TEAM B

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 THE RESPONDENT

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Columbia had jurisdiction over this matter pursuant to 28 U.S.C. § 1331. The United States Court of Appeals for the Fourteenth Circuit properly exercised jurisdiction under 28 U.S.C. § 1291. Petitioner Washington County School District filed a petition for a writ of certiorari, which was granted by this Court. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1).

ISSUES PRESENTED FOR REVIEW

I. Whether a public school student's Facebook post constituted a true threat that was not entitled to protection under the First Amendment.

II. Whether a public school district violated a student's First Amendment rights by disciplining her for an expression disseminated off campus in the privacy of her own home when school authorities concluded that the post was materially and substantially disruptive to the school environment and collided with the right of other students to be secure on campus.

STATEMENT OF THE CASE

This litigation arose out of a quarrel between two members of the girls' basketball team at Pleasantville High School ("the school") in Pleasantville, New Columbia during a November 2, 2015 intrasquad game. (R. at 26). During the game, Respondent Kimberly Clark ("Ms. Clark"), a fourteen-year old freshman at the time, engaged in an argument with sophomore teammate Taylor Anderson ("Ms. Anderson") that resulted in the ejection of both players. *Id*. Ms. Anderson, who is a transgender student identifying as a female, is permitted to participate on the girls' basketball team pursuant to the School District's Non-Discrimination in Athletics: Transgender and Gender Nonconforming Students Policy. *Id*.

Following the incident, Ms. Clark vented her frustrations by posting to her Facebook from her personal computer at the Clark family residence. The content of the post is as follows:

> "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 to…"

(R. at 18).

Ms. Clark was not friends with Ms. Anderson or any other transgender students on Facebook and she only intended for her friends to view the post. (R. at 23). Despite Ms. Clark's intent to have the post kept private, Ms. Anderson and another transgender student, Josie Cardona ("Ms. Cardona"), became aware of its existence and presented a copy of it to Principal Thomas Franklin on November 4, 2015. (R. at 26). The following day, Ms. Clark and her parents met with Principal Franklin to discuss the content of her post. *Id*. Ms. Clark explained her political and religious concerns with allowing transfemales to participate in women's athletics. She has also stated in her affidavit that she meant her statement, "I'll take IT out one way or another," as a joke not to be taken seriously. (R. at 23).

At the end of the meeting, without any further investigation, Principal Franklin suspended Ms. Clark for three days under the school's Anti-Harassment, Intimidation & Bullying Policy. (R. at 27). This disciplinary action will remain on Ms. Clark's permanent high school record. *Id*. Prior to this incident, Ms. Clark had no record of disciplinary infractions. (R. at 13). Alan Clark, on behalf of his daughter, appealed her suspension to the Washington County School Board ("School Board"). (R. at 27). This appeal was denied, as the School Board found that the second

portion of the post constituted a "true threat" and that the post as a whole materially disrupted the learning environment at the school and intruded upon the rights of other students. *Id*. Mr. Clark, then filed suit on behalf of his daughter against the School District in the United Stated District Court for the District of New Columbia. *Id*.

In her complaint, Ms. Clark argued that her First Amendment rights to free expression were violated when the school disciplined her for her off-campus speech. *Id*. After both parties filed motions for summary judgment, the District Court ruled in favor of the School District, holding that Ms. Clark's suspension did not amount to an infringement upon her First Amendment rights. *Id*. Alan Clark, again on behalf of his daughter, timely appealed the decision to the United States Court of Appeals for the Fourteenth Circuit. (R. at 25) The Fourteenth Circuit ruled in favor of Ms. Clark, holding that the School District's punishment violated Ms. Clark's First Amendment free speech rights because the speech was made off campus, did not constitute a true threat, and did not materially disrupt the operation of the school or collide with the rights of other students. (R. at 39). The School District then filed a timely appeal to this Court, which granted a writ of certiorari to review the First Amendment issues raised. (R. at 40).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Fourteenth Circuit and hold that the School District violated Ms. Clark's First Amendment rights to free speech by suspending her for an off-campus expression that did not amount to a true threat or create a material and substantial disruption within the school or collide with the rights of other students.

First, the School District erred in concluding that the second portion of Ms. Clark's Facebook post constituted a true threat. This Court's true threat jurisprudence implies that the government must prove both an objective and subjective intent to intimidate before it can

classify speech as a true threat. Ms. Clark's statement had no subjective or objective intent to threaten Ms. Anderson or any other transgender student. Ms. Clark made no specific threats of violence in her Facebook post, was not friends with Ms. Anderson or any other transgender students, and did not expect any of them to see her post. Further, Ms. Clark intended that her expression would be seen as a joke and not as a threat.

Second, the School District erred in applying the *Tinker* standard to Ms. Clark's off-campus speech, which she expressed from the privacy of her home while not participating in a school-sponsored event. This Court has never applied *Tinker* beyond student expression that occurred at school or at a school-sponsored event, and to do so would give a school district virtually unlimited discretion to control the speech activities of its students at any time and in any place. As such, general First Amendment principles must be applied in determining whether a school district's restriction of off-campus student speech is constitutionally valid. Ms. Clark's speech was not school-sponsored, was not vulgar or offensive, and did not amount to an incitement to immediate violence. Thus, *Tinker* is inapplicable to Ms. Clark's Facebook post, and her expression is entitled to First Amendment protection.

Additionally, notwithstanding the inapplicability of *Tinker*, the School District erred in concluding that Ms. Clark's expression satisfied the *Tinker* standard. Under *Tinker*, a school district may restrict student speech without offending the First Amendment if that speech materially and substantially disrupts the operation of the school or collides with the rights of other students. To satisfy *Tinker*, the burden is on the school district to demonstrate that actual interference has occurred or that such interference is reasonably foreseeable to occur. Here, the School District was unable to show that Ms. Clark's expression led to a disruption of school activities or was reasonably foreseeable to do so, nor did it present evidence to conclude that it

considered Ms. Clark to be dangerous. As such, the School District did not meet its burden of showing that Ms. Clark's discipline was a justified infringement of her First Amendment rights under the *Tinker* standard.

Therefore, the Fourteenth Circuit properly held that the School District violated Ms. Clark's First Amendment rights by punishing her for her Facebook post.

ARGUMENT

This Court exercises *de novo* review over First Amendment claims raised on appeal. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) This Court also exercises *de novo* review over a district court's grant of summary judgment. C*herry v. Auburn Gear, Inc.*, 441 F.3d 476, 481 (7th Cir. 2006). Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). All inferences must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

I. THE FOURTEENTH CIRCUIT PROPERLY HELD THAT THE SCHOOL DISTRICT VIOLATED MS. CLARK'S FIRST AMENDMENT RIGHTS WHEN IT PUNISHED HER FOR A FACEBOOK POST THAT DID NOT CONSTITUTE A TRUE THREAT.

The School District violated Ms. Clark's First Amendment free speech rights when it suspended her for her November 2, 2015 Facebook post. The First Amendment provides in part that, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment is applicable to the states through the Fourteenth Amendment. *Gitlow v. N.Y.*, 268 U.S. 652 (1925). A pillar of the First Amendment is that it represents "[o]ur profound national commitment to the free exchange of ideas." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 563, 573 (2002). In general, the First Amendment embodies the principle that the

government cannot restrict speech simply because it may be distasteful or make those who hear it uncomfortable. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919).

Though the First Amendment affords broad free speech protections, this Court has articulated some narrow exceptions that permit the government to restrict limited forms of expression. *See Chaplinsky v. N.H.*, 315 U.S. 568, 571-572 (1942) (holding that the government may punish words which tend to incite an immediate breach of the peace); *Cohen v. Cal.*, 403 U.S. 15, 20 (1971) (holding that fighting words are generally punishable under the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (ruling that a state can forbid speech which is meant to incite imminent lawless action and is likely to do so). Further, this Court has held that speech that constitutes a true threat is not entitled to First Amendment protection. *Watts v. U.S.,* 394 U.S. 705 (1969).

This Court first considered the First Amendment implications arising from true threats when it overturned the conviction of a man who asserted that, "[I]f they ever make me carry a rifle the first man I want to get my sights on is L.B.J." *Id*. at. 706. This Court concluded that the statement was not a true threat because of its conditional nature and the perception of the listeners that the speaker was being factious. *Id*. at 708. However, in so holding, this Court did not provide a precise definition of a true threat.

The true threat issue was later revisited in *Va. v. Black* when this Court held that the act of cross burning did not enjoy constitutional protection so long as the state can prove that there was an intent to intimidate. 538 U.S. 343, 362 (2003). In reaching its holding, this Court defined a true threat as encompassing "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id*. at 349. Although *Black* was a criminal case, courts have subsequently

applied its analysis to civil matters. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2012); *see also U.S. v. Cassel*, 408 F.3d 622 (9th Cir. 2004).

Following the *Black* decision, circuit courts have expressed differing opinions as to the requisite intent necessary to classify an expression as a true threat. Some circuits have held that the government need only demonstrate that a speaker had an objective intent to intimidate in order for an expression to be classified as a true threat. *See U.S. v. Martinez*, 736 F.3d 981 (11th Cir. 2013). These circuits are split as to how the objective standard should be applied. *See U.S. v. Clemens*, 738 F.3d 1, 11 (1st Cir. 2013) (holding that intent is construed by an objectively reasonable speaker); *Jeffries v. U.S.*, 692 F.3d 473 (6th Cir. 2015) (holding that intent is construed by an objectively reasonable listener). Other circuits have interpreted this Court's holding in *Black* to mean that a speaker's subjective intent to intimidate must be proven in order to classify speech as a true threat. *See Cassel,* 408 F.3d at 622. Under this subjective standard, an expression is defined as a true threat only when the speaker actually intends to threaten the recipient. *Id*. at 632.

Most recently, this Court took up the issue of true threats in *Elonis v. U.S.*, 135 S.Ct. 2001 (2015). In a narrow holding, it concluded that a conviction under a federal statute banning threats made through interstate communications must be supported by government proof that the defendant intended for his or her speech to be threatening. *Id*. This holding was limited to that particular statute and did not address the threshold issue as to which standard should be applied to determine whether an expression constitutes a true threat such that is not entitled to First Amendment protection. *Id*. at 2012.

A. A careful reading of this Court's decision in Virginia v. Black necessitates that the government prove subjective intent to punish a true threat.

The circuits that have adopted a subjective standard have done so through careful consideration of the jurisprudence deriving from this Court's opinion in *Black. See Cassel*, 408 F.3d at 632. At issue in *Black* was the constitutionality of a state statute that banned cross burning and proscribed that the act of cross burning was prima facie evidence of an intent to intimidate. 538 U.S. at 343. Though this Court upheld the constitutionality of a ban on cross burning, it struck down the statute at issue because of the prima facie provision. *Id*. In doing so, this Court mandated that the state prove that an expression was made with an intent to intimidate, in order for a prohibition of such expression to be constitutionally permissible. *Id*. at 1552 In finding the statute to be unconstitutional on this basis, this Court implied that a subjective intent to intimidate must be shown before speech can be classified as a true threat.

Generally, a threat is defined as "[a] communicated intent to inflict harm or loss on another." Black's Law Dictionary 1489 (10th Ed. 2014). The legal definition of a threat implies that a subjective intent on the part of the speaker is required for an expression to be construed as such. To define a true threat based on how an objectively reasonable person would view it would have a chilling effect on dissemination of protected speech. Speech can often be misinterpreted as a threat when, in reality, the speaker merely intended to convey an idea or other expression. If true threats are to be judged under an objective standard, then those who desire to express an idea that might be offensive to some may be restrained from speaking for fear of reprimand. Essentially, a purely objective intent test imposes what amounts to a negligence standard on speech. Imposing a purely objective intent standard could lead to situation where speakers are fearful of expressing themselves because they are unaware if their speech is protected or not. *See Watts*, 394 U.S. at 708.

To date, this Court has primarily considered the concept of true threats through the lens of criminal statutes that ban speech that is purportedly threatening. In the case at bar, this Court has the opportunity to define the requisite intent necessary to justify punishment for a threat under the First Amendment, irrespective of criminal statutes. A standard that requires the government to prove a subjective intent to intimidate provides the proper framework for promoting the goal of the First Amendment to foster an environment of free expression.

B. Ms. Clark did not subjectively intend to threaten Ms. Anderson or any other transgender student when she posted on Facebook.

The circuits that have determined that *Black* requires a subjective standard have utilized a test that considers whether a statement contains the subjective intent to intimidate when determining if that statement is a true threat. In order to prove that speech has the requisite subjective intent, the government must demonstrate that the speaker intended for the recipient(s) to interpret the expression as a true threat. *U.S. v. Bagdasarian,* 652 F.3d 1113, 1122 (9th Cir. 2010). Under the subjective standard, it is insufficient that "objective observers would reasonably perceive such speech as a threat of injury or death." *Id*. at 1116. Rather, the subjective intent standard requires a clear showing that the speaker intended to communicate a threat.

In *Bagdasarian*, the Ninth Circuit held that an examination into whether a subjective intent is present is not confined to the statement alone. *Id*. at 1123. As the court stated, "[W]hen our law punishes words, we must examine the surrounding circumstances to discern the significance of those words' utterance, but must not distort or embellish their plain meaning so that the law may reach them." *Id*. at 1120. In that case, the court overturned the conviction of a man who had posted the following on a message board: "[r]e: Obama fk the niggar, he will have a 50 cal in the head soon," and "shoot the nig." *Id*. at 1123. The court examined these statements in the context of all of the relevant facts and circumstances when considering whether the

defendant had a subjective intent to threaten Barack Obama. *Bagdasarian*, 652 F.3d at 1123. Even though evidence came to light that the defendant actually possessed a .50 caliber weapon, the Ninth Circuit nonetheless held that his statements were not true threats. *Id*.

In another case concerning the application of a subjective standard, the Ninth Circuit upheld the conviction of a man who had communicated true threats directed towards specified individuals through his website. *U.S. v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007). In a number of posts, the defendant made threats against his former employer and disclosed the license plate numbers of various employees. *Id*. at 951. The defendant's statements in *Sutcliffe* also explicitly threatened individuals with bodily harm, such as when he posted, "[I]f I ever see you near my family again, and I know how to stalk too, I will kill you." *Id*.

Here, Ms. Clark did not intend for her Facebook post to be perceived as a threat. As this Court held in *Watts*, it is important to analyze speech in the context of all relevant facts and circumstances. At the time, Ms. Clark was a fourteen-year old high school freshman with no previous disciplinary history prior to being suspended for this post. Ms. Clark, immediately following a heated exchange with Ms. Anderson on the basketball court that led to the ejection of both players, rashly posted the status in a heat of passion. No portion of Ms. Clark's post specifically threatened violence against any individual or group of individuals. Ms. Clark's statement "I'll make sure IT gets more than just ejected. I'll take IT out one way or another," is too ambiguous to be construed as a threat to Ms. Anderson or any other transgender student.

Moreover, Ms. Clark is not friends with Ms. Anderson or any other transgender students on Facebook, and did not intend for any transgender individuals to see it. Though she was aware of the possibility that her expression might be reach Ms. Anderson, she thought that only her friends would see the post. If Ms. Clark subjectively intended to threaten Ms. Anderson, she

would not have used a medium of communication that she did not expect Ms. Anderson to actually see. Rather, she would have chosen a more direct way by which to communicate her expression. Ms. Clark has expressed that the perceived "threats" were intended to be jokes. While Ms. Clark's idea of humor may be offensive and juvenile, befitting her age, the First Amendment nonetheless protects speech of this type and .s not permit a public school to punish a student for offensive expression that was not intended to be a threat. There is nothing in the record to suggest that Ms. Clark intended for anyone, much less transgender students, to perceive her expression as an actual threat.

C. Ms. Clark had no intention to communicate her expression to any subjects of the message nor could an objectively reasonable person have perceived the post as a threat.

Many circuits have held that an expression must only meet an objective standard in order to constitute a true threat. Objective intent has been defined as, "whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause or present future harm. *Doe v. Pulaski,* 306 F.3d 616, 622 (8th Cir. 2002). The circuits that have adopted a purely objective test are split as to how the test should be applied. Some have held that the threshold inquiry should be whether a reasonable speaker would perceive his or her expression as a threat. *U.S. v. Elonis,* 730 F.3d 321 (3d Cir. 2013). Other circuits implement the test in consideration of whether a reasonable person in the shoes of the recipient would perceive the speech as a threat. *Jeffries*, 692 F.3d at 473.

Courts that have applied the objective standard have held that, as a threshold matter, the speaker must intend to communicate a statement that may include a potential threat. *Porter*, 393 F.3d at 616. A finding of no intent to communicate relinquishes the court of the need to determine whether such speech constitutes a true threat. *Id*. In *Porter,* the Fifth Circuit found no

intent to communicate when a student drew a sketch of his school under attack that included disparaging remarks about the school's principal. *Id*. at 611. The student only showed the drawing to his mother, younger brother, and a friend, and never intended for it to be brought to school. *Id*. Conversely, the *Doe* court determined that there was intent to communicate a threat when a student drafted two letters expressing his desire to assault and murder his ex-girlfriend. 306 F.3d at 619. The student shared these letters with a friend, who then showed one of them to the author's ex-girlfriend. *Id.* Further, the student later discussed the violent letters with his ex-girlfriend and admitted to her that he authored them. *Id*. at 624. Considering all of the circumstances, the court concluded that the student did have intent to communicate the potential threat. *Id*.

Once this threshold is met, the government still bears the burden of proving that an objectively reasonable person would interpret the speech as a serious expression of intent to cause harm. The Fourth Circuit applied a purely objective standard in *U.S. v. Napa* and concluded that a email sent to two students at Virginia Tech included true threats. 370 Fed.Appx. 402 (4th Cir. 2010). Both of the students had previously been stalked by another student, Seung-Hui Cho, the orchestrator of the mass shooting at Virginia Tech in 2007. *Id*. at 404. On the eve of the first anniversary of that shooting, the defendant sent an email directly to both students containing web links to Cho's statements and videos. *Id.* The defendants email address was seunghuichorevenge@yahoo.com. *Id*. at 403. Given this confluence of circumstances, the Fourth Circuit held that an objectively reasonable person would interpret this email as a true threat. Likewise, in *U.S. v. Turner,* the Second Circuit upheld the conviction of a man who posted on his blog that certain "judges deserve to be killed" because his expression satisfied the objective true threat standard. 720 F.3d 411 (2d Cir. 2013). The defendant supplemented his statements with

photographs, work addresses, and courtroom numbers of the named judges, along with a map indicating the location of the courthouse. *Id*. at 419. These circumstances, considered in unison, provided enough evidence for an objectively reasonable person to consider the blog post as a threat. *Id*.

Here, Ms. Clark could not have reasonably foreseen that her comments would be understood as a true threat. She did not intend to communicate her statement to Ms. Anderson or any other transgender student at her school. Additionally, after posting her comments to Facebook, Ms. Clark did nothing to assure that her expression would reach those identified in it, in contrast to the student in *Doe*. It is insufficient, under an objective standard, that Ms. Clark was aware that Ms. Anderson or other transgender students *might* see the post, as *intent* to communicate a true threat is clearly required. While Ms. Anderson and Ms. Cardona did view the post and were fearful that Ms. Clark may have intended to threaten them, this is not dispositive of a true threat under the objective standard, which requires a hard look at all of the circumstances. There is no evidence in the record to suggest that Principal Franklin anticipated any acts of violence pursuant to the post. He suspended Ms. Clark for a period of three days, after which she was allowed to return to school. There was no further disciplinary action imposed, nor any further investigation into the matter. Presumably if the school believed that Ms. Clark was actually dangerous, she would have faced further disciplinary action to ensure that she would not be able to carry out any acts of violence at school. Principal Franklin also did not refer Ms. Clark to the police or to a guidance counselor.

The School District has failed to show that Ms. Clark intended for her Facebook post to directly communicate a true threat under either an objective or subjective intent standard. Further, it has failed to prove that Ms. Clark intended to directly communicate her statement to

the subjects of the speech. Therefore, the Fourteenth Circuit properly held that Ms. Clark's First Amendment rights were violated when she was suspended for speech that was entitled to constitutional protection.

II. THE FOURTEENTH CIRCUIT PROPERLY HELD THAT THE SCHOOL DISTRICT VIOLATED MS. CLARK'S FIRST AMENDMENT FREE SPEECH RIGHTS WHEN IT PUNISHED HER FOR WHOLLY OFF-CAMPUS SPEECH SHE DISSEMINATED FROM HER OWN HOME WHILE NOT PARTICIPATING IN A SCHOOL-SPONSORED ACTIVITY.

A. The *Tinker* standard is inapplicable to student speech that occurs off campus and that is not expressed at a school-sponsored event.

The School District violated Ms. Clark's constitutional rights under the First Amendment when it suspended her for speech that was made off campus. In general, the government cannot regulate speech based on its substantive content or the message it conveys. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). In the context of public schools, this Court has provided a framework in for discerning the extent to which a public school can restrict student speech on campus and at school-sponsored events. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). However, this Court has never applied the *Tinker* standard to wholly off-campus speech, and doing so would "give school authorities virtually limitless authority to control the speech of their students at all times and in all places." (R. at 37-38). Therefore, the School District violated Ms. Clark's First Amendment right to free expression when it punished her for statements she made while in the privacy of her own home and while not participating in any school-sponsored activity.

Public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S at 506. However, "the constitutional rights of students in public school are not automatically co-extensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). The standard articulated

by this Court in *Tinker* allows for the disciplining of students for expression otherwise protected by the First Amendment only if school authorities can demonstrate that either a "material and substantial" disruption in the operation of the school is occurring or that the potential for such disruption is reasonably foreseeable. *Tinker*, 393 U.S. at 511. The burden is on the school to prove that such discipline is justified, and "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id*. at 508.

In *Tinker*, two students were suspended from school for wearing black armbands on campus in protest of the Vietnam War. *Id*. at 504. While the protest undoubtedly became a source of curiosity and discussion among the student body, school officials were unable to demonstrate that it reasonably forecasted material interference with school activities or a collision with the rights of other students. *Id*. at 513. In reality, no disturbances actually occurred as a result of the protest, school activities were not substantially interrupted, nor did the protest intrude upon the affairs of others. *Id*. Therefore, this Court held that the protest constituted protected speech and that the students were wrongfully disciplined. *Tinker*, 393 U.S. at 514.

Subsequent to *Tinker*, this Court has addressed the authority of public schools to restrict student speech in three instances. *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (holding that a school district does not offend the First Amendment when it restricts student speech promoting illegal drug use at a school-sponsored event occurring off campus); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (*quoting Fraser*, 478 U.S. at 685) (ruling that a school district may prohibit students from publishing articles in the school newspaper that contain messages that the school district does not wish to convey, under the rationale that "[a] school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside of school"); *Fraser*, 478 U.S. at

675 (concluding that student speech that is offensively lewd and vulgar does not enjoy First Amendment protection when disseminated at school).

The constitutionality of a restriction on student speech that is not school-sponsored nor is offensively lewd and vulgar is governed by the "material and substantial" disruption test articulated in *Tinker*. *See Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013). "Beyond those contexts, the Court has noted only that '[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.'" *Id*. (*quoting Morse*, 551 U.S. at 401). Given that this Court has not yet addressed the applicability of its school speech cases to speech originating off campus and beyond the scope of school-sponsored events, consideration of cases from other jurisdictions is warranted. *Id*. at 1067.

In *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, the Third Circuit overturned the suspension of a student who had been disciplined by the school for expression that occurred off campus. 650 F.3d 915, 928 (3d Cir. 2011). In that case, a student created a fake profile of her school's principal on the social media website MySpace which included sexually explicit content and vulgar language. *Id*. at 920-921. The profile was created at the student's home on a private computer and her classmates were unable to view it at school because access to MySpace was blocked on school computers. *Id*. at 921. Upon learning that some students had viewed the profile, the creator of the profile restricted access to the webpage to her 22 friends on MySpace. *Id*. Despite this, the student was suspended from school for ten days. *Id*. at 922.

Without ruling on the applicability of *Tinker* to off-campus speech, the Third Circuit analyzed the case under the *Tinker* standard and held that the student's free speech rights were violated because the school district could not demonstrate that a substantial disruption as a result of the MySpace profile was reasonably foreseeable. *Snyder*, 650 F.3d at 928. However, of the

eight judges composed of the majority, five of them expressed in a separate concurrence that *Tinker* is inapplicable to a student's off-campus speech entirely:

> Applying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves – so long as it causes a substantial disruption at school . . . . That cannot be, nor is it, the law.

Id. at 939 (Smith, C.J., concurring).

In an attempt to justify its action, the school district argued that this Court's holding in *Fraser* empowered it to discipline the student because the MySpace profile contained lewd, obscene, vulgar, and plainly offensive speech. *Id*. at 932. The Third Circuit rejected this argument, concluding that "the *Fraser* decision did not give the School District the authority to punish [the student] for her off-campus speech." *Id*. at 933. Chief Justice Roberts, writing for the majority in *Morse*, stressed that "[h]ad *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected." *Id*. at 932 (*quoting Morse*, 551 U.S. at 405). But in *Snyder*, the creation of the MySpace profile was entirely beyond the school district's supervision and control:

> Regardless of its place of origin, speech intentionally directed towards a school is properly considered on-campus speech. On the other hand, speech originating off campus does not mutate into on-campus speech simply because it foreseeably makes its way onto campus. A bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters.

Snyder, 650 F.3d at 940 (Smith, C.J., concurring).

In *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, a case similar to *Snyder*, the Third Circuit held that *Tinker* does not apply to off-campus student speech at all. 650 F.3d 205, 207 (3d Cir. 2011). That case concerned a student who created a false and demeaning profile of his school's principal on MySpace. *Id*. Though the profile was created off campus on a private

computer, he provided access to the profile to several other students and even accessed it on a school computer. *Id*. at 207-209. Unlike the MySpace profile at issue in *Snyder*, which was viewed by only a handful of students, most of the student body became aware of its existence. *Id*. at 208. As a result, the school district suspended the student for ten days. *Id*. at 210.

The Third Circuit held that "the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline." *Layshock*, 650 F.3d at 207. In concluding that the school district violated the student's First Amendment rights, the court cautioned that it would be "dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school-sponsored activities." *Id*. at 216. The court issued this ruling despite the fact that the false profile reached a majority of the student body and was viewed on campus.

The Fifth Circuit has also addressed the applicability of *Tinker* to off-campus speech. In *Porter,* a student drew a picture at home depicting attacks on his school by military aircraft and armed assailants. 393 F.3d at 611. The picture "also contained obscenities and racial epithets directed at characters in the drawing, a disparaging remark about [the school principal], and a brick being hurled at him." *Id*. The student never personally brought the drawing to school and school officials only became aware of it when the student's brother inadvertently carried it with him onto the school bus. *Id*. As a result of the concern for the safety of students and administrators caused by the drawing, the student was expelled from school. *Id*. at 612.

The Fifth Circuit concluded that the *Tinker* standard did not apply to the drawing because the student never intended for it to be taken to school and that he "took no action that would increase the chances that his drawing would find its way to school[.]" *Id*. at 615. Thus, general

First Amendment principles governed the issue of whether the student's expulsion was justified because the expression did not occur within the premises of the school. *Porter*, 393 F.3d at 615. In applying those principles, the court concluded that the school's discipline of the student violated his right to free expression under the First Amendment because the sketch constituted protected speech. *Id*. at 618. The Fifth Circuit's holding in *Porter* is significant because it ruled in the student's favor despite the fact that the drawing was brought to campus, depicted violent attacks on the school, and identified specific school officials. *Id.* at 611.

Here, Ms. Clark only intended for her Facebook post to be viewed by her friends and did not expect the subjects of the post to view it. (R. at 23). She authored the post from the privacy of her own home and while not engaged in a school-sponsored activity. (R. at 2). Further, Ms. Clark never intended for her comments to be brought to school and took no action whatsoever to increase the likelihood that the post would reach campus. (R. at 23). Additionally, Ms. Clark never subsequently publicized the post to other students. *Id*. Therefore, similar to the off-campus expressions addressed in *Snyder* and *Porter*, Ms. Clark's speech is not governed by any Supreme Court precedent relating to on-campus or school-sponsored student speech.

Like the speech at issue in *Porter*, Ms. Clark's Facebook post is governed by general First Amendment principles, under which her speech is protected. Moreover, the School District cannot demonstrate that any of the narrow exceptions to the First Amendment are applicable to permit the discipline imposed on Ms. Clark. As such, the School District went beyond the bounds of its authority in suspending Ms. Clark for her off-campus speech. Therefore, the Fourteenth Circuit properly reversed the decision of the District Court.

B. Notwithstanding the inapplicability of *Tinker* to off-campus student speech, Ms. Clark's expression does not satisfy the *Tinker* standard such to justify the School District's restriction of her First Amendment rights.

The essence of *Tinker* is that school officials cannot discipline a student for expressive conduct unless it "materially and substantially" interferes with the operation of the school environment or with the right of students "to be secure and to be let alone." *Tinker*, 393 U.S. at 508. While a school district need not demonstrate that an actual disruption has occurred, it does have the burden of showing at a minimum that disruption was reasonably foreseeable to occur. *Id*. at 509. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001). However, this burden cannot be met if school officials are driven by "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. To justify a restriction of student speech, a school district must support its decision by showing the existence of specific "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Id*. at 514. Here, the School District was unable to prove that an actual disruption occurred as a result of Ms. Clark's off campus speech not did it show that such disruption was reasonably foreseeable to occur.

1. Ms. Clark's Facebook post did not create a material and substantial interference with the operation of the school.

In order to satisfy the "material and substantial" disruption standard articulated in *Tinker*, "a specific and significant fear of disruption, not just some remote apprehension of disturbance[,]" is required. *Saxe*, 240 F.3d at 211. Several factors are relevant in making this determination, including whether the speech at issue includes "grave and unique threats to the physical safety of students." *Morse*, 551 U.S. at 425 (Alito, J., concurring). Other circuits have considered the relationship of the speech to the school and the intent of the speaker to disseminate the speech. *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008). Circuits have also

considered the occurrence of in-school disturbances involving the speaker that caused school officials to deviate from the normal functioning of the school. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011).

The legal meaning of "material and substantial" disruption is ambiguous and has not been expressly defined by this Court. The true nature of *Tinker* becomes further convoluted when applied to off-campus speech. However, some circuits have attempted to resolve this confusion. In *Wynar*, the Ninth Circuit held that a school did not violate a student's First Amendment rights by suspending him for sending "violent and threatening instant messages" from his home computer to his friends about planning and carrying out a school shooting. 728 F.3d at 1064-1065. The student reportedly owned several firearms, referenced the Columbine and Virginia Tech massacres, and specified targets and a specific date for the shooting to take place. *Id*. at 1065-1066. The court concluded that the nature and specificity of the student's expression, coupled with the fact that the messages threatened the entire student body, constituted the requisite "material and substantial" disruption to the school environment to justify discipline under *Tinker*. *Id*. at 1070.

The Second Circuit issued a similar ruling regarding a school district's response to threatening messages authored and disseminated off campus. In *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, a student sent instant messages to classmates that contained a drawing of a pistol firing at a teacher's head along with the word "kill." 494 F.3d 34, 36 (2d Cir. 2007). The drawing referenced the teacher by name and was distributed to other students over a three-week period. *Id*. The court held that it was reasonably foreseeable that the student's off-campus speech would reach the school and would "materially and substantially" disrupt the work

and discipline of the school environment. *Id*. at 39-40. As such, the school district did not violate the student's First Amendment rights by suspending him. *Id*. at 40.

The Fifth Circuit has also found the *Tinker* standard satisfied in justifying the discipline of a student for expression disseminated off campus. In *Bell v. Itawamba Cnty. Sch. Bd.*, a student created and uploaded a rap video off campus to two websites in which he described alleged misconduct of school officials and made specific threats of violence against them. 799 F.3d 379, 383 (5th Cir. 2015). The subjects of the video were made aware of its existence through multiple sources, and the student continued to disseminate it after his initial discipline. *Id*. at 385. Ultimately, the court found *Tinker* satisfied and upheld the action of the school district in suspending the student, though it acknowledged that no specific rule has ever been articulated by this Court to offer guidance regarding *Tinker's* applicability to off-campus speech. *Id*. at 394.

Ms. Clark's Facebook post did not cause the requisite disruption in school to satisfy *Tinker's* "material and substantial" disruption test. Unlike the students in *Wynar* and *Wisniewski*, Ms. Clark's expression did not contain specific threats of violence. (R. at 36). Further, Ms. Clark had never previously been disciplined at school and the School District has not demonstrated that it took any action to show that it believed a "material and substantial" disruption was reasonably foreseeable. (R. at 37). Aside from the concern that the post caused to the Andersons, the Cardonas, and a few other students, there is no evidence to suggest that anybody else thought Ms. Clark was dangerous. *Id*. Additionally, Ms. Clark did not take any action to bolster the likelihood that her speech would reach campus. Nothing in the record supposes that the post became public knowledge, among the student body at-large or otherwise. This is not the type of "material and substantial" disruption contemplated by the *Tinker* Court and by circuits that have upheld discipline of students for off-campus speech. Therefore, the Fourteenth Circuit properly

held that Ms. Clark's Facebook post did not amount to such a disruption to the school environment to satisfy the *Tinker* standard.

2. Ms. Clark's Facebook post did not collide with the right of other students to be secure and to be let alone while at school.

The Fourteenth Circuit was also correct in holding that Ms. Clark's off-campus speech did not collide with the rights of others "to be secure and to be let alone" within the meaning of *Tinker*. 393 U.S. at 508. Courts have been reluctant to uphold student discipline under *Tinker* with respect to off-campus speech aside from expression that pertains to specific acts of school violence as well as expression that invites public ridicule of a classmate or faculty member. *See Wynar*, 728 F.3d at 1062; *Kowalski v. Berkeley Cnty. Sch's.*, 652 F.3d 565, 567 (4th Cir. 2011); *Wisniewski*, 494 F.3d at 34. Though Ms. Clark's discipline might have been justified had her expression been uttered at school, the content of the post was too vague and lacking in any corroborative evidence of danger to justify the School District's suspension of her under *Tinker*.

The second prong of the *Tinker* standard allows school districts to restrict student speech that intrudes upon the rights of others or collides with the rights of students "to be secure and to be let alone." *Tinker*, 393 U.S. at 508. In the context of off-campus speech, circuit courts have been vigilant about permitting restriction of expression pertaining to specific acts of school violence as well as speech that invites public ridicule of specific students. *Wynar*, 728 F.3d at 1062; *Kowalski*, 652 F.3d at 567. In determining whether *Tinker* is satisfied, courts have considered the nature and content of the speech, the objective and subjective seriousness of the speaker, *Wynar*, 728 F.3d at 1070-1071, the intent of the speaker to disseminate the speech, *Doninger*, 527 F.3d at 50, and the existence of "past incidents arising out of similar speech[.]" *Kowalski*, 652 F.3d at 574. Courts have also focused on the speaker's intent to communicate the

expression to the object(s) of a threat and the speaker's intent to carry out that threat. *See Porter*, 393 F.3d at 617.

In analyzing whether an expression collided with the rights of other students, the Fourth Circuit upheld the discipline of a student for inviting public ridicule of a classmate through off-campus speech. In *Kowalski*, a student created a webpage that was demeaning toward a fellow student. 652 F.3d at 567. The webpage contained defamatory accusations, insulting comments, and doctored photographs directed against the classmate specifically. *Id*. at 567-568. Further, the student who created the webpage invited many other students to view it, both on and off campus. *Id*. The court concluded that this conduct interfered with the targeted student's "rights to be secure and to be let alone" at school. *Id*. at 573-574. Although the conduct occurred off campus on the student's home computer, the court found that it was reasonably foreseeable that the expression would reach the school. Further, it justified the school's disciplinary action by highlighting the specificity of the derogatory speech, the awareness among student body of the webpage, and the student's continued efforts to publicize the speech. *Id*. at 574.

Under different circumstances, however, the Seventh Circuit has upheld the First Amendment rights of students engaged in speech that is repugnant or offensive. In *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, a student was restricted from wearing a shirt with the slogan "Be Happy, Not Gay" in response to the school-sponsored "Day of Silence." 523 F.3d 668, 670 (7th Cir. 2008). The student wished to express his displeasure for the purpose of the "Day of Silence," which was to "advocate tolerance for homosexuals." *Id*. The student challenged the restriction, and the Seventh Circuit held that the school violated his First Amendment rights given the absence of foreseeable harm to the school environment and the lack of showing that his expression collided with the rights of other students. *Id*. at 676.

Here, Ms. Clark's speech did not sufficiently intrude upon the rights of others in the manner required for satisfaction of *Tinker*. She authored the Facebook post entirely off campus and beyond the realm of any school-sponsored event. (R. at 36). Ms. Clark's post did not specifically refer to violence, nor did it reflect the requisite specificity in time and manner likely to "create an air of apprehension" that the *Wynar* and *Kowalski* courts found sufficient to satisfy *Tinker*. *Id*. Unlike the facts of *Kowalski*, Ms. Clark's expression was in the form of a single Facebook post, and she did not subsequently invite others to view it. There is no indication that a majority of the student body was aware of the post and the school district did little to demonstrate that it considered Ms. Clark to be dangerous. (R. at 37). Further, Ms. Clark did not intend for Ms. Anderson or any other transgender students to view the post, nor did she communicate the expression on campus. (R. at 23). As such, the School District failed to satisfy its burden of showing that Ms. Clark's off-campus speech violated the rights of any student within the school such that would satisfy *Tinker*. (R. at 37). Therefore, the Fourteenth Circuit properly held that Ms. Clark's First Amendment rights were violated when the School District disciplined her.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court rule that the School District's discipline imposed on Ms. Clark violated her First Amendment rights to free expression and thus affirm the holding of the Fourteenth Circuit.

Respectfully submitted,

_____
Team B
Counsel for the Respondent
January 30, 2017

APPENDIX A

U.S. Const. amend. I

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

CERTIFICATE OF COMPLIANCE

Team B certifies that the work product contained herein is in fact the work product of the team members. In completing this brief, Team B certifies that it has complied fully with it's law school's governing honor code and the Rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.

Respectfully submitted,

Team B