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 PETITIONER

COUNSEL FOR THE PETITIONER
Team G

STATEMENT OF THE ISSUES

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

2. Whether a public school district violated a high school student's First Amendment rights by disciplining her for a Facebook post initiated off campus on her personal computer where school authorities conclude that the post was materially disruptive and/or collided with the right of other students to be secure at school.

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

On December 7, 2015 Kimberly Clark, a minor, by and through her father, Alan Clark, filed a complaint in the United States District Court for the District of New Columbia seeking declaratory relief and alleging that that Washington County School District violated her First Amendment right to freedom of speech. The District Court of New Columbia found in favor of the School District and granted its Motion for Summary Judgment while denying Ms. Clark's Motion for Summary Judgment. Ms. Clark appealed the District Court's decision to the United States Court of Appeals for the Fourteenth Circuit. The Court of Appeals found in favor of the Ms. Clark, reversing the District Court's decision, and remanded the case to the District Court with instructions to enter summary judgment in favor of Ms. Clark. The School District then appealed to this Court, which granted a petition of certiorari.

STATEMENT OF THE FACTS

Taylor Anderson is a fifteen-year-old sophomore at Pleasantville High School (hereinafter "the School"), which is a part of Washington County School District (hereinafter "the School District"). Record at 2. Ms. Anderson, though born a male, openly identifies as a female. *Id.* Students were restricted to only playing on teams associated with their birth sex, meaning Ms. Anderson had to play on male sports teams, even though she wished to play on female teams. *Id.*

However, the School District passed a new school policy on August 1, 2015: Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students. Thomas Franklin Affidavit, Exhibit A. This new policy allows transgender and gender noncomforming students to play on teams of their chosen gender. *Id.* This policy was introduced to create a safe, inclusive learning environment for all students and to ensure that all students have equal access to each component of their education programs. *Id.* The administrators implemented this policy in hopes of protecting the safety of transgender and gender nonconforming students who may feel threatened at school. *Id.* Additionally, the School District implemented another policy: Anti-Harassment, Intimidation, and Bullying Policy. Franklin Aff. Ex. B. This policy deemed harassment, intimidation, bullying and threats as inappropriate in public school environments, and prohibited that type of conduct when it could actually or reasonably be expected to: (1) harm a student, teacher, administrator or staff member, (2) substantially interfere with a student's education, (3) threaten the overall educational environment, and/or (4) substantially disrupt the operation of the school. *Id.* This included harassment based on gender identity. *Id.* Due to these new policies Ms. Anderson was able to play the Girls' Basketball team, where Respondent was her teammate. R. at 2.

Respondent's Facebook post, which is at issue in this case, stems from an argument between Respondent and Ms. Anderson during an intrasquad practice basketball game on November 2, 2015. Kimberly Clark Affidavit ¶ 4. This was a loud and disruptive verbal argument, which resulted in both the Respondent and Ms. Anderson being ejected from the game. R. at 2. Later that evening, Respondent took to Facebook to express her belief being transgender "is immoral and against God's law for people to change their God-given gender." K. Clark Aff. ¶ 5. Armed with these intense beliefs and feelings against transgender students, and specifically Ms. Anderson, Respondent chose to post the following on Facebook for any of her friends to see:

> "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…"

Franklin Aff. Ex. C. Respondent was aware that her Facebook post would likely reach people outside of her friends, such as Ms. Anderson and other transgender students at the School, like Josie Cardona (hereinafter, "Ms. Cardona"). Franklin Aff. ¶ 14.

Two days after Respondent's Facebook post, Ms. Anderson, Ms. Cardona, and their parents went to speak to the Principal of Pleasantville High School, Thomas James Franklin (hereinafter, "Principal Franklin"), regarding their palpable concern that Respondent would become violent towards the two girls because of Respondent's Facebook post. *Id.* at ¶ 9. Both students were visibly distressed. *Id.* at ¶ 7. While Mr. Franklin assured the Andersons and the Cardonas that he would talk to the Respondent and her parents and take disciplinary action if appropriate, the two transgender students stayed home from school for two days. *Id.* at ¶ 10. That

same day Mr. Franklin received complaints from other students, who were also visibly upset, about Respondent's post. *Id.* at ¶ 11.

On November 5, 2015 Mr. Franklin met with the Respondent and her parents in his office, at which time the Respondent admitted to authoring the Facebook post at issue. *Id.* at ¶ 13. Respondent also understood and admitted that she knew Ms. Anderson and other transgender students would likely be alerted to the contents of her Facebook post, even though they were not her Facebook friends. Franklin Aff. ¶ 14. Mr. Franklin determined that the Respondent's post was materially disruptive to the School's learning environment and that it collided with the right to feel safe at school for Ms. Anderson, Ms. Cardona, and other transgender students. *Id.* at ¶ 15. As a result, Respondent was suspended for three days. *Id.*

Respondent's father, Alan Clark, appealed her suspension to the Washington County School Board. Alan Clark Affidavit ¶ 14. The District Disciplinary Review Board heard Mr. Clark's appeal and ultimately upheld the suspension. A. Clark Aff. Ex. A. They found Respondent's post both offensive and threatening, and took note of the fact that she knew Ms. Anderson and other transgender students would become aware of her post. *Id.* Ultimately, the Review Board held that there was no doubt that the post, specifically the second portion, was materially disruptive of the high school learning environment and it clearly collided with the rights of other students to be secure in the school environment. *Id.*

On December 7, 2015 Respondent's father filed their complaint in the United States District Court for the District of New Columbia seeking declaratory relief and alleging that the School District had violated her First Amendment right to freedom of speech. R. at 3.

SUMMARY OF THE ARGUMENT

This Court has long held that the constitutional guarantee to freedom of speech is not absolute and certain types of speech may not be protected. One type of speech that is not protected is a "true threat." The Circuit Courts of the United States have long disagreed about whether objective intent or subjective intent is required to deem speech a true threat. The Supreme Court of the United States laid out the foundations of what constitutes a true threat in *Virginia v. Black*, but that decision still left the type of intent unclear. Furthermore, even the Circuit Courts that agree the First Amendment requires an objective intent analysis, still disagree as to whether the reasonable person standard to analyze the intent to cause harm should be from the point of view of the speaker or the recipient. On the other hand, some Circuit Courts took the decision in *Black* to require a subjective intent analysis that looks at if the speaker intended for the recipient to feel threatened. While these three approaches require different intent analyses, the Respondent's Facebook post is a true threat under all three approaches and this Court should reverse the Fourteenth Circuit Court of Appeal's decision finding Respondent's post as not a true threat.

Furthermore, even if Respondent's Facebook post was not a "true threat," the School District did not violate Respondent's First Amendment rights by disciplining her because it was both materially disruptive to the school operations and collided with the rights of other students to be secure at school. The Court of Appeals for the Fourteenth Circuit incorrectly applied the *Tinker* standard in the case at hand. The School District was well within its authority, under *Tinker*, to discipline Respondent because her post directly related to the school's events. Furthermore, Respondent's Facebook post caused the material disruption necessary in *Tinker*, and likewise collided with the students' right to feel secure at school. There was an interference with school activities, as Ms. Anderson was not comfortable attending school immediately

following the post, which also shows the collision of her right to feel secure at school. Ms. Cardona also did not feel safe at school and other students were noticeably upset at school after the post. Accordingly, this Court should reverse the Court of Appeals' decision finding for Respondent.

ARGUMENT

I. THE RESPONDENT'S FACEBOOK POST IS A TRUE THREAT AND NOT PROTECTED BY THE FIRST AMENDMENT UNDER THE OBJECTIVE INTENT AND SUBJECTIVE INTENT APPROACHES BECAUSE THE RESPONDENT'S POST AND ITS SURROUNDING CONTEXT SATISFY BOTH INTENT REQUIREMENTS SO THAT THE POST IS A SERIOUS EXPRESSION OF INTENT TO COMMIT AN ACT OF VIOLENCE TO MS. ANDERSON.

The First Amendment permits restrictions upon the content of speech in a few limited areas where the speech has slight social value and that any benefit that may be derived is clearly outweighed by the social interest of order and morality. *Virginia v. Black*, 538 U.S. 343, 358 (2003); *see Watts v. United States*, 394 U.S. 705, 707 (1968). Therefore, the First Amendment permits the government to ban speech that constitutes a "true threat." *Id.* This Court has defined "true threats" to encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. *Id.* at 359. Also, this Court has made clear that the speaker of a true threat need not actually intend to carry out the threat. *Id.* True threats are not protected by the First Amendment in order to protect individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur. *See id.*

However, even after this Court's decision in *Black*, the Circuit Courts are still in disagreement about what intent is necessary for speech to qualify as a true threat. *See U.S. v. Heineman*, 767 F.3d 970, 980 (10th Cir. 2014). Some Circuit Courts – 4th, 6th, and 10th – believe that the natural reading of *Black* requires subjective intent on the part of the speaker so

that the speaker intends for a serious expression of intent to commit an act of unlawful violence to be threatening to the recipient. *See id.; see, e.g., U.S. v. White*, 810 F.3d 212 (4th Cir. 2016); *U.S. v. Houston*, 797 F.3d 663 (6th Cir. 2015). On the other hand, the majority of other Circuit Courts – 1st, 2nd, 3rd, 5th, and 8th – understand the language in *Black* to require only an objective intent in which a reasonable person would interpret the message as a serious intent to commit an act of unlawful violence. *See Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1075-76 (9th Cir. 2002); *see, e.g., Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280 (5th Cir. 2014); *U.S. v. Clemens*, 738 F.3d 1 (1st Cir. 2013); *U.S. v. Turner*, 720 F.3d 411 (2d Cir. 2013); *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002); *U.S. v. Kosma*, 951 F.2d 549 (3d Cir. 1991). Furthermore, the 9th Circuit, after *Black*, is still undecided about which approach to apply. *See Fogel v. Collins*, 531 F.3d 824, 831 (9th 2008) ("We have since analyzed speech under both an objective and a subjective standard"). Since a majority of the Circuit Courts believe that the objective intent analysis is proper for determining true threats, this is the proper approach to examine the Respondent's Facebook post as a true threat. *See Planned Parenthood*, 290 F.3d at 1075-76. However, should this Court believe that the subjective intent analysis is the proper approach under the First Amendment, Respondent's Facebook post will nonetheless be found to be a true threat. *See Heineman*, 767 F.3d at 980.

A. Respondent's Facebook post should be analyzed under the objective intent approach because this approach promotes the protection of people being free from the fear of violence and the disruption that fear engenders, which is why the First Amendment does not protect true threats.

While the majority of the Circuit Courts agree on the objective intent approach, there is disagreement about whose viewpoint – the speaker or the recipient – to which the reasonable person standard applies. *See Pulaski*, 306 F.3d at 622. The 1st, 3rd, 5th, and 9th Circuits

approach the alleged threat from the viewpoint of a reasonable speaker and look at whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat; however the 2nd and 8th Circuits view the threat from the viewpoint of a reasonable recipient and look at whether a reasonable person standing in the recipient's shoes would view the alleged threat. *See id.* In this case, regardless of which viewpoint the Respondent's Facebook post is examined under, the post is a true threat and is not protected by the First Amendment.

For both the reasonable speaker and reasonable recipient approach there is a threshold question that must be satisfied: whether the speaker intended to communicate the language alleged to be a threat. *See Elonis v. U.S.*, 135 S.Ct. 2001, 2011 (2015); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617 (5th Cir. 2004); *Pulaski*, 306 F.3d at 624. Requiring less than an intent to communicate the purported threat would be contrary to the notion that an individual's most protected right is to be free from governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts. *See Pulaski*, 306 F.3d at 624. Therefore, if no intent to communicate is found, then there is no need to assess whether the speech constitutes a true threat. *Porter*, 393 F.3d at 616; *see also id.* ("It is only when a threatening idea or thought is communicated that the government's interest in alleviating the fear of violence and disruption associated with a threat engages.").

The threat must be intentionally or knowingly communicated to *either* the object of the threat *or* a third person. *Porter*, 393 F.3d at 616 (*emphasis added*); *see Pulaski*, 306 F.3d at 624. Respondent posted on her personal Facebook page knowing that her friends would see this post and that her post could reach Ms. Anderson, other transgender students, and other classmates. K. Clark Aff. ¶ 6. Therefore, Respondent's Facebook post was not written or posted accidentally

nor was it unintentionally exposed to Ms. Anderson and other students. *But cf. Porter*, 393 F.3d at 617-18 (defendant's drawing was not intentionally or knowingly communicated because it was kept at home until it was accidentally reached the school.). It is clear that she intentionally communicated her threat to a third person, her Facebook friends, which satisfies the threshold requirements of an intent to communicate. *See id.*, at 616.

i. Under the reasonable speaker approach, Respondent's Facebook post is a true threat because a reasonable person posting the Respondent's Facebook post would foresee that the post would be interpreted by viewers as a serious expression of intent to harm or assault Ms. Anderson or other transgender students.

The majority of the Circuit Courts applies the reasonable speaker approach by determining whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. *Lovell By and Through Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996). Additionally, the Respondent's alleged threat should be considered in light of its entire factual context, including the surrounding events and the reaction of other students. *See Planned Parenthood*, 290 F.3d at 1075; *id.* The surrounding context goes to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. *See Planned Parenthood*, 290 F.3d at 1076.

Lovell is a 9th Circuit case that applies the reasonable speaker approach and is most similar to the facts and situation in this present case. 90 F.3d at 372. In *Lovell*, the Court held that the Plaintiff, Sarah Lovell's, speech was a threat and not entitled to First Amendment protection, regardless of whether the conduct occurred on or off campus. *Id.* at 371. Lovell was a 10th grade student who, after being denied a class change from a school guidance counselor, Ms. Suokko, stated "I'm so angry, I could just shoot someone" or a version similarly phrased. *Id.* at 369. Lovell apologized and was given the requested schedule change, but Suokko reported Lovell's

conduct because Suokko felt threatened and was concerned about future reprisal by Lovell. *Id.* Lovell was then suspended for three days. *Id.* The 9th Circuit had to determine whether a reasonable person in Lovell's position would foresee that Suokko would interpret her statement as a serious expression of intent to harm or assault. *Id.* at 373. The Court took into consideration the increasing violence in public schools and the unequivocal and specific nature of the threat in determining that a reasonable person would have foreseen that Lovell's statement was a serious expression of intent to harm or assault Suokko. *See Lovell*, 90 F.3d at 372. The Court also considered Suokko's reaction of feeling threatened and that threats by students must be taken seriously. *Id.* at 373-74.

Similar to the holding in *Lovell*, the Respondent's Facebook post, with consideration of the textual context and prior events, is a true threat because a reasonable person would have foreseen that Respondent's post was a serious expression of intent to harm or assault Ms. Anderson and other transgender students. *See id.* at 372; R. at 2. The prevalence of violence in public schools is relevant here, just as in *Lovell*, and should be taken into consideration even though the message did not occur at school. *See*, 90 F.3d at 371. Furthermore, the loud and disruptive verbal argument on the court between Respondent and Ms. Anderson provides the background and surrounding context that led up to the strongly worded Facebook post, as well as the growing tension between Respondent and Ms. Anderson. R. at 2. Therefore, given the surrounding context, the reaction of the Andersons of keeping their daughter home for two days, and the reports to Mr. Franklin by other upset students, a reasonable person would have foreseen that viewers of the Respondent's Facebook post would interpret it as a serious expression of intent to harm or assault Ms. Anderson and other transgender students. *See Lovell*, 90 F.3d at

372; Franklin Aff. ¶ 14. Therefore, the reasonable speaker approach is satisfied and the Respondent's post is a true threat. *See Lovell*, 90 F.3d at 372.

ii. Under the reasonable recipient approach the Respondent's Facebook post is a true threat because a reasonable viewer of the post would have interpreted it as a serious expression of intent to harm or cause injury to Ms. Anderson and other transgender students.

While the majority of Circuit Courts use the reasonable recipient approach, in the vast majority of cases the outcome will be the same under both the reasonable speaker approach and the reasonable recipient approach. *Pulaski*, 306 F.3d at 623. The results will only differ in the extremely rare case when a recipient suffers from some unique sensitivity that is unknown to the speaker. *Id.* Since classmates and the Respondent knew that Ms. Anderson is a transgender student, any sensitivity related to Ms. Anderson being transgender should not have been a surprise to the Respondent. *See* A. Clark Aff. ¶ 3, 11; K. Clark Aff. ¶ 5. Therefore, the Andersons' and the Cardonas' reaction to Respondent's Facebook post was not unexpected given the tone of the post and the surrounding events. *See Pulaski*, 306 F.3d at 623. So, while a majority of the Circuit Courts uses the reasonable speaker approach, if this Court determines that the reasonable recipient approach is most in line with the First Amendment, Respondent's post is still a true threat. *See id.*

A true threat is found under the reasonable recipient approach when a reasonable recipient of the threatening communication would interpret that communication as a serious expression of intent to harm or cause injury to another. *Id.* at 624. The 8th Circuit lays out a non-exhaustive list of factors relevant to how a reasonable recipient would view the purported threat:

> 1) the reaction of those who heard the alleged threat; 2) whether the threat was not conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

Id. at 623. Analyzing these factors against the facts of this case, a reasonable viewer of Respondent's Facebook post would interpret it as a threat. *See id.* First, Ms. Anderson and Ms. Cardona and their parents reacted to the post by contacting the Principal to express their concerns that Respondent might resort to violence against the students because of their transgender identification; clearly, the Andersons and the Cardonas did not take Respondent's post as merely a joke. *See* Franklin Aff. ¶ 7, 8; K. Clark Aff. ¶ 7. Also, the alleged threat was not conditional because Respondent simply stated that "Taylor better watch out at school," which is the environment in which they would regularly interact. Franklin Aff. Ex. C. While the Respondent did not directly communicate the alleged threat to Ms. Anderson, she was "aware that Facebook posts sometimes go beyond one's own friends" and that it likely would reach Ms. Anderson and others. Franklin Aff. ¶ 14; K. Clark Aff. ¶ 6. Also, even though the content of the argument at the basketball game is unknown, this incident shows a history of the Respondent engaging aggressively towards Ms. Andersons, which could reasonably make one believe Respondent may have a propensity to engage in violence. R. at 2.

Furthermore, there is no indication that the Andersons, the Cardonas, and other students at school cannot be considered reasonable viewers of Respondent's Facebook post, who viewed it as an intent to harm Ms. Anderson and other transgender students. *See* Franklin Aff. ¶ 8. The Andersons and the Cardonas took further action to protect their daughters from the Respondent, including the Andersons keeping their daughter home from school for two days. *Id.* It is this overall factual context that reveals that Ms. Anderson and other transgender students could have reasonably interpreted Respondent's Facebook post as a serious expression of intent to cause harm. *See Pulaski*, 306 F.3d at 623.

B. Under the subjective intent approach, Respondent's Facebook post is a true threat because she intended for Ms. Anderson to feel threatened by her post and she intended to communicate that threat to Ms. Anderson by specifically naming her in the Facebook post.

After this Court decided *Black*, the 4th, 6th, 9th, and 10th Circuits believe that this Court's definition of true threat meant that the intent requirement was now one of subjective intent and not objective intent. *See Heineman*, 767 F.3d at 980. The 10th Circuit believes that *Black* establishes that a speaker can be constitutionally convicted of making a true threat only if the speaker intended the recipient to feel threatened. *See id.* at 978. The Court in *Heineman* examines the language of the *Black* opinion and concludes that *Black* requires for the speaker to want the recipient to believe that the speaker intends to act violently. *See id.* Therefore, these Circuit Courts believe that the objective intent approach is no longer tenable because the definition of true threats in *Black* embraces the requirement that the speaker intend for his language to threaten the victim. *See id.* at 979.

Even though a majority of the Circuit Courts believes the objective intent approach was not destroyed in *Black*, should this Court confirm that the appropriate approach is the subjective intent approach, Respondent's Facebook post will satisfy the subjective intent requirement for being a true threat. *See id.* at 979; *U.S. v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005). Respondent intended to communicate her message through a social media site with the knowledge that her group of Facebook friends and others would read the post. *See Heineman* at 978; R-23. Additionally, Respondent intended for the language of her post to threaten Ms. Anderson using her first name in the post and referring back to the earlier basketball game argument. Franklin Aff. Ex. C. This directness and specificity makes the threat personal and illustrates her intention that Ms. Anderson specifically feels threatened by the Respondent. *See Bell*, 774 F.3d at 302

("Courts have recognized that statements communicated directly to the target are much more likely to constitute true threats than those…communicated as a part of a public protest.").

Furthermore, Respondent claimed she was merely joking in the second portion of her post, but she simultaneously asserted that her opinion in the first portion was serious and influenced by her religion. K. Clark Aff. ¶ 5-9. There was no indication that this single Facebook post was meant to convey two different tones or levels of severity. *See* Franklin Aff. Ex. C. The seriousness of the first portion provides context and sets the level of severity of the second portion. *See U.S. v. Viefhaus*, 168 F.3d 392, 396 (10th Cir. 1999) ("Although the bulk of the recorded message at issue is comprised of crude political rhetoric…The fact that a specific threat accompanies pure political speech does not shield a defendant from culpability."); K. Clark Aff. ¶ 5-9. Therefore, the subjective intent approach produces the same result as either objective approach: that the post is a true threat and is not protected by the First Amendment. *See Heineman*, 767 F.3d at 978; *Pulaski*, 306 F.3d at 625; *Lovell*, 90 F.3d at 372.

II. WASHINGTON COUNTY SCHOOL DISTRICT DID NOT VIOLATE RESPONDENT'S FIRST AMENDMENT RIGHTS WHEN DISCIPLINING HER FOR HER FACEBOOK POST MADE ON HER PERSONAL COMPUTER BECAUSE SCHOOL AUTHORITIES CONCLUDED THAT THE POST WAS MATERIALLY DISRUPTIVE AND SUBSTANTIALLY COLLIDED WITH THE RIGHT OF OTHER STUDENTS TO BE SECURE AT SCHOOL.

The First Amendment provides no protection to a student's speech when it *either* materially disrupts classwork or social disorder, *or* if the speech amounts to a collision with the rights of other students to be left alone. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969) (emphasis added). Thus, conduct by a student, in class or out of it, which for any reason materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the constitutional guarantee of freedom of speech. *See id.* at 513. Accordingly, a public school district does not violate a high school student's First

Amendment rights by disciplining her for a Facebook post initiated off-campus on her home computer when school authorities conclude that the post is materially disruptive and/or collided with the right of other students to be secure at the school. *See Tinker*, 393 U.S. at 509; *see also Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011).

Here, the School District found a Facebook post full of vitriol made by Respondent to be materially disruptive and collided with the rights of other students. This post threatened other students, including one by name, Ms. Anderson, calling her an "IT" and a "FREAK OF NATURE" because she is a transgender, threatening her to "watch out at school" because she would get "more than just ejected" and would be taken out "one way or another." Franklin Aff. Ex. C. The post went further and additionally threatened other transgender students. *Id.* The very emotionally-charged post was the talk of school the following day, and Ms. Anderson and one other student, Josie Cardona felt so unsafe at school that they did not feel comfortable attending. Franklin Aff. ¶ 9, 11. This hateful post caused both students to be visibly upset, which was very noticeable to Principal Franklin while they were in his office. *Id.* at ¶ 9. Due to both Ms. Anderson and her parents' concern for their daughter's safety, she stayed home from school the two days following Ms. Clark's post. *Id.* The post both was substantially disruptive to the school environment and collided with the rights of other students, specifically Ms. Anderson, to be safe and secure at school. *Id.* at ¶ 15. Respondent was suspended by the school district for three days, which was well within the School District's authority and did not violate Respondent's First Amendment rights. *Id.* at ¶ 15.

A. Respondent's speech via Facebook post is not protected by the First Amendment and may be reasonably regulated because the speech was materially disruptive to school operations and collided with the right of other students to be secure at school.

A public school student's speech is not protected by the First Amendment when such speech is either materially disruptive to school operations *or* collides with the rights of other students to be secure at school, therefore that speech may be reasonably regulated; this is known as "the *Tinker* standard." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 676 (1986); *Tinker*, 393 U.S. at 509. Courts have long recognized that appropriate management of educational settings may require school administrators to restrict speech in limited circumstances. *Tinker*, 393 U.S. at 506. School officials have the authority to take actions that may constrain First Amendment rights in certain limited circumstances where necessary for the well-being of their students. *Id.* Given schools' needs to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive to the educational process, the disciplinary rules need not be as detailed as a criminal code, which imposes criminal sanctions. *Fraser*, 478 U.S. 675, 686 (1986).

i. Regardless of the location Respondent's Facebook post was made, it was subject to regulation by the school because there was a reasonable foreseeability that the speech would either materially disrupt classwork and/or collide with the rights of other students to be secure and let alone at school.

A student may be disciplined for expressive conduct, even conduct occurring off school grounds, when such conduct "would foreseeably create a risk of substantial disruption within the school environment," or at least when it was similarly foreseeable that the off-campus expression might also reach the campus. *See Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (citing *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007)). Where a certain post directly pertains to events at the school or specific students and/or the intent of the post was to create a discussion at the school, the *Tinker* standard applies. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012). Speech directly pertains to the school

community/environment when it, *inter alia*, references school events, identifies teachers and/or students by name or association, especially when the speech causes the targets to feel their safety is threatened. *See Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 398–99 (5th Cir. 2015); *see also Kowalski*, 652 F.3d at 576 (victim of the online attack felt the post was school-related and filed her complaint with the school). School administrators are becoming increasingly alarmed by the phenomenon of bullying at schools; where a bully's speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem. *See Kowalski*, 652 F.3d at 577.

Principals and school authorities have difficult and important jobs making sure they are able to keep the school operations in order, and sometimes that requires a decision "to act – or not act – on the spot;" inevitably sometimes a school authority "failing to act would send a powerful message to the students in her charge." *Morse v. Frederick*, 551 U.S. 393, 409 (2007). This is even truer today, with the growth of the internet and in the wake of school shootings, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights. *Wynar v. Douglas Cnt.y Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013). School officials may justify their decisions simply by showing "facts which might *reasonably* have led school authorities to forecast substantial disruption of, or material interference with, school activities." *Tinker*, 393 U.S. at 514 (emphasis added). *Tinker* does not require certainty that disruption will occur, but rather the existence of facts which might lead some, such as school officials, to simply forecast a substantial disruption to school activities. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001).

In *S.J.W.*, the Court found that a pair of students' website was directed at the school because the website contained a blog made with the intention to discuss, satirize, and vent about events at the school. 696 F.3d at 778. The site contained offensive comments about fellow students, which included degrading comments about named female students. *Id.* Once word about the website spread throughout the school, including to school faculty, the students were consequently suspended for 10 days at first, and then ultimately 180; the students contended that the posts were intended to be satirical and not taken seriously, and claimed to have had their First Amendment rights violated. *Id.* at 774. The Court explained the location of the post was immaterial since the posts were directed at the school and could reasonably be expected to reach the school or impact the environment. *Id.* The *Tinker* standard was thus appropriately applied and the Court upheld the suspension. *Id.*

Similarly, in *Doninger*, the Court found that a student's online post from her home computer was purposely designed to reach the school's campus because the blog posting directly pertained to events at the school, and the student's intent in writing it was specifically to encourage her fellow students to read and respond. 527 F.3d at 45. The blog contained rude comments about a school administrator and a decision regarding a school event. *Id.* at 49. The Court found that it was reasonably foreseeable that her speech was going to cause a substantial disruption at the school because there was an imploration for discussion. *See id.* at 52.

Respondent's Facebook post, as did the post in *Doninger*, pertained directly to events and policies at the school, as Respondent spent the first half of her post criticizing the school's policy, going as far as saying it was "immoral." 527 F.3d at 45; Franklin Aff. Ex. C. Additionally, as in *S.J.W.*, Respondent identified one student by name and others by association, and this was understood by students, their respective parents, and neutral third parties as

threatening. 696 F.3d at 778; Franklin Aff. ¶¶ 9, 11. Word of Respondent's threatening post spread around the school and it was not long before students knew about the threats Respondent made about Ms. Anderson and the other transgender students. Franklin Aff. ¶¶ 9, 11.

To Principal Franklin's knowledge, Respondent did not have a history of making similarly worded posts, and there were no words or emoticons indicating a joke, so he had no basis to believe that Respondent was simply joking; therefore, he was forced to take the post as a serious threat due to the danger of a false negative. Franklin Aff. ¶ 6. Importantly, despite claiming her remarks about "IT" and other "TGs" "getting it" were a joke, Respondent stood by her beliefs regarding transgender students and the new school policy, including that she thinks, even if people identify with another gender, they should not transition because it is against God's law. K. Clark Aff. ¶¶ 5, 7-9. Moreover, by naming Ms. Anderson on Facebook, a social media site, and directing her post at "other TGs crawling out of the woodwork lately too," it is unreasonable to believe that Respondent did not want others to pass on her message. Franklin Aff. Ex. C. While what would result if Respondent carried out her threat is unclear, a substantial disruption had already happened and it would have been *unreasonable* for Principal Franklin to assume nothing further would occur if the school did not take action. Franklin Aff. ¶ 15. Lastly, Respondent's specific threat to Ms. Anderson about needing to "watch out at school" makes it irrefutable that the threatening tone of her post was intended to be felt at school. Franklin Aff. Ex. C.

Since Principal Franklin reasonably forecasted a material disruption to the school, the *Tinker* standard applies, so Respondent's off-campus speech is not protected by the First Amendment.

ii. Respondent's Facebook post was materially disruptive to school operations.

Speech is materially disruptive to school operations when it becomes difficult for the school to carry on in typical fashion and educate the students, such as interference with work or causing disorder. *See Tinker*, 393 U.S. at 513. Under *Tinker*, school officials do not have to wait until disruption actually occurs before they may act; they actually have a "duty to prevent the occurrence of disturbances." 393 U.S. at 512; *see LaVine*, 257 F.3d at 989; *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 424 (Pa. Comm. Ct. 2000) (the Court found that a student's off-campus website was materially disruptive to the learning environment through embarrassing teachers and students, leading to a discussion of the content of it at school, and causing teachers and students to feel threatened). It is important for school authorities to be able to act swiftly because "experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in 'copycat' efforts by other students or in retaliation for the initial harassment." *Kowalski*, 652 F.3d at 574 (4th Cir. 2011).

In *Kowalski*, the Court held a school district had authority to discipline a student's speech when she used the "internet to orchestrate a targeted attack on a classmate, and she did so in a manner that was sufficiently connected to the school environment" because it materially and substantially interfered with the operation of the school and collided with the rights of others. 652 F.3d at 567. The student created a website with the intention of having other students post defamatory information about a classmate; the Court found, "[g]iven the targeted, defamatory nature of Kowalski's speech, aimed at a fellow classmate, it created 'actual or nascent' substantial disorder and disruption in the school." *Id.* at 574.

In the aforementioned *S.J.W.* case, the Court likewise found that the school district was justified in disciplining the students for their website because it caused a substantial disruption to the school environment. 696 F.3d at 778. The website contained a variety of offensive and racist

comments, where the commenters mocked black students and discussed fights, as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name. *Id.* at 773. The creators of the website had only told their friends about the site, but word spread and the discovery of the website caused a substantial disruption at the school. *Id.* at 774. Teachers experienced difficulty teaching their classes that day, as the post was the talk of the school, and some students were upset; parents also contacted the school with concerns about safety, bullying, and discrimination. *Id.*

Here, the Facebook post caused an immediate disruption to school order and Principal Franklin did not even have time to get out in front of the issue before the post substantially interfered with the learning environment; it is clear Principal Franklin had little choice but to take action at this point. *See* Franklin Aff. ¶ 15. Respondent's post was seen by a number of students and eventually made its rounds throughout the school, and two students in particular were unmistakably, deeply and noticeably hurt by the post: Ms. Anderson and Ms. Cardona. Franklin Aff. ¶¶ 9-11. Moreover, like in *S.J.W.*, there were parents who contacted the school with concerns about safety, bullying, and discrimination, and actually met Principal Franklin at his office. 696 F.3d at 774; Franklin Aff. ¶ 10. Ms. Anderson was so distressed about the post that she did not feel safe coming to school following the post; her fear caused her to stay home for two days following the post. Franklin Aff. ¶ 9. This disruption is more substantial than the two previous cases because, in those cases, no one had to actually miss class, while Ms. Anderson stayed home from school for two days due to Respondent's post. Franklin Aff. ¶ 9.

The disruption to the school caused by Respondent's Facebook post, similar to the aforementioned cases, was substantial and thus is not protected by the First Amendment and was

subject to regulation by the school. Therefore, the School District did not violate Respondent's First Amendment rights by disciplining her for her Facebook post.

iii. Respondent's Facebook post collided with the right of other students to feel safe, secure, and let alone while at school.

Student speech is not entitled to First Amendment protection when it collides with the rights of other students to be secure and let alone at school. *Tinker*, 393 U.S. at 508. In Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissent), he stated that the right to be let alone is "the most comprehensive of rights and the right most valued by civilized men." 277 U.S. 438, 478 (1928) (dissent). Students should not have to feel their safety is compromised by coming to school, and, likewise, they should not feel that their own identity is a crime and a cause for someone to take them out; "being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1176 (9th Cir. 2006); *see also D.J.M. v. Hannibal Public Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011) (explaining that one of the primary missions of schools is to encourage student creativity and to develop student ability to express ideas, but neither can flourish if violence threatens the school environment).

School is for students to learn, and "almost all young Americans attend public schools. During the time they do—from first grade through twelfth—students are discovering what and who they are. Often, they are insecure. Generally, they are vulnerable to cruel, inhuman, and prejudiced treatment by others." *Harper*, 445 F.3d at 1178; *see also Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1540 (7th Cir. 1996) (schools may restrict speech "that could crush a child's sense of self-worth"). Student-on-student bullying is a major concern in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to

school, and to have thoughts of suicide. *Kowalski,* at 572. It is already difficult enough for students to study, do all of their homework, and pay attention in class, so when they are forced to look over their shoulders, it is unreasonable to think those students will be able to focus in class and soak up all of the information for which they are at school to learn; "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning." *Id.*

In *Wynar*, the Court found that the rights of students to be secure and let alone at school were collided with when a student sent online instant messages containing threats of violence at school from his home computer to his friends. 728 F.3d at 1065. The recipients of the text messages, other students, grew alarmed and alerted adults, who subsequently took action. *Id.* The student who sent the messages ended up being suspended initially for 10 days, and then 90 days. *Id.* at 1072. The Court found that the threatening nature of the messages and targeting specific students by name represented the "quintessential harm to the rights of other students to be secure." *Id.* These threats of violence surely collided with the rights of other students, especially since the threats specified the intended victim. *See id.*

Furthermore, in *Kowalski*, in determining that the aforementioned website collided with other students' right to be secure and let alone at school, the Court was persuaded by the fact that the website forced the targeted student to miss classes to avoid further abuse. 652 F.3d at 574. The Court also explained that, if the school authorities had not intervened, the potential for a continuing and more serious harassment of the targeted student, as well as other students, was a very real possibility. *Id.* The victim clearly felt that the website was serious and felt in danger because of it. *Id.* The Court also was concerned that the bully was not aware of the inappropriate

and harmful nature of her bullying and harassment, which is something that school authorities must take seriously in order to ensure students feel safe at school. *Id.* at 577.

In the case at hand, there is no doubt that Respondent's Facebook post severely and deliberately collided with the right of students to feel safe and secure at school. *See Wynar,* 728 F.3d at 1072. This Facebook post went far beyond the typical name calling and teasing that will inevitably go on at schools; the content of Respondent's post resulted in Ms. Anderson, a targeted student, to no longer feel safe at school, just like in *Kowalski*, causing her parents to keep her home for two days. 652 F.3d at 576; Franklin Aff. ¶ 9. As was the case in *Wynar*, students, other than the victims of the targeted online attack, were greatly affected by Respondent's actions, as many other students and parents were alarmed and upset about the hateful post; accordingly, they contacted Principal Franklin complaining about the perceived threat of violence in the post. 728 F.3d at 1065; Franklin Aff. ¶ 9, 11. This type of fear suffered by Ms. Anderson, Ms. Cardona, and the other students, is the quintessential harm to their right to be left alone. *Wynar*, 728 F.3d at 1072. To grant Respondent's hateful, intimidating, and threatening speech First Amendment protection, while simultaneously turning a blind eye to the harm suffered by Ms. Anderson, other students, and the School, would not only be against the aforementioned case law, it also would be unfair and immoral.

CONCLUSION

For the following reasons this Court should reverse the Fourteenth Circuit and find that Kimberly Clark's Facebook post constituted a "true threat" beyond the protection of the First Amendment and that Washington County School District did not violate Kimberly Clark's First Amendment rights for disciplining her for her Facebook post.

APPENDIX

U.S. Const. Amend. I

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

CERTIFICATE

I hereby certify that the work product contained in all copies of this brief is in fact that work product of the members of Team G. I hereby certify that Team G has fully complied with the governing honor code of Team G's school. I hereby certify that Team G has complied with all rules of the competition.