No. 16-9999

In the Supreme Court of the United States

WASHINGTON COUNTRY SCHOOL DISTRICT,
Petitioners,

v.

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

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

BRIEF FOR THE PETITIONER

Team W
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.

2. Whether a public school administration may regulate a student's internet speech that was made off campus from a personal computer when the speech made its way into the school and the administration determined the internet post was materially disruptive and infringed the rights of other students at the school.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on January 5, 2017. *Clark by Clark v. Sch. Dist. of Washington County, New Columbia*, No. 17-307. Petitioner timely filed a petition for writ of certiorari, which this Court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Washington County School District wanted to create an environment conducive to learning in its schools. In this endeavor, the school district enacted two policies to prevent bullying and to encourage all students to participate in athletics programs. These two policies are the "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" policy, and the "School District of Washington County, New Columbia Anti-Harassment, Intimidation and Bullying Policy." Record 15-17. In relevant part, the Nondiscrimination in Athletics policy allows students to participate in school sports for the gender they identify with and assert at school. Record 16.

On November 2, 2015, Ms. Kimberly Clark and Ms. Taylor Anderson, two students at Pleasantville High School in Washington County, had a loud and disruptive argument at an intrasquad basketball game, and both students were ejected. Record 2. It is relevant for this case to mention Ms. Anderson is considered transgender, having been born a male but identifying and asserting that she is a female. Later in the evening, Ms. Clark took to Facebook and posted a status update shared with friends. The post read:

> I can't believe Taylor was allowed to play on a girls' team! That boy (that IT!!) should never be allowed to play on a girls' team. TRANSGENDER is just another word for FREAK OF NATURE!!! This new school policy is the dumbest thing I've ever heard of! It's UNFAIR. It's IMMORAL and it's AGAINST GOD'S LAW!!!
>
> Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too…

Record 2. The principal of Pleasantville High School, Mr. James Franklin, became aware of the post on November 4, 2015. Ms. Anderson's parents met with Mr. Franklin and the parents of another transgender student, Josie Cardona. Ms. Anderson and Ms. Cardona were present at the

meeting and were "visibly distressed." Record 13. The Andersons and the Cardonas presented Mr. Franklin with Ms. Clark's Facebook post. Record 14. Both families were concerned that Ms. Clark may become violent towards Ms. Anderson and Ms. Cardona because they identify as transgender. *Id*. The Andersons kept Taylor home from school as a result of the basketball game and Facebook post. *Id*. In addition to Ms. Anderson and Ms. Cardona, other students complained to Mr. Franklin about the Facebook post, and Mr. Franklin noticed that some of these students were "visibly distressed." *Id*.

The next day, Mr. Franklin spoke with Ms. Clark and her parents. Ms. Clark admitted to being the author of the post, and stated her statements were intended as jokes. Record 23. Ms. Clark also stated the post was meant for her friends, but she knew that her friends might pass her post along to others, and she conceded that she knew that some of the people that were able to view her message may share it with Ms. Anderson or other transgender students. Record 14. After Mr. Franklin met with Ms. Clark and her parents, he concluded that Ms. Clark's post, particularly the second part, created a material disruption within the school and collided with the rights of transgender students to feel secure and to be let alone. *Id.* Mr. Franklin used that conclusion to support suspending Ms. Clark for three days. Mr. Clark appealed his daughter's suspension unsuccessfully. Record 20.

Mr. Clark filed a complaint in the federal district court for the District of New Columbia. Record 3. The district court found that Ms. Clark's post was a "true threat." Record 7. The court also found the post fell under the *Tinker* analysis and was a material disruption and infringed the rights of students to feel secure. Record 9-12. Mr. Clark appealed the district court's decision. The United States Court of Appeals for the Fourteenth Circuit reversed the district court on both

the "true threat" question and the *Tinker* application. Record 25. The Washington County School District was granted certiorari to appeal this case to the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT

I. This Court should reverse the decision of the United States Court of Appeals for the Fourteenth Circuit and find that the Washington County School District did not violate Ms. Clark's First Amendment rights because Ms. Clark's Facebook post constituted a true threat. The Court of Appeals for the Fourteenth Circuit improperly held that true threats require a subjective level of intent, and under a subjective test, Ms. Clark's posts did not constitute a true threat. However, this Court should adopt an objective test to determine if Ms. Clark Facebook post constituted a true threat. First, Ms. Clark's Facebook post resulted in school disciplinary action and should therefore be analyzed under an objective approach consistent with holdings from the Fifth and Eighth Circuits in similar school disciplinary actions. Second, the split in the circuits is a result of the Court's holding in *Virginia v. Black*, however, *Black* did not compel a subjective intent requirement to determine if speech constituted a true threat.

In school disciplinary actions, the Fifth and Eighth Circuits have applied an objective approach to determine whether speech constitutes a true threat. Under an objective approach, the only intent requirement is that a person intend to communicate the speech to the object of the purported threat, or to a third party. After it has been proven that an individual had an intent to communicate the speech, the speech is evaluated by an objectively reasonable standard. The Fifth Circuit asks whether an "objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm." *Porter v. Ascension Parish Sch. Bd*., 393 F.3d 608, 618 (5th Cir. 2004). The Eighth Circuit puts forward an objective-recipient test, asking "whether the recipient of the alleged threat could reasonably conclude that

it expresses a determination or an intent to injure presently or in the future." *Doe v. Pulaski County Special Sch. Dist*., 306 F.3d, 616, 622 (8th Cir. 2002).

Furthermore, this Court should apply an objective test to Ms. Clark's Facebook post because *Virginia v. Black* does not compel a subjective intent requirement to determine if speech constitutes a true threat. The Ninth Circuit interpreted the *Black* definition of a true threat to mean that speech is only a true threat "upon proof that the speaker subjectively intended the speech to be a threat." *United States v. Cassel*, 408 F.3d 622, 634. However, *Virginia v. Black* does not hold that a speaker must subjectively intend to threaten in order for the speech to constitute a true threat. The *Black* court ultimately held narrowly, finding a criminal cross-burning statute to be unconstitutional because the prime facie evidence provision, which made all cross burning prime facie evidence of an intent to intimidate, eliminated the statutes intent requirement. Second, *Black*'s policy behind prohibiting true threats lends itself to an objective test. The Court states that "the prohibition on true threats is to 'protect individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Virginia v. Black*, 538 U.S 343, 559-560 (2003) (quoting *R.A.V v. City of St. Paul*, 505 U.S. 377, 388 (1992)). The Court is considering the effect that threatening language has on the recipient of the threat. The Court does not imply that the speaker's subjective intent to threaten the recipient is of concern.

This Court should not interpret *Black* to compel a subjective intent to determine a true threat. Therefore, this Court should apply an objective approach consistent with the Fifth and Eighth Circuit holdings in school disciplinary matters.

Under an objective approach to Ms. Clark's post, her speech constituted a true threat. First, Ms. Clark intended to communicate her speech when she posted it on a social media site.

Furthermore, based on the tone of her Facebook post and the circumstances surrounding this post, an objectively reasonable person would find Ms. Clark's Facebook post threatening.

II. The Supreme Court held that students retain their First Amendment rights in school in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* However, the Court also recognized that schools must be able to regulate student speech differently than the standard normally followed under First Amendment jurisprudence. The *Tinker* standard allows for restricting speech when the speech creates a material disruption of the school environment or when the speech violates the rights of students to feel secure and to be left alone. This is the standard applied to student speech that occurs in school.

For student speech that occurs outside of school, courts are split on how that speech should be analyzed. Some courts do not consider the geographic location of the speech if the speech has made it to the school. Some courts consider the relationship between the speech and the school environment. In *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, the Second Circuit upheld a student's punishment for speech made off campus on a personal computer because it was reasonably foreseeable that the speech expression would have come to the attention of the target of the speech and the school authorities. Finally, some courts will not apply *Tinker* to cases where the speech is created off campus and the students did not intend or expect the speech to find its way into the school.

This Court should apply *Tinker* without regard for the geographic location of the speech because Ms. Clark knew it was reasonably foreseeable her post would make its way into the school halls. Ms. Clark posted her statement to the public forum of Facebook, increasing the likelihood that it would reach Ms. Anderson. If this Court finds it necessary to show a relationship and nexus with on-campus activity, Ms. Clark's post came after a disagreement that

occurred on campus during basketball practice. Ms. Clark mentions the ejection from the game in her post.

Once the Court has applied the *Tinker* standard, the restriction of Ms. Clark's speech is reasonable because her speech created a material disruption and violated the rights of students to feel secure at school and to be left alone. From *Kowalski v. Berkeley County Sch.* and *J.S. v. Bethlehem County Sch.*, courts will consider the targeted and defamatory nature of statements, as well as the unconditional nature of threatening statements. Each of these factors is present in Ms. Clark's post. She targeted a single student first, then targeted a group of students based on a shared characteristic in an unconditional manner.

Courts have also determined that statements that interfere with student's performances or that are inconsistent with a school's educational purpose may be restricted. Ms. Clark's post interfered with Ms. Anderson's performance when Ms. Anderson stayed home from school following the post. The post was inconsistent with Pleasantville High School's educational purpose by making other transgender students fearful they may be the victims of violence.

ARGUMENT

I THE WASHINGTON COUNTY SCHOOL DISTRCIT DID NOT VIOLATE MS. CLARK'S FIRST AMENDMENT RIGHTS BECAUSE HER FACEBOOK POST CONSTITUTED A TRUE THREAT.

The current issue is whether Ms. Clark's Facebook posts constituted a "true threat" beyond the protection of the First Amendment. The district court held that the school district did not violate Ms. Clark's First Amendment rights. The district court followed an objective approach because the case at bar involves school proceedings. However, the United States Court of Appeals for the Fourteenth Circuit reversed the district court's holding, finding a subjective approach to be the proper test. Under this test, the court held Ms. Clark's statements did not constitute a true threat.

The petitioner appeals the decision. The appropriate standard of review to determine if Ms. Clark's First Amendment rights were violated is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The petitioners respectfully request that this Court reverse the lower court's judgment because Ms. Clark's Facebook post constituted a true threat, and, therefore, the Washington County School Board did not violate her First Amendment rights.

A. This Court should adopt an objective test to determine whether Ms. Clark's speech constitutes a true threat, and therefore, falls outside of First Amendment protection.

The First Amendment, which extends to the states through the Fourteenth Amendment, *W. Va. State Bd. of Educ. V. Barnette*, 319 U.S. 624, 367 (1943), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

"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 (1989). However, the First Amendment is not absolute, and the Court has "long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). For example, the Court has held that "lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942). Furthermore, the Court has held that First Amendment protection does not extend to child pornography, *Ferber v. New York*, 458 U.S 747 (1982), obscenity, *Miller v. California*, 413 U.S. 15 (1973) and incitement to imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Court has also carved out an exception to First Amendment protection for true threats. *Watts v. United States*, 394 U.S. 705 (1969).

The Court originally introduced the concept of the "true threat" in *Watts v. United States* after a man was convicted of threatening the President. *Watts*, 394 U.S at 706. During a political rally, Watts stated, "If they ever make me carry a rifle, the first man I want to get in my sights is L. B. J." *Id.* The Court ultimately held Watts' speech to be protected because it was political hyperbole, and "taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id.* at 708. The Court expanded on the true threat doctrine in *Virginia v. Black*, in which Justice O'Conner stated:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts* v. *United*

> *States*, *supra*, at 708 ("political hyperbole" is not a true threat); ***R. A. V.*** v. ***City of St. Paul***, 505 U.S., at 388.

Black, 538 U.S. at 359-360. Ultimately, the Court ruled on the constitutionality of a specific criminal statute that included an intent to intimidate provision. *Id*. At 367. The Court did not specifically address the level of intent necessary for speech to constitute a true threat. However, since *Black*, there has been a split in the circuits as to the level of intent required to prove that a speaker "communicate[d] a serious expression of an intent to commit and act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359.

After *Watts* and prior to *Black*, all of the circuits applied an objective approach to determine if speech constituted a true threat. *See United States v. Flumer*, 108. F3d 1486, 1491 (1st Cir. 1997) (discusses different objective approaches to determining a true threat). Following the *Black* opinion, however, the courts are split as to whether an objective intent standard is still required of a true threat, or if *Black* implemented a subjective standard. Multiple circuits however, continue to apply an objective standard following *Black. See United States v. Mabie*. 663 F.3d 322, 330 (8th Cir. 2011); *United Stated v. White*, 670 F. 3d 498, 507 (4th Cir. 2012); *United States v. Dillard*, 795 F.3d 1191, 1199 (10th Cir. 2015).

In school disciplinary actions, like the case at bar, the Fifth Circuit applied an objective test to determine whether speech constituted a true threat. The Fifth Circuit stated that "speech 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." *Porter v. Ascension Parish Sch. Bd*., 393 F.3d 608, 618 (5th Cir. 2004) (applying an objective test to a student's violent drawing). The Eighth Circuit has also applied an objective test to determine if a student's speech constituted a true threat. *Doe v. Pulaski County Special Sch. Dist*., 306 F.3d 616 (8th Cir. 2002). The Eighth Circuit asks "whether the recipient of the alleged threat could

reasonably conclude that it expresses a determination or an intent to injure presently or in the future." *Doe*, 306 F.3d at 622.

The Ninth Circuit, however, applied a subjective level of intent to determine a true threat in a criminal case, in which the defendant was criminally charged with interfering with federal lands. *United States v. Cassel*, 408 F.3d 622, 635 (9th Cir. 2005). The court read *Black*'s definition of a true threat to mean that "only intentional threats are criminally punishable consistent with the First Amendment," therefore, speech is only a true threat "upon proof that the speaker subjectively intended the speech to be a threat." *Cassel*, 408 F.3d at 631, 634. In light of this, the court reasoned that the government must prove an intent to intimidate before it can secure a conviction under the criminal statute in question. *Id*. at 632.

However, this Court should apply an objective test to determine if Ms. Clark's Facebook posts constituted a true threat. First, Ms. Clark's statements resulted in school disciplinary action. Therefore, this Court should adopt an objective approach like that of the Fifth and the Eighth Circuits to determine if a student's speech is a true threat, which requires that a person intend to communicate the speech, and a reasonable person would find the speech threatening. Second, the Court's holding in *Virginia v. Black* does not compel a subjective reading of the true threat doctrine. In *Black* the Court ruled narrowly on the constitutionality of a specific criminal statute. Furthermore, *Black*'s policy behind prohibiting true threats is consistent with an objective approach for determining when speech constitutes a true threat.

1. In school disciplinary matters, this Court should apply an objective approach and hold that a speaker must only intend to communicate the speech and an objectively reasonable person would find this speech threatening.

The Fifth Circuit applied an objective test to determine whether a student's violent drawing constituted a true threat. The court stated:

> Speech 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.' The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly communicated to either the object of the threat or a third party.

Porter, 393 F.3d at 616. Therefore, to determine whether a true threat has occurred, a two-part inquiry is required. First, did the speaker intend to communicate the speech to the object of the threat or a third party, and second, would a reasonable person find this speech threatening.

In *Porter*, the Fifth Circuit found that Adam Porter did not meet the threshold requirement of intent to communicate because "Adam 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. After drawing a violent picture of his high school under siege and showing it to his brother, friend and mother, Adam placed the drawing in a closet. *Id*. at 611. It was not until two years later that his younger brother found the drawing and took it to school. *Id*. After the school authorities were notified of the drawing, Adam was suspended. *Id*. at 612.

The court found that the school district violated Adam's First Amendment rights. *Id*. at 618. The court reasoned that since "the communication was confined to his home," Adam did not knowingly or intentionally communicate his speech in a sufficient way, and therefore, the threshold requirement of intent to communicate was not met. *Id*. at 617. Consequently, there was no need to look to the second question of whether Adam's drawing would constitute a true threat in the eyes of a reasonable and objective person." *Id*.

However, in *Doe v. Pulaski* the Eighth Circuit, applying an objective test, found that a student knowingly or intentionally communicated his message, even though he did not personally deliver the message to the recipient. *Doe*, 306 F.3d at 624-625. *See also, D.J.M. v*

Hannibal Pub. Sch. Dist., 647 F.3d 754 (8th Cir. 2011) (found that a student intentionally communicated his threats to third party when he sent his instant message to a third party, who subsequently transmitted the messages to the school authorities). In *Doe*, a junior-high student, J.M. wrote two letters containing "violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder" his ex-girlfriend, K.M. *Doe*, 306 F.3d at 619. Both of the letters were written at J.M.'s home and remained there until J.M. gave his friend, D.M., permission to read the letter. *Id*. J.M. also discussed the contents of the letter with his ex-girlfriend during telephone conversations on two or three occasions. *Id*. K.M. eventually saw the letter while in gym class. *Id*. at 620. A friend who was with her at this time, reported the letter to a school resource officer, after which, J.M. was expelled from the school for making terrorizing threats against others. *Id*. at 626.

The Eighth Circuit Court of Appeals found that D.M. intended to communicate the letter. *Id*. at 624. As evidence of this, the court looked to the fact that J.M. allowed a third party, D.M., to view the letter, and furthermore, J.M admitted that "he knew there was a good possibility that D.M. would tell K.G. about the letter because D.M. and K.G. were friends." *Id*. J. M. also discussed the contents of the letter with K.G. on more than one occasion. *Id.* at 625. He also relayed similar information to K.G.'s best friend "who would be likely to convey the information to K.G." *Id.* In light of this, the court stated that based on J.M willingness to allow D.M to read the letter, and his discussion with K.M and her best friend, "one could hardly say… that J.M. intended to keep the letter, and the message it contained, within his own lockbox of personal privacy." *Id*. The court ultimately held that because J.M. intended to communicate the letter, he was accountable if a reasonable recipient would have viewed the letter as a threat. *Id*. at 624.

After determining that a speaker intended to communicate the speech, it is then necessary to evaluate whether the speech would appear threatening to a reasonable person. *Porter*, 393 F.3d at 616. In *Doe*, the court asked if "a reasonable recipient would have perceived the letter as a threat." *Id*. at 625. The court looked to the contents and tone of the letter, stating that "the letter exhibited J.M.'s pronounced, contemptuous and depraved hate for K.G." *Id*. Based on the letter's language, the court stated that "most, if not all, normal thirteen-year-old girls (and probably most reasonable adults) would be frightened by the message and tone of J.M.'s letter and would fear for their physical well-being if they received the same letter." *Id.*

The court also looked to the reaction of those who were aware of the letter. *Id*. at 626. D.M. was concerned enough about the letter that he took it from J.M's house because he "felt something that had to be done about it." *Id*. A girl present while K.G read the letter, immediately went to school authorities because she felt someone needed to know about the letter. *Id*. Furthermore, after K.G. read the letter, she was "extremely frightened," and afraid to leave the gym where she first read the letter, and she left school early when J.M was permitted to return to school after being temporarily restrained. *Id.* "Based on the tone of the letter, and the situation surrounding its communication" the court stated that it was "not surprised that those who read [the letter] interpreted it as a threat. *Id.*

The court ultimately held that "the letter amounted to a true threat and the school board did not violate J.M.'s First Amendment rights by initiating disciplinary actions based on the letter's threatening content." *Id.* at 627.

2. The Court's holding in *Black* does not compel a subjective intent requirement of the true threat doctrine because the *Black* court ruled narrowly on the constitutionality of a specific criminal statute.

The Court's holding in *Black* does not compel a subjective intent reading of the true threat doctrine. In *Black*, the court narrowly ruled on the constitutionality of a criminal statute which (1) made it a felony "for any person . . ., with the intent of intimidating any person or group . . ., to burn . . . a cross on the property of another, a highway or other public place;" and (2) specified that any such burning was to be "prima facie evidence of an intent to intimidate a person or group." Va. Code Ann. § 18.2-423. The Court ultimately held that the cross-burning statute was unconstitutional because "the intent element that was included in the statue 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 intimate." *United States v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011) (the court discusses the narrow holding of *Black*). Regarding true threats, *Black* holds that intimidation is a subset of true threats, however, the Court rules solely on the constitutionality of the criminal statute at hand and does not rule on the level of intent required for true threats, generally. *Black*, 538 U.S. at 367.

In addition, the Court's reason to prohibit true threats, which is to "protect individuals from the fear of violence…from the disruption that fear engenders…and to protect people from the possibility that the threatened violence will occur" *Black*, 538 U.S at 559-560 appears to "imply the application of an objective test for finding a true threat by focusing on the *effect* of the threat on the recipient." *United Stated v. White*, 670 F. 3d 498, 509 (4th Cir. 2012). The Court is concerned with the impact that certain speech will have on the object of the threat. At no point in the discussion of the effect of true threats does the Court imply that the speaker's subjective intent to threaten is of primary consideration. *Black*, 538 U.S. at 359, 369.

The split in the circuits comes as a result of the *Black* opinion. However, *Black* does not compel a subjective intent requirement for true threats, generally. The Black court held narrowly

and ruled that a provision making all cross burning prima facie evidence of intent to intimidate to be unconstitutional because it eliminated the intent requirement included in the provision. *Black*, 538 U.S. at 367. Furthermore the Court's commentary regarding true threats lends itself to an objective test to determine a true threat due to the Court's concern for the effect of threatening speech on the recipient. Therefore, an objective reading, consistent with the circuit courts' holdings prior to the *Black* opinion, remains the appropriate test to determine if speech has resulted in a true threat.

A. Applying an objective intent standard to the true threat doctrine, Ms. Clark's posts constituted a true threat because she intended to communicate the speech and a reasonable person would find the speech threatening.

Under an objective test, Ms. Clark's Facebook post constituted a true threat. Looking to the first element of the objective test—intent to communicate, Ms. Clark undoubtedly communicated her threat "intentionally or knowingly…to a third person" *Porter,* 393 F.3d at 616. Unlike Adam Porter's actions of placing his violent message in his closet, Ms. Clark did not intend to keep her message private.

Ms. Clark's actions were like that of J.M,'s actions in *Doe*. J.M allowed a third party, D.M., to view his violent and threatening letter to K.G, knowing that there was a "good possibility that D.M. would tell K.G. about the letter because D.M. and K.G. were friends." *Doe*, 603 F.3d at 624. Similarly, Ms. Clark admitted to authoring the Facebook post and to allowing others to see read her message. Record 21. Although she thought only her friends would see the post, she conceded that "she knew that at least some of her friends might pass the post on to others." *Id*. She also admitted that "she knew that some of those who viewed her message were likely to alert Taylor Anderson or other transgender students to her post." *Id*. Therefore, she intentionally and knowingly placed the post on a Facebook with the knowledge that her post

regarding Ms. Taylor and other transgender students would be seen by a third party. Furthermore, Ms. Clark posted this message on Facebook with the knowledge that those who saw the message would likely tell Ms. Taylor and other transgender students. Therefore, Ms. Clark knew that should would likely communicate her message to the "object of the purported threat." *Doe*, 603 F.3d at 624.

Since Ms. Clark intended to communicate her message, it is necessary to analyze whether a reasonable person would find her message threatening. *Porter*, 393 F.3d at 616. An objectively reasonable person would find Ms. Clark's message threatening based on the tone and the surrounding circumstances. As a result of Ms. Clark and Ms. Anderson both being ejected from an intrasquad practice basketball game after getting into a disruptive argument on the court, Ms. Clark took to Facebook to threaten Ms. Anderson and other transgender students. Record 2.

As the letter in *Doe* "exhibited J.M's pronounced, contemptuous and depraved hate for K.G." *Id.* at 625, Ms. Clark's post exhibited her hate for Ms. Anderson and other transgender students. She referred to the transgender student's as "It" and a "Freak of Nature." Record 18. Furthermore, a reasonable person would find it threatening that Ms. Clark's Facebook post was not a general rant about transgender students, but the threat was specifically aimed at Ms. Anderson, whom she addressed by name in the post, stating: "Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another." *Id*. Ms. Clark goes further by attacking the other transgender student's at the school by extending this threat to "other TGs crawling out of the woodwork lately too." *Id*.

It is also necessary to evaluate the reaction of those who read or heard of the Facebook post. *See Doe*, 306 U.S. at 626. *See also Watts,* 394 U.S. at 708 (considers the reactions of the listeners to determine if a statement was a true threat). In *Doe*, the court looked to how others

responded to J.M's threatening letter in order to determine if a reasonable recipient would find the letter threatening. Here, other students were "visibly upset" because of the post and felt it necessary to bring it to the attention of Thomas Franklin, the principal of Pleasantville High School. Record 14. Furthermore, the parents of Ms. Anderson and Ms. Cardona, another transgender student at the school, felt compelled to speak to Principal Franklin regarding the incident. Record 3. Both students accompanied their parents to speak with Principal Franklin and were "visibly distressed" by Ms. Clark's Facebook post. *Id*. Ms. Clark's post left the parents of Ms. Anderson and Ms. Cardonas concerned that "Ms. Clark might resort to violence against their children." *Id*. The Facebook post left the parents concerned as to whether it was safe to allow their children to continue playing on the high school basketball team or to even allow their children to go back to school. Record 3. In light of the Facebook post, the Andersons kept Ms. Anderson home from school for two days. *Id*.

Ms. Clark's Facebook post constituted a true threat because she intentionally and knowingly communicated her post to a third party. Furthermore, an objectively reasonable person would find Ms. Clark's Facebook post to be threatening.

II. A SCHOOL MAY REGULATE A STUDENT'S OFF-CAMPUS INTERNET SPEECH POSTED FROM A PERSONAL COMPUTER WHEN THE SPEECH REACHES THE SCHOOL CAMPUS AND IS DETERMINED TO CAUSE A SUBSTANTIAL DISRUPTION OR INFRINGE THE RIGHTS OF STUDENTS.

The Washington County School District and Mr. Franklin appropriately restricted Ms. Clark's speech because it was reasonably foreseeable that her speech would end up inside the school. Mr. Franklin appropriately concluded the speech had created a material disruption because her statement was targeted and unconditional. Mr. Franklin's conclusion that her speech violated the rights of students to be secure in the school is supported because Ms. Clark's

statement interfered with Ms. Anderson's performance and was inconsistent with Pleasantville High School's educational purpose.

A. The *Tinker* analysis applies to internet speech that originated off-campus and is brought into the school or when the speech reasonably may end up in the school.

The *Tinker* court stated that students did not lose their First Amendment rights at the "schoolhouse gates." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). However, the Court did acknowledge a school's ability to regulate a student's speech differently than regulation only under the First Amendment. The *Tinker* rule provides a student's speech may be regulated by the administration when it creates a "substantial disruption," when the school may reasonably foresee a substantial disruption, or when the speech infringes the rights of another student. *Id.*

In *Tinker*, the Court held that students who were disciplined for wearing black arm bands in school in protest of military action in Vietnam had their First Amendment rights violated. *Id*. at 514. The Court reasoned that when the students passively wore the armbands, the students did not create a substantial disruption. *Id*.

The issue that remains following *Tinker* is how far a school's regulation of student speech may extend. *Tinker* sets the rule for governing speech by a school district when that speech is made on school grounds. *Tinker* does not mention speech that is initiated off school grounds that may find its way into the school, as Ms. Clark's speech did here. As the internet has grown more ubiquitous, courts have been asked to address this question.

The circuits are split on whether school administrators can regulate a student's internet speech that originates off campus without violating the student's First Amendment rights. The split has resulted in essentially three different rules regarding the application of *Tinker* to off

campus speech. The rules are summarized by the court in *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010).

The first rule the *J.C.* court provides is that the majority of courts will apply the *Tinker* analysis to any speech that reaches the school authorities if that speech causes or is likely to cause a substantial disruption. *Id.* The court supported this rule by looking to *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2000). In *LaVine*, the court considered a student's violent poem that was written entirely off campus, but which the student brought on campus to show a teacher. *Id*. When considering if the student's resulting expulsion was warranted, the court only considered whether *Tinker* or another Supreme Court student speech rule applied; the geographic origin of the speech did not factor into the analysis at all. *Id.* at 989.

This rule also gains support from the Seventh Circuit in *Boucher v. School Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998). The court held that a student's First Amendment rights were not violated. *Id*. The student wrote an article advocating hacking school computers for an underground newspaper that was created and printed off campus. *Id*. at 822 The newspaper was distributed on campus. *Id.* When the student challenged his suspension because the newspaper was created off campus, the court gave only a cursory consideration to the geographic location. The court determined that *Tinker* applied after the newspaper was distributed on campus and the article advocated on campus activity. *Id.* at 829.

The second rule from *J.C.* involves an analysis of the off-campus speech and the nexus the speech has to the on-campus environment. 711 F. Supp. 2d 1107. The Second Circuit followed this analysis in *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007). The court held that the school was justified in punishing a student's off-campus speech because it was reasonably foreseeable that Wisniewski's speech would cause a disruption. *Id*. at

35. Wisniewski was punished for creating an AOL instant messenger icon that called for killing one of his teachers. After the icon was posted for three weeks, one of Wisniewski's classmates showed the teacher in the icon the image, and the teacher sent that to the school administration. The court in this case was unsure if the school needed to show it was reasonably foreseeable that the icon would reach the school property, but agreed the icon could reasonably have come to the attention of the teacher and the school authorities. *Id*. at 39.

Alternatively, the Second Circuit came out a different way in *Thomas v. Bd. of Educ.*, 607 F.2d 1043 (2d Cir. 1979). There, the court refused to uphold a punishment after a student brought an independent newspaper created by the plaintiffs to school. One teacher knew about the paper and permitted the students to store the paper in a classroom closet. Other than that presence on campus, the paper had a disclaimer that it was unaffiliated with the school. *Id.* The students attempted to completely separate the paper from the school. *Id.* The court recognized that only insignificant activity was related to the school and the students specifically tried to keep the paper off campus. *Id*. at 1050.

The third and final rule from *J.C.* is that *Tinker* and the other student speech precedents will probably not apply if the student did not expect the speech to reach the school or took steps to prevent the speech from reaching the school. 711 F. Supp. 2d 1107. In the Fifth Circuit, the court did not apply *Tinker* to a student's drawing that featured his school being attacked by military vehicles. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004). The student's brother brought the two-year-old drawing to school, and the student was punished. *Id*. at 612. The drawing was made at home. The court recognized the student did not publish the drawing in a way that it would end up at the school. *Id.*

Here, Ms. Clark stated she knew that her Facebook friends may pass her post on to others and may show Ms. Anderson the post. Record 14. While the record does not specify how others may have shown Ms. Anderson the post, it was at least reasonably foreseeable that the post would have made its way onto campus. This result would follow from *Wisniewski*. Ms. Clark created the post following a disagreement at school and the two students are ostensibly still on the same basketball team. It is reasonable that the two have more common acquaintances at school than outside, and that the post would be brought up again when all parties were at school together. Unlike in *Porter* and *Thomas*, Ms. Clark made no attempt to mitigate the chance this speech would end up on campus. She shared the post with her friends who attend the same school and who know Ms. Anderson. By posting her comment to Facebook instead of some other medium like a paper journal, Ms. Clark increased the chances this speech would end up on campus. Because it was reasonably foreseeable that Ms. Clark's post would reach the campus, and because Ms. Clark did not attempt to mitigate the chance her post would reach the campus, the *Tinker* rule should apply to this internet speech made off campus from a personal computer.

B. Ms. Clark's speech created a material disruption of the school environment or allowed the school administrators to reasonably foresee a material disruption of the school environment because of the targeted and unconditional statements.

The facts of this case need to be analyzed under the *Tinker* rule. The Supreme Court in *Tinker* stated that speech in a school that causes a material disruption is not protected by the First Amendment. 393 U.S. at 508-509. Courts consider all of the facts of the case when determining if a student's speech was appropriately regulated. This approach is used because the Court in *Tinker* does not give a specific rule on what constitutes a material disruption. However, the Court does state that something more than a mere "fear or apprehension of disturbance" is required. *Id.*

Two cases help to illustrate when cyber speech can create a material disruption, or provide a reasonable expectation of a material disruption.

The first case is *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011). The court in this case held there was an actual substantial disruption of the school environment. *Id.* at 574. One student was responsible for creating a MySpace page that harassed and ridiculed a fellow classmate. The subject of the page missed school following the posts. *Id*. The court took into consideration the targeted and defamatory nature of the posts, and mentioned the potential for copycat posts that would target the victimized student. *Id.*

The second case that shows when cyber speech creates a substantial disruption is *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002). The Pennsylvania Supreme Court determined the student's off-campus cyber speech created a material disruption. *Id.* In this case, J.S. created a website that contained derogatory and defamatory statements about the principal and a math teacher, and solicited donations to pay for the assassination of the math teacher. *Id*. at 851. J.S. told other students about the website, and showed it to at least one other student at school. *Id.* at 852. The math teacher did not finish the school year. *Id.* at 859. The court's conclusion was based on the reaction by the school. The entire school's morale had dropped. *Id*. The court also considered the unconditional threatening nature of the statements. *Id*. at 857.

Applying the previous two case results to the current case leads to similar results. Just as the posts in *Kowalski* and *Bethlehem* targeted and defamed a single student, Ms. Clark's post singled out Ms. Anderson specifically. Also, like *Kowalski*, Ms. Clark's post generated at least some support from her Facebook friends. Record 18. Without knowing who these supporters are, the school could reasonably believe that Ms. Clark had gained support from fellow classmates, which could encourage copycat posts that continue to disparage Ms. Anderson and other

transgender students. As in *Bethlehem*, the threats contained in Ms. Clark's post were unconditional. They did occur following an argument earlier that day with Ms. Anderson, but there was no condition contained in the threat. The threat contained the ominous statement that Ms. Clark would "take [Ms. Anderson] out one way or another." *Id*. Ms. Clark's statements regarding Ms. Anderson and other transgender students were targeted, public, and unconditional. Following the results of *Kowalski* and *Bethlehem*, the Washington County School District appropriately determined that Ms. Clark had created an actual disruption, and the school could reasonably foresee that a material disruption was likely to occur.

C. Ms. Clark infringed Ms. Anderson's right to feel secure in school and right to be left alone by threatening Ms. Anderson based on a core characteristic.

The *Tinker* court did not limit regulation of student speech to material disruptions. The Court also stated that speech in school may be regulated if it infringes on the rights of other students to be secure and to be left alone. 393 U.S. at 508. There are few precedents available for this standard. However, two cases still provide some tangential guidance for this analysis.

In *Saxe v. State College Area Sch. Dist.*, a court was charged with analyzing the constitutionality of a school's anti-harassment policy. 240 F.3d 200 (3rd Cir. 2001). The court concluded the policy was overbroad because the school sought to limit speech protected by the First Amendment and outside of *Tinker*. *Id.* In its analysis, the court compares different parts of the policy to the standard of *Tinker* and the other student-speech precedents. *Id*. The court noted the policy contains a provision to restrict speech that would "substantially interfere with a student's educational performance." *Id*. at 217. According to the court, an interference with a student's performance is disruptive in itself. *Id.*

The court in *Muller by Muller v. Jefferson Lighthouse Sch.* also provides an analysis of the rights of others standard in *Tinker*. 98 F.3d 1530 (7th Cir. 1996). The court in *Muller*

analyzed a school district policy to determine if the policy violated the First Amendment. *Id.* at 1532. The court held that the policy did not violate the First Amendment because schools may rightfully restrict speech inconsistent with the educational purpose of the school. *Id*. at 1542. The court determined that a school has an interest "in protecting minors from exposure to vulgar and offensive" speech. *Id.* (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986)). The court understood the school district policy that prohibited insults to groups and individuals to fall within the meaning of *Tinker*. *Id.* The Seventh Circuit felt comfortable holding that schools may appropriately restrict speech injurious to groups and individuals.

From these two cases, courts have held that schools are justified in protecting groups and individuals from speech that may be seen as offensive or that interferes with a student's performance at school. In the current case, Ms. Clark wrote a targeted threat that caused Ms. Anderson to miss school. A student has likely had an interference with his or her schooling when they are absent for days at a time. Further, a school must be allowed to regulate some speech to facilitate a learning environment. *Id.* This includes limiting insults to groups or individuals. Washington County School District fell within its power to restrict and regulate Ms. Clark's post that was insulting to both a group and an individual, and which interfered with Ms. Anderson's performance at school.

CONCLUSION

For the previously mentioned reasons, the Washington County School District respectfully requests this Court reverse the decision of the Court of Appeals of the Fourteenth Circuit and find that the school district appropriately regulated Ms. Clark's speech because it was a true threat and a material disruption that infringed the rights of other students.