TEAM S

No. 16-9999

IN THE
Supreme Court of the
United States

WASHINGTON COUNTY
SCHOOL DISTRICT,
Petitioner,

v.

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

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

BRIEF FOR PETITIONER

TEAM S
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a public high school student's Facebook post constituted a "true threat" beyond the protection of the First Amendment where the post targeted specific other students, as a group and individually, whom the author knew were likely to see the post.

2. Whether a public school board may, consistent with the First Amendment, discipline a student for a Facebook post written off campus and disseminated to fellow students, where that post threatens and derides a group of students generally, and a named student specifically.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit rendered its decision on January 5, 2017. *Clark ex. rel. Clark v. School Dist. of Washington Cty.* (*Clark II*), No. 17-307, slip op. at 1 (14th Cir. January 5, 2017), R. at 1. A Petition for Writ of Certiorari was filed and granted. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Kimberly Clark ("Ms. Clark"), through her father Alan Clark ("Mr. Clark"), brought this action against the Washington County School District (the "School District"), seeking declaratory relief and alleging that the School District violated Ms. Clark's First Amendment rights when it suspended her for three days for violating the School District's Anti-Harassment, Intimidation and Bullying Policy. *Clark ex. rel. Clark v. Washington Cty. Sch. Dist.* (*Clark I*), C.A. No. 16-9999, slip op. at 3 (D. Columbia April 14, 2016), R. at 3. The parties submitted cross-motions for summary judgment, and on April 14, 2016 the District Court granted the School Board's motion, holding that the Facebook post for which Ms. Clark was punished constituted a "true threat" unprotected by the First Amendment, and that, in the alternative, the post had caused a substantial disruption to the school environment and collided with the rights of other students, allowing the School Board to lawfully censure the post. *Clark I*, R. at 12.

Ms. Clark timely appealed the ruling to the Court of Appeals for the Fourteenth Circuit, seeking reversal of the District Court's grant of summary judgment. *Clark II*, R. at 25. On January 5, 2017, the Fourteenth Circuit reversed, holding that Ms. Clark's Facebook post did not rise to the level of a "true threat." *Id.*, R. at 32. Further, the Court held that, because the Facebook post originated off-campus, it could not be lawfully punished by the School District. The School District filed a petition for writ of certiorari, which this Court granted. R. at 40. This Court reviews

the District Court's grant of summary judgment *de novo*. *See Bell v. Itawamba Cty. Sch. Bd*, 799 F.3d 379, 389 (5th Cir. 2015) (en banc).

STATEMENT OF FACTS

Taylor Anderson is a 15-year-old sophomore at Pleasantville High School, in the Washington County School District, in the state of New Columbia. R. at 2. Pursuant to a previous school policy, Ms. Anderson was not allowed to join the girls' basketball team because although she identifies her gender as female, she was born a biological male. *Id.*

On August 1, 2015, the School District adopted a new policy titled "Nondiscrimination in Athletics: Transgender and Nonconforming Students" in order to foster a "safe, inclusive learning environment," to give all "equal access" to educational programs, and to protect transgender students like Ms. Anderson from threatening behavior. Affidavit of Thomas James Franklin (hereafter "Franklin Aff."), Ex. A., R. at 15. The nondiscrimination policy instructed, *inter alia*, that transgender and gender non-conforming students be allowed to participate in athletics programs consistent with their identified gender. The School District also adopted an "Anti-Harassment, Intimidation & Bullying Policy." Franklin Aff., Ex. B, R. at 17. That policy prohibited "harassment, intimidation, bullying and threats communicated by any means" whenever such practices actually or could reasonably be expected to "(1) harm a student, teacher, administrator or staff member, (2) substantially interfere with a student's education, (3) threaten the overall education environment, and/or (4) substantially disrupt the operation of the school." *Id*.

With the non-discrimination and anti-harassment policies in place, Ms. Anderson joined the girls' basketball team. Josie Cardona, who also identifies as female and was born a biological

male, likewise joined the team. *Clark I*, R. at 2-3. Kimberly Clark is a 14-year-old freshman who is also on the team. Ms. Clark identifies as a female and was born a biological female. *Id.*

On November 2, 2015, Ms. Clark and Ms. Anderson engaged in a loud and disruptive argument during an intrasquad basketball practice game. Both were ejected by the referee. *Clark I*, R. at 2. That night, Ms. Clark posted on her Facebook page:

> 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'm make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too…

Franklin Aff., Ex. C., R. at 18.

Ms. Anderson and Ms. Cardona went to see Principal Thomas Franklin, visibly upset and joined by their parents. *Clark I*, R. at 3. Both families expressed their concern that Ms. Clark would resort to violence against their children. Both were concerned for their daughters on the basketball team and at school, to the point where the Andersons kept Taylor home for two days following the incident. Franklin Aff. at ¶¶ 6-9, R. at 13-14.

The following day, Ms. Clark and her parents were called to see Principal Franklin. Ms. Clark admitted that she authored the Facebook post. Franklin Aff. at ¶ 13, R. at 14. She further admitted that while she was not Facebook friends with any transgender students, she knew that Ms. Anderson and other transgender students were likely to see her post as others shared it. Franklin Aff. at ¶ 14, R. at 14. After the meeting, Principal Franklin suspended Ms. Clark for three days, pursuant to the District's Anti-Harassment, Intimidation & Bullying Policy. Franklin Aff. at ¶ 15, R. at 14.

The Clark family challenged their daughter's suspension with the Washington County School Board, which upheld the punishment. *Clark I*, R. at 3. The Board agreed with Principal Franklin that Ms. Clark's words constituted a "true threat" and were "materially disruptive of the high school." *Id*. The Clarks next filed suit in the United States District Court, alleging a violation of Ms. Clark's First Amendment rights under the United States Constitution. The District Court affirmed the constitutionality of the School District's actions by granting its motion for summary judgment. *Clark I*, R. at 12. The Clarks appealed to the Fourteenth Circuit Court of Appeals, which reversed the District Court and remanded with an order to grant summary judgment in favor of Ms. Clark. This Court granted certiorari. R. at 40.

SUMMARY OF THE ARGUMENT

The Supreme Court should reverse the Fourteenth Circuit and affirm the District Court's grant of summary judgment to the School District because Ms. Clark's statements constituted a true threat and were materially disruptive to the school community, colliding with the right of other students to be secure there.

True threats, like obscenity, libel, and fighting words, are not protected by the First Amendment. Threats are statements that illicit fear in their intended audience, whether of physical, emotional, or social harm. A threat must be made with intent. The considerable majority of circuits conduct an objective test of intent, while some, particularly the Ninth Circuit, require a subjective test.

Petitioner asks that this Court resolve the circuit split and apply an objective test of intent. While it has never expressly addressed the debate of an objective or subjective test, this Court has employed an objective test in its true threat jurisprudence, notably in *Watts v. United States*, 394 U.S. 705 (1969) and *Virginia v. Black*, 538 U.S. 343 (2003). An objective test is appropriate

because speech not protected by the First Amendment is speech whose social value is outweighed by its negative effects on society. Therefore, the relevant analysis is the speech as it is understood by a reasonable speaker or hearer, to determine its effects in societal context. Based on the Supreme Court's precedent and reasoning, the vast majority of circuits apply an objective test. Under any objective test of intent, Ms. Clark's statements that Ms. Anderson "better watch out," that she would "get more than just ejected," and that Ms. Clark would "take [her] out one way or another" were true threats, because they would be understood as such by any reasonable hearer or speaker. If Ms. Clark's claim that she was only kidding suffices to deem her speech not a true threat, then previous decisions of the Court would be rendered meaningless.

A subjective test of intent is used by the Ninth Circuit, although not consistently and not in the context of school discipline, per *Wynar v. Douglas Cty. Sch. Dist.*, 728 F. 3d 1062 (9th Cir. 2013). Even if the Court applied a subjective test, Ms. Clark's statements constitute a true threat. Under the subjective test, a reasonable person standard is not sufficiently volitional to be threatening. However, Ms. Clark's statements were made knowing that her school considered such speech to be intimidating, and knowing that her targets were likely to see them. That action was therefore at least reckless, which is sufficient intent under a subjective test.

In reversing the District Court's grant of summary judgment in favor of the Washington County School Board, the Fourteenth Circuit also adopted an unduly narrow reading of the scope of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The language and reasoning of this Court, as well as the precedent of a nearly unanimous consensus of the circuit courts, compels the understanding that *Tinker*, in certain circumstances, can be lawfully applied to student speech originating off-campus. In an era in which students routinely engage in expression electronically—via text messages, blogs, and social media—a rule governed by a strictly

geographic on-campus/off-campus distinction would leave school administrators largely powerless to maintain the safety and effectiveness of the school environment.

The record demonstrates that Ms. Clark's Facebook post was disseminated to fellow Pleasantville High School students with the knowledge that the post would likely be shared widely throughout the school community. The post related directly to events that had occurred on campus hours earlier, and criticized a recently adopted school policy. Further, the post threatened violence against a specific, named student, as well as class of students generally. Given these facts, it would be absurd to conclude that Ms. Clark's post did not target the school community, and thus fall within the scope of *Tinker*.

Likewise, there can be little doubt that the School Board was reasonable in predicting that the post might cause a substantial disruption of the school environment. The record reflects that the post caused two families to fear for the physical safety of their children while on campus, and for one student to stay home from class for two days. Indeed, where student expression threatens on-campus violence against named students, courts have consistently held that school officials can discipline that speech (regardless of whether the threat is ultimately deemed serious). Additionally, schools have a strong interest in preventing bullying—verbal or physical—that violates the rights of fellow students, particularly when it is directed against vulnerable minorities. Thus, in disciplining Ms. Clark for her threatening Facebook post, the School Board acted within the wide range of reasonable discretion that must be granted to school authorities.

ARGUMENT

I. MS. CLARK'S FACEBOOK POST CONSTITUTED A "TRUE THREAT," NOT ENTITLED TO FIRST AMENDMENT PROTECTION.

When examining a proscription on pure speech, "[w]hat is a threat must be distinguished from what is constitutionally protected[.]" *Watts v. United States*, 394 U.S. 705, 707 (1969). True threats are not protected by the First Amendment, comparable to obscenity, libel, and 'fighting' words "which by their very utterance inflict injury or tend to an incite an immediate breach of the peace." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Threats represent a category of proscribable speech which is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. Speakers who threaten need not possess any intent to carry out the threat. Speech which intimidates by eliciting fear in its target is not constitutionally protected under the true threats doctrine. *Black*, 538 U.S. at 360.

Ms. Clark's statements that Ms. Anderson "better watch out," that she would "take IT out one way or another," and that other transgender students should be equally afraid, are threats of no social value, issued for no reason other than to intimidate a vulnerable young teenager.

A. Ms. Clark's Statement Would Be Considered a True Threat Under Any Objective Test of Intent, Which Is Most in Line With This Court's Court Precedent.

This Court should apply an objective test to determine whether a statement was made with the requisite intent to constitute a true threat, in line with the majority of the circuit courts and its own precedents. Under an objective test, there is no doubt that Ms. Clark's words were intimidation, outside of the First Amendment's ambit.

1. This Court Has Applied an Objective Test of Intent in Its True Threat Cases.

As this Court wrote in *Watts*, threatening speech must be evaluated in context to determine whether it is a true threat, not protected by the First Amendment. In that case, a speaker at a public rally against the Vietnam War told the crowd gathered before the Washington Monument: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Watts*, 394 U.S. at 706. That statement, political hyperbole expressed conditionally to a large rally, was not a true threat. *Id.* at 708.

The *Watts* court did not explicitly address the issue of how to evaluate the speaker's intent to determine if speech is a true threat. However, the per curium opinion is instructive in its method. The Court identifies three main factors in determining that the statement was not a true threat: (1) it was made in a political context; (2) the statement was conditional; and (3) the reaction of the listeners demonstrated that they understood the threat to be hyperbole. *Watts*, 394 U.S. at 708. Each of these factors is purely objective and could have been satisfied even if the speaker had specific, rather than symbolic, violent intentions.

This Court applied a similar objective analysis in the most recent case to explore the elements of a true threat for constitutional purposes. *Virginia v. Black*, 538 U.S. 343 (2003). There, the Court said that a state could criminalize burning a cross with the intent to intimidate, but that it could not treat the action of cross burning on its own as prima facie evidence of intent. The Court reasoned that there were several reasons to burn a cross that were not specific threats, many of them political. *Id*. at 365. However, each of the Court's examples of non-true threat cross-burning is defined by external, objective circumstances, similar to *Watts*. For instance, Justice O'Connor notes that the statute "does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn." *Id.* at 366. It would stretch credulity to suggest that

the opinion requires a court to inquire into the mindset of a defendant who burns a cross on the lawn of an African American neighbor rather than the objective facts of the defendant's expressive actions.

2. An Objective Test Is in Line With the Purpose of Not Giving Constitutional Protection To Speech When Its Negative Effects Outweigh Its Social Value.

The objective methods employed in *Watts* and *Black* are consistent with the Supreme Court's reasoning for exempting from constitutional protection speech that produces little social utility and many deleterious effects. *See Chaplinsky*, 315 U.S. at 572. Considering exemptions to First Amendment protection, the Court follows a "limited categorical approach," which balances the right to free expression against "the social interest in order and morality." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky*, 315 U.S. at 572). Thus, in the few categories of speech where the balance tips in favor of social order—such as threats, obscenity, and libel—the Court considers the effects of the speech on society. The relevant analysis, therefore, focuses on the objective nature of the speech and not the subjective thoughts of the speaker. Words that "incite an immediate breach of the peace" are measured by the reaction of *hearer*, not the thoughts of the speaker. *Chaplinsky*, 315 U.S. at 572; *see also Watts*, 394 U.S. at 708 (considering the "reaction of the listeners" to determine if speech was a true threat).

In accordance with this Court's precedents, the overwhelming majority of circuit courts apply some version of an objective test in true threat cases, either by examining whether a reasonable hearer would find the statement threatening, whether a reasonable speaker would believe the statement to be threatening, or some multi-factored objective analysis. *See, e.g., Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004) (applying a reasonable hearer standard); *United States v. Fuller*, 387 F.3d 643, 645 (7th Cir. 2004) ("this objective standard is proper"); *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997) (applying a reasonable

speaker test); *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (applying a multi-factor objective test).

The Fourteenth Circuit, in granting summary judgment to Ms. Clark, adopted a subjective test to determine whether she possessed the requisite intent for her statements to be considered true threats, meaning that a court must determine that the speaker intended in her own mind for the statement to be threatening. *Clark II*, R. at 30. A small minority of circuit courts have similarly read this Court's true threat jurisprudence as requiring a subjective inquiry into intent. *See, e.g., United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005). Yet, the Ninth Circuit reversed itself and applied an objective standard in a case decided fewer than fifty days after *Cassel*. *United States v. Romo*, 413 F.3d 1044 (9th Cir. 2005).

Even the Ninth Circuit acknowledges that a subjective test of intent is not always required. The *Cassel* court posited in a footnote: "We are not faced with the question of what effect our holding has on other specific statutes that we have previously held do not require the government to prove subjective intent." *Cassel*, 408 F.3d 622, 633 n. 8. If the *Cassel* court believed there could be constitutional criminal statutes that require only objective intent, then surely such speech could be regulated permissibly by a school discipline policy. In 2013, the Circuit confirmed as much in a school discipline case. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F. 3d 1062, 1075 (9th Cir. 2013) ("the school was not acting in the role of a government prosecutor enforcing a criminal statute [and therefore] was not required to prove Landon's subjective intent in writing the messages before expelling him.")

3. Under Any Objective Test, Ms. Clark's Statements Were True Threats.

This Court should apply an objective test to determine if Ms. Clark had the requisite intent for her statements to be considered true threats, consistent with its own precedents and the majority

of the Circuit Courts. As the Eighth Circuit observed, whichever objective test the Court applies, "in the vast majority of cases the outcome be the same." *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F. 3d. 616, 623 (8th Cir. 2002). This case falls squarely within that category. Ms. Clark had already engaged in a loud and disruptive argument with Ms. Anderson when she took to Facebook to tell her "[she] better watch out at school," that she would get "more than just ejected," and that she would "take [Ms. Anderson] out one way or another." Franklin Aff., Ex. C, R. at 18. Ms. Clark said this knowing Ms. Anderson would see it. Franklin Aff. at ¶ 14, R. at 14. Applying the *Watts* factors, these statements were not political or conditional, and there is no indication of any reaction save for Ms. Anderson's legitimate fear for her own safety. *Watts*, 394 U.S. at 708.

Ms. Clark's sole defense is that the Court should read her mind to know that she was kidding when all evidence is to the contrary. To adopt this reasoning would eviscerate the true threat doctrine by providing a complete "just kidding" defense to any abuser threatening a victim. *See generally* Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?*, 20 Tex. J. Women & L. 131 (2011). The Court should reverse the Fourteenth Circuit below and grant summary judgment in favor of the Petitioner. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Even if the Court Adopted a Subjective Test of Intent, Ms. Clark Had the Requisite Intent to Intimidate Ms. Anderson Because Her Conduct Was At Least Reckless.

Even if this Court upholds the minority view that speech may only be deemed a true threat based on an inquiry into the speaker's subjective intent, Ms. Clark's statements should still satisfy this inquiry.

The Ninth Circuit has favored a subjective intent requirement. *Cassel*, 408 F.3d. In *Cassel*, the panel concluded: "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* at 633;

but see Wynar, 728 F. 3d 1062, 1075 (declining to apply the subjective intent standard in a school discipline rather than criminal context.) As noted above, while every court agrees that intent is a necessary element of a true threat, few have understood the Supreme Court to require that the intent be "subjectively intended" to be deemed a true threat for constitutional purposes.[1]

The *Cassel* court's understanding of "subjective intent" only led it so far as to strike down a "reasonable person" negligence standard for what constituted a true threat. The court did not instruct what level of *mens rea* would be necessary to determine whether speech is a true threat. While negligence refers only to a "reasonable person," the next level of *mens rea*, recklessness, applies when a person "consciously disregards a substantial and unjustifiable risk[.]" Model Penal Code § 2.02(2)(c) (Am. Law Inst. 2015). The Supreme Court has recognized recklessness as sufficient culpability for libel and even for the death penalty. *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring). A reckless defendant, unlike a negligent one, possesses subjective knowledge and makes an active choice to disregard the known risk. Therefore, even if this Court adopted the Ninth Circuit's subjective test for intent, a reckless threat would still be "true."

Ms. Clark knew that Ms. Anderson would see her threatening message. Franklin Aff. at ¶ 14, R. at 14. Furthermore, she knew that the policy of the Washington County School District was to treat electronic messages targeting students for their gender identities as intimidating,

[1] In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Court found that specific subjective intent was necessary for a criminal conviction under 18 U.S.C. § 875(c) (criminalizing threats in interstate commerce) because canons of statutory interpretation forbid courts from inferring a *mens rea* of negligence in criminal statutes silent on intent. The Court expressly declined to consider any First Amendment issues in the case. *See also Bell v. Itawamba Cty. Sch. Dist.*, 799 F.3d 379, 396 (5th Cir. 2015) (citing *Elonis* for the proposition that intent in criminal threat statutes is distinct from intent to threaten in a First Amendment context).

punishable offenses. Franklin Aff., Ex. B, R. at 17. Despite that, Ms. Clark recklessly disregarded the known risk.

Even if the Court adopted a subjective test for intent in determining if speech was a true threat for constitutional purposes, Ms. Clark's reckless speech would still fall outside of the First Amendment's protection.

II. CONSISTENT WITH *TINKER*, THE WASHINGTON COUNTY SCHOOL DISTRICT DID NOT VIOLATE MS. CLARK'S FIRST AMENDMENT RIGHTS BY DISCIPLINING HER FOR VIOLATING ITS ANTI-HARASSMENT POLICY.

While it is axiomatic that students do not "shed their constitutional rights to free speech or expression at the schoolhouse gates," *Tinker*, 393 U.S. at 506, this Court has nonetheless held that the rights of students in public schools "are not equally coextensive with adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S 675, 682 (1986). In *Tinker*, this Court held that where student expression might be reasonably anticipated to "substantially interfere with the work of the school or impinge on the rights of other students," the unique nature of the public school environment allows school administrators to lawfully restrict that speech. *Tinker*, 503 U.S. at 509.

A. School Administrators May Discipline Students for Violent Off-Campus Speech Reasonably Forecasted to Disrupt the School Environment.

1. The Reasoning Underlying *Tinker* Applies to Speech Originating Off-Campus.

Although the *Tinker* Court needed only to determine the scope of First Amendment protection applicable to student speech originating within the school itself, and was therefore cautious to limit its holding to that issue, the *reasoning* underlying the decision compels the understanding that off-campus speech can, in certain circumstances, be lawfully restricted. *See id.* at 513 ("Conduct by the student, *in class or out of it*, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized . . . ." (emphasis added). In *Tinker*, the Court considered whether students could be

lawfully suspended from school for wearing black armbands in protest of the Vietnam War. *Id.* at 505. In determining that the students' speech was protected, the Court focused not on the geographic source of the speech, but rather its potential for disruptive *effect* on "the special characteristics of the school environment." *Id.* at 506.

It is readily apparent that speech originating off-campus is capable of creating "substantial disruption of or material interference with school activities." *Id.* at 514. In today's age, "students both on and off campus routinely participate in school affairs, as well as other expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication." *Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008). Given the "'everywhere at once' nature of the internet," it would be quixotic to allow the scope of protection granted to student expression to "turn solely on where the speaker was sitting when the speech was originally uttered." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring). The facts of the case at bar illuminate the way in which off-campus, online speech can cause a concrete, significant disruption to the school environment: despite that Ms. Clark's Facebook post was composed entirely on her home computer, the post nonetheless caused the families of two students to fear for their children's physical safety while attending school, and for one family to keep their child home from school for two days. Franklin Aff. at ¶ 9, R. at 14.

While this Court has yet to apply the *Tinker* standard to speech originating off-campus, *Morse v. Frederick*, 551 U.S. 393 (2007), demonstrates the Court's willingness to accept censure of student expression originating beyond the physical geography of the school itself. In *Morse*, the Court considered whether a student could be properly disciplined for displaying an irreverent banner at a school rally across the street from campus. In holding that the school's principal could

properly discipline the student for refusing to take down the banner, the Court rejected the argument that the precise location that the expression took place was determinative, noting that the student "directed his banner toward the school, making it plainly visible to most students." *Id.* at 394. As courts have long noted, "territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority." *Thomas v. Board of Educ.*, 607 F.2d 1043, 1058 n. 13 (2d Cir. 1979) (Newman, J., concurring in the result). Any rule categorically excepting off-campus expression from the scope of the *Tinker* framework would be contrary to this Court's own reasoning, and would likewise "fail[] to account for evolving technological developments," leaving school administrators unable to address actual or nascent threats to the school environment. *Bell*, F.3d at 393; *see also Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220–21 (3d. Cir. 2011) (Jordan, J., concurring) (noting that the Internet and social media "give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.").

2. Every Circuit to Decide the Issue Has Held That *Tinker* Applies to Certain Off-Campus Speech.

The Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits have all recognized the potential "substantial disruption" to school activities posed by speech originating off-campus, and have therefore held that "school administrators' authority to regulate student speech extends, in the appropriate circumstances, to speech that does not originate at the school itself, so long as the speech eventually makes its way to the school in a meaningful way." *Kowalski v. Berkeley Cty. Schls.*, 652 F.3d 565, 574 (4th Cir. 2011); *see also Doninger*, 527 F.3d at 50 (holding that, where a blog disrupts school activities, "its off-campus character does not necessarily insulate the student from school discipline."); *Bell*, 799 F.3d at 392 (noting that the ubiquity of the Internet "confound[s] previously permissible boundaries of permissible regulations."); *Boucher v. School*

Bd. of Greenfield, 134 F.3d 821, 829 (7th Cir. 1998) (holding that an underground newspaper distributed on campus is governed by *Tinker*); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012) (holding that students can be disciplined for creating a racist and sexually degrading website); *Wynar*, 728 F.3d at 1069 (holding that schools may take disciplinary action against off-campus threats of school violence.). Without deciding, the Third Circuit has likewise been willing to assume that *Tinker* may be applied to off-campus speech. *See Blue Mountain*, 650 F.3d at 926. Widely established precedent, therefore, dictates that in appropriate circumstances *Tinker* should be applied to speech originating beyond the schoolhouse gates. Thus, the overwhelming weight of authority compels against a rule immunizing substantially disruptive, off-campus speech from censure.

B. Ms. Clark's Facebook Post Was Directed Inevitably at the School Community, and is Therefore Governed by *Tinker*.

Where threatening off-campus speech is directed at the school environment, with the explicit knowledge that students within the school community will inevitably receive it, that speech is subject to the standards of *Tinker*. *See, e.g.*, *Bell*, 799 F.3d at 396 (holding that *Tinker* governs "when a student a student intentionally directs at the school community speech reasonably understood to threaten harass, and intimidate."). In so holding, several of the circuits have adopted their own threshold test for applying *Tinker* to speech originating off-campus. The Second and Eighth Circuits, for instance, have held that, where expression is "reasonably foreseeable" to reach the school community, school administrators can lawfully restrict it.[2] *Wisniewski v. Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007); *Lee's Summit*, 696 F.3d at 777. Similarly, the Fourth Circuit requires that the speech in question have a "sufficiently strong" "nexus" to the

[2] The Second Circuit has divided on whether speech that *does* reach school property is per se governed by *Tinker*, regardless of foreseeability. *Wisniewski*, 494 F.3d at 39.

school's interests. *Kowalski*, 652 F.3d at 573. The Fifth Circuit, while declining to adopt a rigid standard, has held that *Tinker* applies to "threats, harassment, and intimidation" directed at the school community. *Bell*, 799 F.3d at 396.

It is not necessary, however, for this Court to adopt or reject any specific standard, because the speech in question here satisfies any threshold yet annunciated. There is no genuine dispute of material fact that Ms. Clark knew that her post would likely be shared among the student community at Pleasantville High School, and would likewise be seen by Ms. Anderson (who was explicitly named in the post) and other transgender students. Franklin Aff. at ¶ 14, R. at 14. It is of no consequence, therefore, whether Ms. Clark subjectively intended or desired the post to be disseminated among the school community or to reach Ms. Anderson and other transgender students, or that she did not personally bring the post to the attention of school authorities. In *Kowalski*, for instance, the Fourth Circuit held that a MySpace page targeting a student by name for harassment fell within the scope of *Tinker*, even though the student creator of the page disseminated it only to her own MySpace "friends." *See Kowalski*, 652 F.3d at 573 (noting that the student author of the page "knew that the electronic response would, as it in fact was, published beyond her home and could be reasonably expected to reach the school or impact the school environment."). Similarly, in *Wisniewski* the Second Circuit held that *Tinker* governed where a student had sent instant messages containing a crude drawing threatening a teacher to fifteen online "buddies," even though the drawing was never intended to reach the teacher or the school. *See Wisniewski*, 494 F.3d at 40 (holding that discipline was permitted "whether or not [the student] intended his IM icon to be communicated to school authorities.").

The nexus between Ms. Clark's post and the school community is further strengthened by the fact that the post stemmed from an incident that occurred on campus, and related directly to

the school's Nondiscrimination in Athletics policy. Clark Aff. ¶¶ 5, 9, R. at 23–24. Where a student's speech "pertain[s] directly to events occurring at school," courts have dependably held that the speech functionally targets the school environment. *Bell* 799 F.3d at 396. In *Bell*, the Fifth Circuit held that a student-authored rap, posted online and alleging on-campus misconduct by teachers, was necessarily intended to reach the school community. *Id.* Similarly, in *Doninger* the Second Circuit held that an off-campus blog posting directed at fellow students fell within the *Tinker* framework. *Doninger*, 527 F.3d at 50. There, the court was careful to note that the blog post "directly pertained" to events at the school. *Id.*

Indeed, in determining the extent to which *Tinker* can reach beyond the school grounds, it is instructive to look to cases in which courts have been *unwilling* to apply the *Tinker* framework. In *Porter*, the court considered a violent student drawing that, two years after its creation, was unwittingly carried onto campus by the student's twelve-year-old brother. *Porter*, 393 F.3d at 611–12. In determining that the drawing (a depiction of a violent siege on the school) did not constitute speech on the school premises, the court noted that the student "took no action that would increase the chances that his drawing would find its way to school," and that it had arrived on campus by "mere chance." *Id.* at 615. The analysis would differ, the court determined, had the drawing been "publicized in a way certain to result in its appearance on campus." *Id.* at 620. The facts underlying *Porter* stand in stark contrast to those of the case at bar. Ms. Clark wrote the Facebook post for which she was disciplined in direct response to an altercation that took place on campus earlier that day. Clark Aff. at ¶¶ 4–5, R. at 23. The post was directed toward fellow students, and was intended to criticize school policy. Clark Aff. at ¶¶ 5–6, R. at 23. It threatened Ms. Anderson and other transgender students specifically, and was published with the awareness that it would likely reach Ms. Anderson, as well as others within the school community. Franklin

Aff. at ¶ 14, R. at 14. Ms. Clark made no effort to prevent the post from spreading throughout the school community, and in fact acknowledged that it would likely be disseminated beyond her control. Franklin Aff. at ¶ 14, R. at 14. Given these facts, it would be implausible to conclude that Ms. Clark's post was not sufficiently connected to the school environment to bring it within the scope of *Tinker*.

C. Ms. Clark's Facebook Post Was Reasonably Forecasted To, and In Fact Did, Substantially Disrupt the School Environment.

The *Tinker* test is satisfied where student speech causes an actual disruption to the school environment, or "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. Where, as here, student speech contains threats of violence against named individuals, courts have consistently held that such expression creates a reasonable threat of substantial disorder within the school, even if the speech does not rise to the level of a "true threat." *See, e.g.*, *Bell*, F.3d at 398 (observing that "threatening, intimidating, and harassing language—must be taken seriously by school officials"); *Wisniewski*, 494 F.3d at 38–39 (holding that an icon calling for the death of a specific teacher "crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon . . . would materially and substantially disrupt the work and discipline of the school.") (internal quotation marks omitted).

Here, Ms. Clark's Facebook post *did*, in fact, cause a material disruption to the school environment, causing two families to fear potential violent attacks against their children, and leading one student to miss two days of school. Franklin Aff. at ¶ 9, R. at 14. It is self-evident that expression that causes students to stay away from school out of reasonable fear of violence meets the "substantial disruption" standard. *See Kowalski*, 652 F.3d at 574 (noting that a MySpace page created to mock a specific student caused that student "to miss school in order to avoid further

abuse."); *Wynar*, F.3d at 1071 (observing that a student mentioned by name in online messages threatening a school shooting "was afraid . . . and that her father would not let her return to school.").

Even if Ms. Clark did not, in fact, cause a material disruption to the school environment, administrators nonetheless could have lawfully disciplined her, because her Facebook post "might reasonably have led school authorities to *forecast* substantial disruption." *Tinker*, 393 U.S. at 514 (emphasis added); *see also Lowery v. Euverard*, 497 F.3d 584, 591–92 (6th Cir. 2007) ("*Tinker* does not require school officials to wait until the horse has left the barn to close the door."). Further, *Tinker* does not require "absolute certainty that substantial disruption will occur," but instead only facts that allow administrators to reasonably predict a disruption. *Doninger*, 527 F.3d at 51. Given the delicate task carried out by school administrators, the decisions of school officials should govern, provided "they are in the range where reasonable minds will differ." *A.M. v. Cash*, 585 F.3d 214, 222 (5th Cir. 2009).

In the case at bar, Ms. Clark has stated that the threats contained in her Facebook post ("Taylor better watch out at school" and "I'll take IT out one way or another") were merely jokes meant for her friends. Clark Aff. at ¶¶ 6–7, R. at 23. Whether Ms. Clark subjectively intended the threats as "jokes" is, however, ultimately not decisive, because it was eminently reasonable for the School District to proceed as if she did not. *See Wynar*, 728 F.3d at 1071 ("We need not discredit [the student's] insistence that he was joking; our point is that it was reasonable for Douglas County to proceed as though he was not."). Indeed, in *Wisniewski*, a police officer concluded that a drawing calling for the death of a teacher was merely a joke, and that the student who drew it posed no threat. *Wisniewski*, 494 F.3d at 36. Nonetheless, the court held that the school district had responded reasonably in forecasting a potential disruption. In *Wynar*, the court similarly held that

any emphasis on a student's lack of a prior disciplinary history would be "misplaced."[3] *Wynar*, 728 F.3d at 1070 n.8. Ms. Clark's post threatened, with no hint of irony or jest, on-campus violence against a specific, named member of a marginalized minority, Taylor Anderson. Ms. Anderson and her family took this threat seriously, leaving them reasonably fearing that the school environment was no longer safe. Franklin Aff. at ¶¶ 7, 9, R. at 13–14. It would be absurd, given these facts, to conclude that the School District was unreasonable in forecasting that the Facebook post could cause a "substantial disruption" of the school environment. Indeed, in the wake of the tragedies at Columbine, Virginia Tech, and Sandy Hook, school administrators would be derelict in their responsibilities if they *did not* respond to threats of on-campus violence.

D. Ms. Clark's Facebook Post Collided with the Rights of Other Students to Be Secure and Let Alone.

Where student speech "collides with the rights of other students to be secure and let alone," that speech can be lawfully disciplined by school authorities, even where no "substantial disruption" has occurred or been forecasted. *Tinker*, 393 U.S. at 513. It is undeniable that a threat of on-campus violence against a minority group generally and an individual named specifically "collides" with the rights of those threatened. In *Wynar*, for instance, the Ninth Circuit held that online messages threatening a school shooting and targeting certain individuals by name, "represent the quintessential harm to the rights of other students to be secure." *Wynar*, 728 F.3d at 1072. Further, school officials "need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179 (9th Cir. 2006) *judgment vacated sub*

[3] Secret Service and Department of Education statistics indicate that nearly two thirds of the assailants in school attacks had never been, or were rarely in trouble in school. U.S. Secret Serv. & U.S. Dep't of Educ., *The Final Report and Findings of the Safe School Initiative* ii, 20 (July 2004), *available at* https://www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf.

nom. Harper ex rel. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007).[4] In *Harper*, school officials required a student to spend the day in the school office because he refused to remove a t-shirt on which he had written "BE ASHAMED, OUR SCHOOL HAS EMBRACED WHAT GOD HAS CONDEMNED. HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'". Holding that the student's First Amendment rights had not been violated, the court observed that "being secure involves not only freedom from physical assaults, but from psychological attacks that cause young people to question their self-worth and their rightful place in society." *Id.*

Here, the content of Ms. Clark's Facebook post ("TRANSGENDER is just another word for FREAK OF NATURE!!! . . . It's IMMORAL and it's AGAINST GOD'S LAW!!!") bears striking similarity to the language in question in *Harper*. Franklin Aff., Ex. C, R. at 18. Even ignoring Ms. Clark's threat of physical violence, there can be little doubt that the post amounts to the type of "psychological assault[]" against "members of minority groups" that the Ninth Circuit has held can be properly disciplined within the school context.[5] *Harper*, F.3d 445 at 1178. The School District has a strong interest in preventing bullying, cyber or otherwise, from occurring within the school community. *See Lee's Summit*, 696 F.3d at 779 ("The specter of cyber-bullying hangs over this case. The repercussions of cyber-bullying are serious and sometimes tragic."); *see also C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1152–53 (9th Cir. 2016) (holding that off-campus, verbal sexual harassment directed at two disabled students violated their right to be secure). Here, the School District's Anti-Harassment, Intimidation & Bullying Policy explicitly

[4] After granting certiorari, the Supreme Court vacated the Ninth Circuit's decision as moot because the plaintiff had graduated. *Harper*, 549 U.S. at 1262.

[5] Several commentators have noted that transgender youth are particularly vulnerable to physical and verbal bullying in school, often leading to a fear of seeking higher education, homelessness, and suicide. *See, e.g.*, Zenobia V. Harris, *Breaking the Dress Code: Transgender Students, Their Identities, and Their Rights*, 13 SCHOLAR 149, 152–54 (2010).

noted that bullying and threats based on gender identity would not be tolerated where those threats could be expected to harm a student or substantially interfere with a student's education. Franklin Aff., Ex. B, R. at 18. Ms. Clark's Facebook post was precisely the type of abusive speech that, consistent with *Tinker*, the Policy was intended to curb, and indeed, Ms. Clark was suspended for violation of the policy. Franklin Aff. at ¶ 15, R. at 14. Thus, in addition to posing the threat of "substantial disruption" to the school environment, Ms. Clark's post "collided" with the rights of Ms. Anderson and other transgender students, and was therefore not immune to discipline by school authorities.

CONCLUSION

Ms. Clark's Facebook post constituted a "true threat" unprotected by the First Amendment. It foreseeably caused a "substantial disruption" in the school environment, and interfered with the rights of other students to be secure within the school setting. For the foregoing reasons, this Court should reverse the decision of the Fourteenth Circuit, and affirm the District Court's grant of summary judgment to the School District.

Respectfully Submitted,

_____
Team S
Counsel for Petitioner

January 31, 2017

CERTIFICATE

We hereby certify that:

1. The work product contained in this brief is our work only;
2. In preparing this brief, we have complied fully with our law school's honor code;
3. In preparing this brief, we have complied fully with the Rules of the Competition.

Team S

January 31, 2017