy allowed transgender student Taylor Anderson, who was born a male but self-identifies as a female, to join the girls' basketball team with Clark. Following an argument between the two students during the game, Clark returned home and wrote the following on Facebook:

> 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…

School officials suspended Clark for the post, and Clark sought declaratory relief in the United State's District Court for the District of New Columbia. The district court granted summary judgment in favor of the school district. The Fourteenth Circuit reversed. Recognizing a circuit split on both issues, the Fourteenth Circuit held that a subjective standard should apply to determine whether a statement is a "true threat." Additionally, the Fourteenth Circuit held that *Tinker* does not apply to off campus speech.

The Fourteenth Circuit's ruling strikes the right balance between preserving First Amendment rights and ensuring public safety and a school official's ability to maintain a safe and effective learning environment.

STATEMENT OF THE FACTS

Taylor Anderson, a 15-year-old sophomore at Pleasantville High School located in the Washington School Board District, joined the girls' basketball team following the implementation of a new policy entitled Non-discrimination in Athletics: Transgender and Gender Nonconforming Student policy. R-2. Before the policy was enacted, Anderson was limited to playing on the boys' teams at her high school. *Id.* Now, Anderson and other transgender students can opt to play on the team that is "consistent with the gender identity they consistently assert at school." *Id.*

Kimberly Clark is a 14-year-old student that was born a female and identifies as a female and as such, can only play on the high school girls' basketball team. *Id.* On November 2, 2015,

the two got into an argument over a call made by the referee at an intrasquad practice game. *Id*.; R-23 at ¶ 4. As a result of the argument, both Clark and Anderson were ejected from the game. R-23 at ¶ 4. Clark returned home and vented about the situation to her friends through a Facebook post:

> 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.

Two days later, the parents of Anderson and another student, Josie Cardonas, reported the post to the high school principal. R-13 at ¶ 7. Both parents were concerned for the students' safety and Anderson's parents kept her out of school for two days but Josie's parents did not. *Id.* at ¶¶ 6-7; R-14 at ¶¶ 8-9. Clark was not Facebook friends with either Anderson or any other transgender students, which means these students could not directly access Clark's post, but both students and their parents had a copy of Clark's Facebook post. R-14 at ¶ 8; R-23 at ¶ 6.

Mr. Franklin met with Clark's parents the following day and showed them her post. Clark admitted to writing the Facebook post, but explained that she was joking when she said she would "take IT out one way or another." *Id.* at ¶ 13; R-23 at ¶ 7. Clark was aware that her Facebook posts sometimes reach beyond her friends like Anderson, but her post was only meant for her friends to see. R-23 at ¶ 6. Furthermore, Clark stated that she believes that allowing trans-females to compete on girls' teams is unfair, dangerous, and immoral. R-24 at ¶ 9. Clark has no history of disciplinary infractions or violent behavior, but Mr. Franklin suspended her for three

days for violating the School's Anti-Harassment, Intimidation & Bullying Policy. R-13 at ¶ 6; R-14 at ¶ 15. This suspension will be on Clark's permanent high school record. *Id.* at ¶ 16.

At the conclusion of the meeting, Mr. Franklin denied Mr. Clark's request to reconsider his daughter's suspension. R-20 at ¶ 14. Following this denial, Mr. Clark appealed his daughter's suspension to the Washington County School Board. *Id*. The board upheld Clark's suspension after finding that Clark's Facebook post was a "true threat" that materially disrupted the learning environment and collided with the rights of other students to be secure in their school. R-20; R-21; R-22.

PROCEDURAL HISTORY

Following the School Board's decision to uphold Clark's suspension, Mr. Clark filed a complaint in the United States District Court for the District of New Columbia on behalf of his daughter for declaratory relief alleging that the School District violated his daughter's First Amendment rights. R-1. With no material facts in dispute, both parties filed for Summary Judgment. *Id.* The School District's argument for summary judgment was based on their belief that Clark's suspension was constitutional. R-4. The School District argued that Clark's suspension was constitutional because Clark's post was a "true threat" based on the Supreme Court case *Virginia v. Black*, 538 U.S. 343 (2003) and according to *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506-08 (1969), her post was materially disruptive speech that collided with the rights of other students. *Id.* Clark argued that her suspension by Mr. Franklin that was upheld by the School District violated her First Amendment right to free speech. R-1.

The District Court granted summary judgment in favor of the School District. R-4. The court employed an objective standard of a true threat and used *Tinker* to find that the second part

of Clark's Facebook post was a true threat beyond the protection of the First Amendment. R-7. In addition, the court held that even if Clark's post was not a true threat, her suspension was justified under *Tinker* because it materially disrupted and collided with the rights of other students. R-12. Clark timely appealed the District Court's ruling of summary judgment to the Fourteenth Circuit. R-25.

The Fourteenth Circuit reversed. R-39. The court found that Clark's Facebook post was not a "true threat" under the subjective standard because there was no evidence she intended to intimidate Anderson or other transgender students. R-32. In addition, the Fourteenth Circuit found that applying *Tinker* to off-campus student speech undermines the core principles of the First Amendment. R-39. Therefore, the Fourteenth Circuit refused to apply *Tinker* to Clark's case because Clark's post was speech that did not take place at school nor at a school-sponsored event. *Id.* Without the application of *Tinker* to Clark's post, the Fourteenth Circuit held that Clark's speech was not a true threat, and that *Tinker* did not authorize the Washington County School District to discipline Clark for her Facebook post concerning Anderson and other transgender students. R-39. This Court should affirm the Fourteenth Circuit's ruling.

SUMMARY OF ARGUMENT

Clark's post was not a "true threat" under either the subjective or objective standard. Despite the current spilt in the circuit courts on what the appropriate standard is, this Court should apply the subjective standard because it best protects constitutional rights. Under the subjective standard, Clark clearly did not intend her speech to be a threat. She did not communicate it directly to Anderson, her post was political speech, and it was a joke. Her post was directed only at her friends. Mere awareness that someone may overhear you or see your posts on the internet is not enough to meet the subjective standard for "true threats."

Even under the objective standard, Clark's post is not a true threat. Clark did not intend for Anderson to see her post and she was not directly threatening Anderson. Given the fact that Clark does not have a violent history, there was no evidence that she would engage in violence in the future, and her post, placed in the correct context, was mere political hyperbole; no reasonable person could find her post threatening.

Furthermore, *Tinker* does not apply to Clark's speech. *Tinker* only granted school officials authority to regulate student speech in school settings. Outside the context of school, children enjoy the same rights under the First Amendment as adults do. Clark's case is a prime illustration. Because her post was not a true threat, it is protected under the First Amendment. Both the legislature and the executive branch could not punish what Clark posted without satisfying the demands of strict scrutiny. Yet, under the district's reasoning, educators can usurp both powers under the more generous *Tinker* standard. Allowing such control gives schools the power to dictate what views and ideas are worthy of protection and risks chilling a vast amount of minor and even adult expression. Nothing in this Court's precedent supports such a dramatic shift in First Amendment law.

Even if *Tinker* applies to speech outside of the school environment, Clark's post does not satisfy the *Tinker* standard. Her post did not materially disrupt the school environment. There is no evidence that her post disrupted the day-to-day operation of the school. There is no evidence that the student body as a whole or teachers were materially affected by Clark's post. According to the evidence, only two students were affected by Clark's post. Indeed, Clark attended two full days of school, without incident, before the principal was even aware of her post. Ms. Clark's Facebook post plainly did not disrupt the school's environment.

Moreover, Clark's post did not intrude on the rights of students to feel secure in their environment. Her post was not directed at Anderson. Her post was not made in the presence of Anderson or the school body in general. Clark's post was directed at her friends and just because someone in effect, *overheard* the comments does not mean that Clark's post intruded on the rights of others. Mere offensive language, whether one likes it or not, is protected by the First Amendment. Shielding children from offensive language is a terribly misguided way of preparing them for adulthood given that adults encounter it nearly everyday. If anything, a school's job is to educate the children about offensive speech and facilitate an environment for counter-speech. Punishment for offensive speech undermines the First Amendment and the school's duty to create educated, tolerant, and democratically aware individuals.

Accordingly, the school cannot constitutionally punish Clark for statements she posted on Facebook. Her speech was not a "true threat" and *Tinker* does not apply to her post. The Fourteenth Circuit's decision should be affirmed.

ARGUMENT

I. A TRUE THREAT IS NOT PROTECTED BY THE FIRST AMENDMENT

"If there is a bedrock principle underlying the First Amendment, it is that 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). However, this Court has held that there are a few *narrow* exceptions for certain types of speech that is not protected by the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Miller v. California*, 413 U.S. 15 (1973); *United States v. Williams*, 553 U.S. 285 (2008). One of these *narrow* exceptions is known as a "true threat" and was first

articulated in *Watts v. United States*, 394 U.S. 705 (1968) (per curiam), and later refined in *Virginia v. Black*, 538 U.S. 343 (2003).

In *Watts v. United States*, this Court analyzed a statute that criminalized offensive speech directed at the President or President-elect. 395 U.S. at 705-06. The petitioner in *Watts* shouted to a crowd "[i]f 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 found that the speech was political, conditional, and "the full context of the speech indicated it was not a serious threat." R-4. In *Virginia v. Black*, Justice O'Connor further explained that '"[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359.

A. DESPITE THE CIRCUIT SPLIT, THIS COURT HAS CONSISTENTLY USED THE SUBJECTIVE STANDARD TO DETERMINE A TRUE THREAT

Following this Court's decision, the circuits are split over whether the "true threat" inquiry should be governed by an objective or subjective standard. The Ninth Circuit has adopted a subjective approach, concluding that it best preserves the First Amendment. *United States v. Cassel*, 408 F.3d 622, 633, 638 (2005). The Fifth and Eighth Circuits have applied an objective standard. *Porter v. Ascension School District*, 393 F.3d 608, 616 (5th Cir. 2004); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996). The Fourteenth Circuit here agreed with those courts that favor a subjective test and applied it to Clark's post. As explained below, this Court should hold that the "true threat" analysis turns on the speaker's subjective intent. As this case illustrates, an objective standard would quell free speech.

This Court has recently affirmed that the subjective standard should apply to "true threats." In *Elonis v. U.S.*, 135 S.Ct. 2001, 2011 (2015), this Court held that the government could not criminalize a "true threat" without also proving the defendant "transmit[ed] a

communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." In *Elonis,* the defendant posted on Facebook about killing his wife, causing her to fear for her life, and obtain the equivalent of a restraining order. *Id* at 2006. He also talked about shooting up a Kindergarten class and threatening park employees. *Id* at 2005.

Despite the district court following an objective approach, this Court explained that showing how his posts would be interpreted by a reasonable person is not enough, the Government had to prove the defendant's mental state, that he purposely issued a threatened or knowingly communicated what would be viewed as a threat. *Id.* at 2012. Because the Court decided the case on criminal grounds, it did not feel it was necessary to address any First Amendment issues. But Justice Alito concurred in the judgment and explained that even in the context of the First Amendment, some type of *mens rea* is needed. *See Id.* at 2017 (Alito, J., concurring in part and dissenting in part).

The Ninth Circuit follows the subjective standard because it is what this Court articulated in *Virginia v. Black.* In *United States v. Cassel*, the Ninth Circuit held that a "subjective" standard for "true threats" is required and the case was reversed and remanded because the jury instructions failed to provide a *mens rea* element. 408 F.3d 622, 633, 638 (2005). Even though the court looked at the criminal statute addressing "true threats," it found *Virginia v. Black* instructive. *Id.* at 630-31. According to the Ninth Circuit:

> [t]he [Supreme] Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another "prima facie evidence of an intent to intimidate."

Id. at 631.

Against the standard that this Court has consistently applied, the Eighth Circuit has applied an objective standard to analyze "true threats." *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996); *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002). In *Dinwiddie*, the court laid out five factors for deciding whether a statement is a "true threat." 76 F.3d at 925.

> [T]he reaction of the recipient of the threat and of other listeners; whether the threat was 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.*

This test was later applied by the Eighth Circuit in *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002). The court found that a student's letter about sexually assaulting and murdering a specific student was a "true threat." *Id.* 619-20. The court specifically found that the letter was communicated over 50 times to the victim by the student, a factor important to the *Dinwiddie* test. *Id.* at 628.

In *Porter v. Ascension School District*, the 5th Circuit applied an objective test and held that "[s]peech is a 'true threat'" and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'" 393 F.3d 608, 616 (5th Cir. 2004). Ultimately, the court found that a 14-year-old's drawing of the "violent destruction" of the school and several administrators was not a true threat. *Id.* at 613, 616. The court explained that because the student did not show the sketch to anyone and it was only revealed accidently two years later by his younger brother, the student did not "intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the first amendment." *Id.* at 617. The court noted that "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.* at 617. Accordingly, "[f]or such writings to lose their First Amendment protection, something more than their accidental and unintentional exposure to public scrutiny must take place." *Id.* at 618.

But even with the circuit split, this Court has consistently articulated a subjective standard because it stays true to the policies underlying the First Amendment. A reasonable person standard creates a chilling effect on speech. The "true threats" analysis needs an intent element. The reasonable person standard is too vague and impermissibly limits the expression of people. This damages the First Amendment and creates a standard of speech that is not synonymous with democracy. The objective standard is too susceptible to abuse. It can be easily used as a filter for speech that people do not agree with. But the thrust of a "true threat" is speech that can cause violence. The crux of the First Amendment is to promote tolerance and the exchange of ideas, even if the content is offensive.

Watts was about a person shouting at a crowd that they wanted to shoot the president. This was political, conditional speech that drew laughter from a *crowd*. The Court did not look at what only one person thought about the speech, but what everyone thought. While Ms. Clark's statements were distasteful, there is no evidence that they were violent. This is the problem with the objective standard. The subjective test is preferable because it requires the extra level of proof we need in a society that values speech and democracy. The objective standard requires everyone to be careful about expressing their ideas in a democracy. It is a standard that says only be as tolerant as everyone else. This is not the First Amendment the framers imagined. What is needed is a free exchange of ideas unless the idea is a true threat. Any standard less then that means less speech and expression for everyone.

In addition, this Court should apply the subjective intent requirement for "true threats" despite the District Court of New Columbia's belief that the subjective intent requirement for "true threats" only applies to criminal law and not civil. While there are differences between criminal and civil law, many torts require intent. *See* Restatement (Second) of Torts § 13 (1965) (battery); *Id.* at § 21 (assault); *Id.* at § 35 (false imprisonment); *Id.* at § 46 (outrageous conduct causing severe emotional distress). Furthermore, requiring an objective, reasonable person standard akin to negligence would cause a chilling effect on speech. People all over would have to watch what they say because they may get sued for communicating a "true threat." Additionally, courts would have to spend valuable resources deciding what a reasonable person would find offensive when it comes to speech. The courts will be quite busy indeed.

B. CLARK'S POST IS PORTECTED BY THE FIRST AMENDMENT BECAUSE IT IS NOT A TRUE THREAT UNDER THE SUBJECTIVE STANDARD

Clark's post, however offensive, is still protected by the First Amendment because she did not intentionally communicate it to Anderson. As the record shows, Clark never intended to communicate her post to Anderson and she did not have the subjective intent to communicate a "true threat" to her either. Accordingly, Clark's post is not a "true threat" and her post is protected by the First Amendment.

Furthermore, Clark did not subjectively intend her post to be threatening. Clark's post as a whole was a joke and political speech, which is protected by the First Amendment. This is supported by the fact that she stated it was a joke, has no violent history, and was not violent to any transgender students' despite being at school for two days after her post was made. In *Elonis* and *Cassel*, the threats were more specific, the former mentioned killing the person and the latter mentioned burning a house down, and neither one was found sufficient in and of itself to prove

intent. Clark's post did not reach this level of specificity. As the 14th Circuit pointed out, there is no evidence that she intended her post to be threatening.

C. EVEN UNDER THE OBJECTIVE STANDARD CLARK'S POST IS STILL PROTECTED UNDER THE FIRST AMENDMENT

Because Clark did not intend her speech to reach Anderson, there is no way an objective reasonable person could think her post was a true threat. Like *Porter* and *Dinwiddie* mention, the intention to communicate the threat to the victim is key. Like *Porter*, Clark did not *intend* to communicate her post to Anderson. Clark made the post at home with her personal laptop and intentionally directed the post only to her Facebook friends and no one else. The fact that others were able to see her post, does not mean her First Amendment rights should be violated. As mentioned in *Porter*, "[f]or such writings to lose their First Amendment protection, something more than their accidental and unintentional exposure to public scrutiny must take place." 393 F.3d at 618

Just like a child who gossips outside of school, they only intend their friends to hear the gossip, not the person gossiped about. Technology cannot distort this simple analysis. Just because Clark was aware her post might be seen by others is not enough. Awareness was not enough in *Porter* and *Dinwiddie* and it would distort the true threat analysis to hold such a thing. Everyone is *aware* that their speech will reach others, but to lose First Amendment protection for being aware that your speech will reach others would destroy the purpose of the First Amendment. While Clark's speech was vulgar and upsetting, it is the price we pay for free speech and democracy.

Furthermore, there is no evidence of past or present violence. The district court separated her statements into two, but Clark's post should be analyzed in whole and not in part. Saying "IT will get it" and "all the other TGs" does not automatically infer violence, especially when

you read her post in context with her other statements. Given the fact that she has never engaged in violence, it would be an enormous jump to say that she would get violent now. The jump is actually unreasonable because there is no reason to think she would be violent. She was upset about the policy and that Anderson was on the team. She could have meant a variety of things, like she would get Anderson suspended from school or the team, or that Anderson would hear Clark's thoughts about the policy and her views on homosexuality, speech that is political in nature. There are a variety of reasonable inferences that can be drawn from Clark's statements that do not include violence. In fact, given all the evidence, it would be unreasonable to think that Clark would resort to violence. Clark did not intentionally communicate her post to Anderson and she did not intend to threaten anyone. To hold otherwise would be the death of the First Amendment and courts everywhere.

II. *TINKER'S* APLLICATION

A. THE SCHOOL CANNOT PUNISH MS. CLARK FOR HER FACEBOOK POST BECAUSE IT WAS UPLOADED FROM HER COMPUTER, WHILE SHE WAS AT HOME—NOT AT SCHOOL OR AT A SCHOOL-SPONSORED OR SUPERVISED EVENT

"[M]inors are entitled to a significant measure of First Amendment Protection. . . ,"*Erznoznik v. Jacksonville,* 422 U.S. 205, 212-213 (1975), that is not suspended at the schoolhouse gate." *Tinker v. Des Moines Indep. Cnty. Sch. Dist*., 393 U.S. 503, 507 (1969). Nonetheless, educators have authority to regulate some student speech, "even though the government could not censor similar speech outside the school." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). But school officials are generally forbidden from restricting student speech that does not substantially disrupt the school's work or invade the rights of others. *Tinker*, 393 U.S. at 513; *Saxe v. State College Area School Dist.,* 240 F.3d 200, 211 (3rd Cir. 2001).

In *Tinker*, a school district failed to satisfy this standard when it suspended two students for wearing black armbands to school in protest of the Vietnam War. 393 U.S. at 514. Beyond generating some hostile discussion outside of class, the students' political expression caused no disruption of the school's activities and no disturbance or disorder. *Id.* at 508. This Court held that the school district violated the student's First Amendment rights because the school could not show its reaction was motivated by something other than an "undifferentiated fear or apprehension of disturbance," or a desire to silence viewpoints with "which they do not wish to contend." *Id.* at 508, 511.

Following *Tinker*, this Court has recognized three specific and narrowly-defined exceptions to the general rule it set forth in that case. First, school authorities may prohibit and discipline lewd and vulgar speech in the classroom and at school events. *Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 685 (1986) (upholding school's disciplinary action against student who made nominating speech riddled with sexual innuendos at formal school election assembly). Second, they may "regulate the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (principal's deletion of two pages of stories on school pregnancy written by students for school newspaper). Third, educators can restrict speech they "reasonably regard as promoting illegal drug use." *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

Morse is the only case where this Court has addressed a school's authority to regulate off-campus student speech. There, a principal suspended a student for unfurling a banner that read, "BONG HITS 4 JESUS" at a school-approved and school-supervised event. *Id.* at 396. In holding that the principal's disciplinary action was constitutional, the Court rejected the student's

argument that his was not a school speech case. *Morse,* 551 U.S. at 401. This Court noted the student had directed his banner toward the school while standing "in the midst of his fellow students, during school hours, at a school-sanctioned activity. . . ." *Id.*

Post-*Morse*, the scope of a school's authority to regulate student expression off-campus or outside of a school sponsored event or activity is unclear. But in an age where the internet and social media so-permeates the lives of adolescents, several federal circuit courts have been forced to confront the issue. To the extent that these courts have permitted school administrators to regulate student expression that takes place neither on campus, nor at a school-sponsored event, they have misread *Tinker*.

Before the expansion of the internet and digital technology, courts routinely held had that school officials did not have authority to regulate student expression beyond the schoolhouse gate. In *Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, the Second Circuit determined that a school could not sanction students for a lewd satirical publication they "conceived, executed, and distributed outside the school." *Id.* Students had performed a small amount of work on the publication at school and even stored some copies in a teacher's closet, but this activity was "De minimis" and did not justify the school's imposition of sanctions. *Id.* If the result were different, educators would have almost uninhibited authority to "punish protected speech and inhibit future expression." *Id* at 1051 (noting as an example, students might be placed in detention for watching an X-rated film at home).

Yet, off-campus student expression can become subject to a school's authority if it is brought to the school and then prompts an educator to reasonably forecast a material disturbance or invasion on other's rights. Courts have upheld a student's expulsion for an article he wrote containing detailed instructions on how to hack the school's computers. *Boucher v. Sch. Bd. of*

Sch. Dist. of Greenfield, 134 F.3d 821, 827 (7th Cir. 1998). The article was featured in a student-initiated and executed publication that was heavily distributed on school grounds. *Id* at 822 (noting the article was passed out in bathrooms, lockers, and the cafeteria). Moreover, there was some evidence the article did disrupt the school's work. *Id.* at 827. School administrators had to change passwords the student had revealed in the article and run hours of diagnostic tests which did reveal signs of tampering. *Id.* Compare *Boucher* with *Porter v. Ascension Par. Sch. Bd.,* 393 F.3d 608, 611 (5th Cir. 2004) (student's drawing depicting military-like siege on school was not student speech where it was brought to school by his little brother two years after it was drawn).

Recently, courts have struggled to define the reach of *Tinker* given the internets ubiquity. As the *Thomas* court predicted, public school students are now being punished for off-campus internet expression that would undoubtedly be protected if the student had simply written it in a journal or shared it with a group of friends over the weekend. *See e.g.*, *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008) (upholding discipline of student for off-campus blog post blasting school administration for perceived interference with event students were planning); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34,35 (2d Cir. 2007) (no First Amendment violation where school suspended student for setting AOL instant messenger icon to a drawing of principal being shot in the head); *Bell v. Itawamba Id. Cty. Sch. Bd.,* 799 F.3d 379, 383 (5th Cir. 2015) (school could constitutionally punish student for uploading a rap that badmouthed two coaches and contained threatening language), *cert. denied sub nom. Bell v.Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166, (2016). Increasingly, it is enough for administrators to justify restrictions on off-campus student speech on grounds that it "reaches" the school environment. *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011); *S.J.W. ex rel.*

Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012); *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1069 (2013). The problem with such a standard is that all off-campus cyber expression can be said to "reach" the school—indeed, it can be said to reach anywhere.

Some judges have recognized the perils of subjecting student's off-campus expression to a school official's educational authority. J.*S. ex rel. Snyder v. Blue Mountain Sch. Dist*., 650 F.3d 915, 928 (3d Cir. 2011) (J. Smith Concurring); *Bell*, 799 F.3d at 403 (J. Dennis Dissenting). Courts that have upheld this assumption ignore this Court's guidance in several related areas. First, outside of school, minor speech is either protected or it is not. The government has no "free-floating power to restrict the ideas to which children may be exposed." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 794 (2011). Likewise, it cannot "declare new categories of speech outside the scope of the first amendment," even in the interest of protecting minors. *U.S. v. Stevens*, 559 U.S. 460, 471 (2010); *Brown*, 564 U.S. at 795. Accordingly, in *Brown*, the Court applied strict scrutiny and struck down a state law that prohibited the sale and rental of video games to minors. *Id.* at 805.

Furthermore, there is nothing special about the internet for First Amendment purposes. *Reno v. American Civil Liberties Union* is the seminal case on this point. 521 U.S. 844 (1997). In *Reno*, this Court declined to fashion different rules for the regulation of cyber speech. *Id.* at 868. With cyberspace, special factors that have justified regulating speech based on its mode of communication simply do not exist. *Id.* Unlike, broadcast media, cyberspace has no extensive history of government regulation, it is not a scarce resource, and it is not invasive or inescapable in the way broadcast media can be. *Id.* Allowing a school's educational authority to encompass off-campus cyber speech that is otherwise protected under the First Amendment, not

only infringes the rights of the student-speaker, but potentially those of other students and adults as well. It is well-known that the right to freedom of expression includes "not only the right to speak, but the right to receive speech from others." *Bell*, 799 F.3d at 426 (J. Dennis Dissenting).

Expression in either form does not become subject to regulation just because a government official, or even a speaker's fellow citizens, dislike or disagree with the speech in question. "There is no constitutional basis for excluding 'threatening,' 'harassing,' or 'intimidating' speech from the "special protection" that is afforded speech on matters of public concern." *Id.* at 412; *See also, Snyder v. Phelps*, 562 U.S. 443 (2011). Any authority school officials have to restrict such speech must be limited to the school setting. If allowed to assert their authority beyond the schoolhouse gates, schools could curtail adult expression, even without meaning to, in a way this Court has never before allowed. *See Butler v. State of Mich.*, 352 U.S. 380 (1957) (forbidding restrictions on minor expression that unduly hamper adult expression).

Likewise, it would only be a matter of time before school officials' authority to regulate student speech rubbed against parents' constitutional right "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57 (2000) (state could not grant parental grandparents' visitation rights over objection of children's' mother). Indeed, one reason for allowing schools to restrict the speech of students under their supervision is that schools are acting in the place of the parents who are not there to supervise and protect their children themselves. See *Fraser*, 478 U.S. at 684. In performing this role, schools might impose standards of conduct at school that parents do not necessarily agree with or enforce at home. *Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000). However, allowing them to project

those standards and force them on minors and their parents in settings the school has no responsibility for sponsoring or supervising is another matter entirely. The government has never been considered equal partners with parents in raising the nation's youth and this is exactly what school officials will become if allowed to exercise *Tinker* authority outside of school grounds or school-sponsored functions.

B. CLARK'S POST SHOULD NOT BE SUBJECTED TO THE *TINKER* STANDARD

The instant case highlights the dangers of allowing school officials to exercise the authority the district has assumed over Clark's expression. Clark made her Facebook post to her friends, on her profile, from her own computer, in the comfort of her own home. She did not use school property to engage in her expression and she was not under school supervision when she did so. The school's only connection to Clark's post is that it was written by a minor who happens to be a student at their school and was about a student who also happens to be a student at their school. If this is enough to justify restricting student speech, then schools *would* have "free-floating power to restrict the ideas to which children may be exposed." *Stevens*, 559 U.S. at 472.

In light of this Court's jurisprudence on restrictions of minor speech, this Court should hold that schools lack the authority to regulate off-campus student speech that neither takes place at a school-sponsored or school-supervised event, nor involves the use of school property. However, should the Court decide *Tinker* does give schools such authority, it should find that its exercise is not justified in Clark's case. There is no evidence her Facebook post caused a material disruption of the school environment or collided with the rights of others.

C. CLARK'S POSTS DID NOT MATTERIALLY DISRUPT THE SCHOOLS ENVIORMENT

Under *Tinker*, a court can regulate a student's speech if it "materially disrupts classwork or involves social disorder." 393 U.S. 508-09. This Court has not decided to what degree *off-campus* speech materially disrupts the classroom environment. The following circuit court opinions point to a *very high* degree of disruption needed in order to satisfy *Tinker's* material disruption prong for off-campus speech.

In *S.J.W. v. Lee's Summit R-7 School District*, the Eighth Circuit held that two students' racist and sexist website materially disrupted the school environment. 696 F.3d 771, 778 (2012). Over a string of three days, the students created a website focused on "events at Lee Summit North" and posted racist and sexists comments about female students, whom were specifically named. *Id.* at 773. During the three days, the two students used the school's computers to upload files onto their website and other students used the school's computers to access the website. *Id.* Soon the student body at large learned of the website and tried to access the website via the school computers. *Id.* at 774. The last day of posts proved to be the most disruptive:

> Lee's Summit North teachers testified they experienced difficulty managing their classes because students were distracted and in some cases upset by NorthPress; at least two teachers described December 16 as one of the most or the most disrupted day of their teaching careers. *Id.*

Even the local media came to the school in response to the disruption. *Id.* Consequently, the court had no difficulty finding that the website materially disrupted the school environment, especially because the students "targeted" the school itself. *Id.* at 776-78.

In *Wynar v. Douglas County School District*, the Ninth Circuit held that a student's string of instant messages about shooting up a school materially disrupted the school environment. 728

F.3d 1062, 109-1070 (2013). The student made a variety of posts about the guns he had, who he would shoot, and how he would do it, warning that it would happen on the Columbine anniversary. *Id.* at 1065-66. The court explained that it did not need to address "whether *Tinker* applies to all off-campus speech such as principal parody profiles or websites dedicated to disparaging or bullying fellow students" because the court found that the degree and the directness of the student's messages easily established that the school's environment was materially disrupted. *Id.* at 1067-72.

Furthermore, in *Kowalski v. Berkeley County Schools*, the Fourth Circuit found that an internet forum of approximately 100 people who made defamatory posts, materially disrupted the school's environment. 652 F.3d 565, 566-568, 574 (4th Cir. 2011). The student created a forum that attacked a specific student and invited approximately 100 friends to join in. *Id.* at 567. Overall, the student recruited approximately two dozen students and they all exchanged defamatory remarks and photographs about the student. *Id.* There was evidence that at least one student accessed the website on school property and, given all the other facts, the court held that the website materially disrupted the school's environment. *Id.* at 574.

Clark's post did not materially disrupt the school's environment. She did not target the school itself with her post and there was no evidence that her post substantially interfered with the school environment. There is no evidence that any classroom activities were disrupted or that the media was involved because of the disruption. Clark only intended on for her friends to see her post and she did not invite others to see her post. In fact, only two people liked her post within a 22-hour period. Furthermore, unlike in *Wynar*, Clark's post was not as serious as a series of "targeted" and descriptive posts about shooting up the school. At most, one student was affected by Clark's post, not the whole school.

Unlike in *Kowalski*, where the student invited 100 of her Myspace friends to become a part of her group that targeted a student at a school with negative comments, here, Clark did not make any efforts to have persons outside of her friends' group see her post. Clark was not friends with either Ms. Anderson or Josie Cardona. Clark did not encourage her friends to view her post or solicit others outside her friends' group to view her post. In fact, Clark's post had a very limited audience. The only way Clark's friends could see her post was to see it at the time it was on their Facebook's thread or go to Clark's page. In addition, unlike in *Kowalski*, Clark did not create a forum for students and the speech was not defamatory.

Furthermore, Clark was at school for two days after she made her post. While at school, there was no evidence that the school environment was disrupted. She did not have any further altercations and there is no evidence that she bothered any transgender students or Anderson. To find that her posts caused a material disruption contradicts the record. Only one student stayed home. No other students were affected enough to impact the school environment. The record shows that the school suffered no material disruption to its environment. Other cases point to an immediate disruption of the environment, this is not the case here. Therefore, Clark's posts did not materially disrupt the school's environment.

D. CLARK'S POST DID NOT INTRUDE ON THE RIGHTS OF OTHERS

Schools can also discipline a student's speech if it "intrudes upon . . . the rights of others" or "collides with the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508. Few courts have considered the second prong in *Tinker*.

In *Harper v. Poway Unified School School Dist.,* the Ninth Circuit held that a student's right to feel secure was violated when a student wore a anti-homosexual t-shirt at a Gay-Straight Alliance school sponsored event. 445 F.3d 1166, 1171, 1183 (9th Cir. 2006). Part of the concern

about the protest was that in the previous year, the same event caused a series of altercations. *Id.* at 1171. The student wore the t-shirt two days in a row, was asked to remove it on the second day, refused, and was told to leave campus. *Id.* at 1171-1173. The student was not suspended or formerly disciplined for the conduct. *Id.* at 1173. The court concluded that the t-shirt intruded on the rights of others and that the school did only what was necessary to prevent further intrusion. *Id.* at 1183. As the court noted:

> Finally, we emphasize that the School's actions here were no more than necessary to prevent the intrusion on the rights of other students. Aside from prohibiting the wearing of the shirt, the School did not take the additional step of punishing the speaker: Harper was not suspended from school nor was the incident made a part of his disciplinary record. *Id.*

Here, Clark's posts did not interfere with the rights of others. Unlike in *Harper*, Clark's post was a one-time event and was not an ongoing situation. Furthermore, there was no evidence that there was a previous series of altercations that would cause the school to take preventative action. In *Harper*, the intrusion was at a school event in front of others, but here the speech was off-campus, away from the student body at large. Finally, even if Clark's post intruded on the rights of others, her suspension was beyond what was necessary in order to prevent further intrusion, which was important to the court in *Harper*.

CONCLUSION

Clark's post was not a "true threat" and *Tinker* does not apply to Clark's off-campus speech. This Court should affirm the 14th Circuit's ruling.

APPENDIX

U.S. Const. Amend. I

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.

CERTIFICATE OF COMPLIANCE

We, Team R, certify that the work product contained in all copies of Team R's brief is the work product of the team members. Team R has fully complied with our school's honor code and with all Rules of the Competition.

Respectfully submitted,

Team R
Counsel for Respondent