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,
Respondents.

NO. 16-999

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

BRIEF FOR RESPONDENTS

Team J
Counsel for Respondents

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2. Whether Ms. Clark's First Amendment rights were violated where the school disciplined her for a Facebook post made on her personal computer, in the privacy of her home, by stretching *Tinker*'s application to off-campus speech?

III. PARTIES TO THE PROCEEDINGS BELOW

Petitioner is the Washington County School District (hereinafter "the school" or "Petitioner"). The school was the defendant in the District Court, and the appellee in the Court of Appeals for the Fourteenth Circuit.

Respondents are Kimberly and Alan Clark. Ms. Clark is a minor, and her father brings this case on her behalf. They were plaintiffs in the District Court and appellants in the Court of Appeals for the Fourteenth Circuit.

IV. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at page 23 of the record. The opinion of the United States District Court for the District of New Columbia is reported at page 1 of the record.

V. JURISDICTION

The judgment of the court of appeals was entered on January 5, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides that, "Congress shall make no law…abridging the freedom of speech".
2. The Due Process Clause of the Fourteenth Amendment provides that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law".

VII. STATEMENT OF THE CASE

Ms. Clark was a fourteen-year-old freshman at Pleasantville High School of the Washington County School District when the pertinent events of the case took place. R. at 2. Ms. Clark was a member of the Girls' Basketball team, and was born and identifies as a female. R. at 2. Taylor Anderson (hereafter "Ms. Anderson") was a fifteen-year-old sophomore at Pleasantville High School at the time the events pertinent to this litigation took place. R. at 2. Ms. Anderson was born a biological male, but later identified as a female. R. at 2.

On August 1, 2015, Washington County School District implemented a new policy entitled the "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students." R. at 2. This policy gave students the ability to choose the sports programs they wanted to participate in based on which gender they identify with. R. at 2. The new policy allowed Ms. Anderson to join the Girls' Basketball team. R. at 2.

Ms. Clark and Ms. Anderson engaged in a verbal dispute during an intrasquad practice basketball game held at the school on November 2, 2015 that resulted in both students being

ejected from the game by the referee. R. at 2. Later that night, Ms. Clark posted the following on her Facebook page while at home:

> 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…

R. at 18.

Ms. Anderson's parents, along with the parents of another transgender student named Josie Cardona, met with Principal Thomas Franklin at the school two days later on November 4, 2015. R. at 2-3. The students and their parents expressed their concerns about Ms. Clark's post, the possibility that Ms. Clark might resort to violence, and whether it was safe to allow their children back at school. R. at 3. The Andersons had, in fact, kept Ms. Anderson home the two days after Ms. Clark published her Facebook post. R. at 3.

Principal Franklin met with Ms. Clark and her parents the next morning, and Ms. Clark admitted to authoring the post, but stated that she was simply joking when she said she would "take out" the transgender students. R. at 3. Although Ms. Clark conceded that she knew that the post might reach Ms. Anderson, she stated that she thought only her Facebook friends, which does not include Ms. Anderson or Ms. Cardona, would be able to see the post. R. at 3.

Principal Franklin determined that Ms. Clark had violated the School District's Bullying and Intimidation policy, and subsequently suspended her for three days. R. at 3. This suspension will remain as a disciplinary sanction on Ms. Clark's permanent high school record. R. at 14. The Clarks immediately filed an appeal with the Washington County School Board contesting the suspension. R. at 3. The School Board upheld the punishment, and the Clarks filed a complaint to

the United States District Court for the District of New Columbia on December 7, 2015 seeking declaratory relief based on a claim that the school district had violated Ms. Clark's First Amendment right to freedom of speech. R. at 3. On April 14, 2016, the District Court granted Washington County School District's motion for summary judgment and denied the Clarks' cross motion for summary judgment. R. at 12. The Clarks appealed the decision, and on January 5, 2017 the United States Court of Appeals for the Fourteenth Circuit ruled in favor of the Clark's and remanded the case to the District Court with instructions to enter summary judgment in favor of the Clarks. R. at 39.

VIII. SUMMARY OF THE ARGUMENT

Ms. Clark did not hold the necessary subjective intent to convey a message of intimidation for her speech to be considered a true threat. True threats fall within the categories of speech that are considered outside the purview of First Amendment protection. True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. This language, along with the decisions of numerous federal appellate courts, indicates that in order to classify speech as a true threat, a court must find that the speaker held a subjective intent to communicate an intimidating message to a particular individual or group. The record of evidence shows that Ms. Clark did not have a subjective intent to convey such an intimidating message. Thus, Ms. Clark's language cannot be considered a true threat and does not fall outside of the protection of the First Amendment.

Furthermore, even if the Court applies objective standard is more appropriate for true threat jurisprudence, Ms. Clark's speech still cannot be considered a true threat. An objective standard would find a true threat where an objectively reasonable person would interpret the

speech as a serious expression of intent to cause present or future harm. More so, the threat must be intentionally or knowingly communicated to either the object of the threat or a third person. Here, Ms. Clark intended her post to be seen by no one outside of her group of friends on Facebook, which did not include Ms. Anderson. Additionally, Ms. Clark indicated that the post was her attempt at humor, and could not be considered a serious expression of intent to cause present or future harm. Therefore, Ms. Clark's post cannot be considered a true threat under an objective standard of intent either.

Pleasantville High School and the Washington County School District cannot regulate Ms. Clark's off-campus speech because it violates her First Amendment rights. Allowing a school to regulate speech conducted off-campus will be too large of a burden on the autonomy of students, will inevitably allow schools to suppress and promote viewpoints only consistent with an ordered campus, and will eventually chill student speech to an unacceptable level. Thus, extending a school's ability to regulate speech conducted off-campus would be an unjustified violation of all student's First Amendment rights.

Furthermore, even if it is determined that off-campus speech may be regulated by school districts, Ms. Clark's speech does not meet the *Tinker* standard for regulating student speech. In *Tinker v. Des Moines Independent County School District*, the Court held that the First Amendment protects a student's speech so long as that speech does not, materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and does not collide with the rights of others.

In addition, the Court outlined that fear of a disturbance will not suffice in justifying the regulation of a student's speech by a school, but rather, must come from facts which might have reasonably forecast substantial disruption or material interference with school activities. The

record does not indicate any material or substantial interference with school discipline, nor do the facts, when compared to pertinent circuit cases, support a conclusion that one may have reasonably forecasted such a disruption. Furthermore, Ms. Clark's statements did not interfere with the rights of others. It was the choice of Ms. Anderson's parents to pull her out of school, a decision that was not followed by the parents of any other parents of transgender students at the school. Therefore, Ms. Clark's post does not meet the standard for regulating student speech set out in *Tinker*, and still falls within the protections of the First Amendment.

IX. ARGUMENT

A. True Threats and the First Amendment

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Virginia v. Black*, 538 U.S. 343, 358 (2003). The Court has consistently held that it is necessary to tolerate "instance[s] of individual distasteful abuse of a privilege" to avoid chilling free speech. *Cohen v. California*, 403 U.S. 15, 25 (1971).

The protections afforded to free speech, however, are not absolute, and we recognize that the government may regulate certain categories of expression without offending the Constitution. *Black*, 538 U.S. at 358. The government is permitted to regulate speech that falls within these categories, because the speech is "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). True threats are one of these categories that fall outside

the ambit of First Amendment protection. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

According to Black's Law Dictionary, a true threat is an "intentional statement that expresses a sincere intent to commit an act of unlawful violence against a particular individual or group." TRUE THREAT, Black's Law Dictionary (10th ed. 2014). A true threat does not include statements that would reasonably be understood as jest, hyperbole, or exaggerated vehemence. *Watts*, 394 U.S. at 706–08. Rather, "'true threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359.

The speaker need not intend to carry out the threat. *Id.* at 359–60. By its very utterance, a true threat inflicts injury on the recipient. *Chaplinsky*, 315 U.S. at 572. As such, a ban on "true threats protects individuals from the fear of violence and from the disruption that fear engenders." *Black*, 538 U.S. at 360 (internal quotations omitted).

The preeminent true threats case is *Virginia v. Black*, 538 U.S. 343 (2003). In *Black*, the Supreme Court held that a Virginia statute banning cross-burnings with "an intent to intimidate a person or group of persons" was not an impermissible content-based restriction on free speech. *Black*, 538 U.S. at 347. The Court affirmed that "the First Amendment permits a State to ban a 'true threat,'" and explained that Virginia's prohibition regulated a type of unprotected speech particularly "likely to inspire fear of bodily harm." *Id.* at 359, 362–63. A plurality of the Court concluded, however, that the statute's presumption that the burning of a cross was "prima facie evidence of an intent to intimidate," rendered the statute unconstitutional. *Id.* at 363–67 (plurality opinion). The plurality reasoned that because some cross-burnings may be protected "political speech" rather than "constitutionally proscribable intimidation," the statute, as

interpreted through the jury instructions, "strips away the very reason why a State may ban cross burning with an intent to intimidate." *Id.* at 365.

The issue in *Black* "thus did not turn on subjective versus objective standards for construing threats. It turned on overbreadth—that the statute lacked any standard at all." *United States v. Jeffries*, 692 F.3d 473, 479–80 (6th Cir. 2012). Therefore, while *Black* provides a foundation for understanding prohibitions on true threats, *Black* did not explicitly answer the question of whether a speaker must have a subjective intent to threaten before the speaker's communication will be deemed a true threat, or whether an objective test may be utilized. *See* Paul T. Crane, "*True Threats" and the Issue of Intent*, 92 VA. L. Rev. 1225, 1256 (2006). As a result lower courts have necessarily answered this question for themselves, arriving at different conclusions.

Courts employing an objective test define "a true threat as a communication that a reasonable person would find threatening." *Id.* at 1235. *See, e.g.*, *Heller v. Bedford Cent. Sch. Dist.*, No. 16-242, 2016 U.S. App. LEXIS 19894, at *4 n.1 (2d Cir. Nov. 4, 2016) (citing *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013)); *United States v. Dinwiddie*, 76 F.3d 923, 925 (8th Cir. 1996); *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004). By contrast, jurisdictions with subjective intent standards require the government to prove two intent elements: 1) that the defendant knowingly made the statement, and 2) that the defendant intended it to be threatening. Crane, 92 VA. L. Rev. at 1248. *See, e.g.*, *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); *United States v. White*, 810 F.3d 212, 220-21 (4th Cir. 2016); *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008); *United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005). Although the circuits are split

on whether the subjective or objective test should prevail, the subjective test is more appropriate and should be explicitly embraced by this Court.

1. The subjective standard is the appropriate standard for analysis of an alleged true threat.

This Court's decision in *Black* should be understood as endorsing a subjective intent requirement. The *Black* Court explained that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359 (citations omitted; emphasis added). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." *Id.* at 360 (emphasis added); *see United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005). Indeed, the statute at issue in *Black* was declared unconstitutional precisely *because* it did not require the government to prove any intent. *Black*, 538 U.S. at 366.

The Tenth Circuit has interpreted *Black* as requiring a subjective intent to threaten. In *United States v. Magleby*, the Tenth Circuit determined that, following *Black*, a true threat must be made "with the intent of placing the victim in fear of bodily harm or death." *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting *Black*, 538 U.S. at 360). The court also held that there must be an intent to threaten although a further intent to carry out the threat is unnecessary. *Magleby*, 420 F.3d at 1139 (10th Cir. 2005). In *United States v. Heineman*, the Tenth Circuit reasoned that "when the Court says that the speaker must 'mean to communicate a serious expression of an intent,' it is requiring more than a purpose to communicate just the threatening words . . . It is requiring that the speaker want the recipient to believe that the

speaker intends to act violently." *United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014).

Other courts have reached similar conclusions. *See, e.g., United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) ("It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*; the plurality's discussion of threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable."); *United States v. White*, 810 F.3d 212, 220-21 (4th Cir. 2016) (stating that it must be shown that "the defendant subjectively intended the communication as a threat"); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech."). Accordingly, "*Black* stands as a bright beacon reconfirming that without an intent . . . to intimidate, speech cannot lawfully be punished, no matter how likely the tendency that unintended intimidation in fact will result." Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech: A Comment on Virginia v. Black*, 54 Cath. U.L. Rev. 1, 31 (2004).

2. Ms. Clark's post is not a true threat under the subjective standard.

As provided in her affidavit, Ms. Clark intended for only her friends to see her Facebook post. R. at 23. She was not friends with Ms. Anderson or any other transgender student on Facebook. R. at 23. Consequently, she did not intend for those students to receive her message. Further, Ms. Clark swears that her remarks about "IT" and other "TGs" "getting it" were intended as jokes. R. at 23. While her opinion of what constitutes good humor may be questionable, she simply did not intend to intimidate her classmates—only to joke with friends. Therefore, because Ms. Clark lacked the necessary subjective intent to intimidate when she

posted her comment on Facebook, her expression was not a true threat. As such, the school violated Ms. Clark's right to free speech when the school punished her for her Facebook post.

3. Even under the objective standard Ms. Clark's post does not constitute a true threat.

a. The facts herein do not meet the factors set forth in Dinwiddie.

Under the objective standard, several factors are relevant to how a reasonable recipient views a purported threat. As outlined by *United States v. Dinwiddie*, these factors include: 1) the reaction of those who heard the alleged threat; 2) whether the threat was 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. *United States v. Dinwiddie*, 76 F.3d 923, 925 (8th Cir. 1996).

In applying factors to Ms. Clark's post, it is evident that a reasonable recipient would not view Ms. Clark's post as a purported threat. Although Ms. Anderson and several other students were upset upon learning about Ms. Clark's post, they were not the intended recipients of her post. Ms. Clark's friends were the intended recipients of her post. R. at 23. Even assuming that Ms. Anderson's reaction is relevant to this analysis, there was no reason to believe Ms. Clark had a propensity to engage in violence nor did she have a history of making threats against the person purportedly threatened. R. at 13. Finally, the alleged threat was not conditional. *See* R. at 18. Thus, even under the objective standard, Ms. Clark's post cannot be reasonably be seen as a true threat.

b. The facts Pulaski *are distinguishable from the facts herein.*

In *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002), the student's letter was specific as to who was the object of the threat—in that it was addressed to and

concerned the student's former girlfriend—and the comments were extremely graphic in nature. *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 625 (8th Cir. 2002). The Eighth Circuit noted that the student "spoke frequently in the letter of his wish to sodomize, rape, and kill" the recipient of the letter. *Id.* While the student did not personally deliver the letter to his target, he repeatedly referenced the contents of the letter in phone conversation with her. *Id.* at 624–25. More so, the student's alleged gang membership and "penchant for violence toward animals" made these threats more credible and heightened the recipient's concern. *Id.* at 626. Accordingly, the court held that the school board's decision to initiate disciplinary action against the student for the true threat did not violate the student's First Amendment rights. *Id.* at 626–27.

In contrast to *Pulaski*, Ms. Clark's post did not contain concrete, graphic threats. *See* R. at 18. Rather, her post could reasonably be read as a wish to have certain players removed permanently from the Girls' Basketball team. *See* R. at 18. Further, unlike the student in *Pulaski* who contacted the target of his threats, Ms. Clark had no contact with Ms. Anderson or any other students who identify as transgender after writing her post. *See* R. at 2, 3. Finally, Ms. Clark does not have a history of violence or of *any* disciplinary infractions. R. at 13. Therefore, the District Court erred in drawing an analogy to the facts contained in *Pulaski*. R. at 7.

c. The District Court failed to recognize that the Porter *case supports a finding that Ms. Clark's post is not a true threat.*

In *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004), the Fifth Circuit established an objective test to determine whether a student's drawing of his school under a "state of siege" constituted a true threat. *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 611–16. (5th Cir. 2004). In *Porter*, school administration learned that a student had produced—in the confines of his own home and two years prior—an alarming sketch depicting the destruction of

the school through violent means. *Id.* at 611–12. When the illustration was brought to the school's attention "serendipitously" through a set of "wholly accidental" events, school officials disciplined the student for possession of the "threatening" drawing and for possession of an illegal weapon. *Id.* at 612, 617.

In analyzing whether the school's actions violated the student's First Amendment rights, the Fifth Circuit held that "speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'" *Id.* at 616 (quoting in part *Pulaski*, 306 F.3d at 622). Additionally, the Fifth Circuit recognized that while there need not be a subjective intent to carry out the threat, the threat must be intentionally or knowingly communicated to either the object of the threat or a third person. *Id.* at 616. With this framework set forth, the court concluded that the school was without authority to sanction the student, because the student did not intentionally communicate the message contained within the drawing to anyone outside a relatively close-knit group. *Id.* at 617–18. Thus, the Fifth Circuit found that there "must be something more than an accidental and unintentional exposure to public scrutiny must take place" for a message to be considered a true threat. *Id.* at 618.

Similarly, Ms. Clark did not intend for her message to be received by anyone other than the select audience she was friends with on Facebook—none of whom identified as transgendered as far as Ms. Clark was aware. R. at 23. While she acknowledged that Facebook posts "sometimes go beyond one's own friends," she swore that she only meant for her own friends to see her Facebook post. R. at 23. Therefore, any exposure to public scrutiny was unintentional on Ms. Clark's part.

Further, Ms. Clark's post cannot be deemed a "serious expression of an intent to cause a present or future harm" as discussed in *Porter*. *Porter,* 393 F.3d at 616. Certainly, Ms. Clark's expressed opinions about transgender individuals could be upsetting and seen as disrespectful. However, once more, context, as outlined by *Watts*, leads to the conclusion that an objectively reasonable person would not see Ms. Clark's post as constituting a true threat. *Watts*, 394 U.S. at 708 ("When determining whether an alleged threat falls outside the realm of protected speech, it is important to focus on the context of the expression."); *see also* TRUE THREAT, Black's Law Dictionary (Courts "undertake a totality-of-the-circumstances analysis of all relevant factors that might reasonably affect the statement's interpretation.").

B. The First Amendment Protects Ms. Clark's Off-Campus Facebook Post Originating from Her Personal Computer.

Although students do not receive the same robust constitutional protections while on campus due to the need for often swift and informal disciplinary action, this does not mean that students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995); *Tinker v. Des Moines Independent County School District*, 393 U.S. 503, 506 (1969). In fact, because free speech constitutes such an integral part of the educational system, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker*, 393 U.S. 503 at 512. Some exceptions for which this Court has recognized a school's ability to restrict student speech includes: 1) regulation of curriculum in a reasonable matter related to legitimate pedagogical concerns (*Bethel School District v. Fraser*, 478 U.S. 675 (1986)), 2) regulation of lewd, indecent, or offensive speech (*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)), and 3) restriction of student speech at a school event when that

speech is reasonably viewed as promoting illegal drug use (*Morse v. Frederick*, 551 U.S. 393 (2007)).

The Court's general test for whether a restriction on speech in school is permissible falls under the framework laid out in *Tinker v. Des Moines Independent County School District*. There the Court held that so long as a student's speech does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and [does not] collide with the rights of others," the First Amendment protects that speech. *Tinker*, 393 U.S. 503 at 513. Any action on the part of school authorities in regards to speech cannot come from "undifferentiated fear or apprehension of disturbance." *Id.* at 508. Rather, the action must come from "facts which might reasonably have led school authorities to forecast substantial disruption or material interference with school activities." *Id.* at 513.

While the Court has upheld these various restrictions to student speech on campus and at school events, none of these cases reach so far as to regulate student speech done from a personal computer at home. Here, Petitioner seeks to push beyond the outer limits of a school's authority to circumscribe even off-campus speech, such that a student's First Amendment right would "exist [only] in principle but not in fact." *Id.*

1. The standard set forth in Tinker does not apply to off-campus Internet speech made from the privacy of a student's home.

At the heart of the First Amendment exists the inescapable relationship between a free flow of information and a democratic society. *Thomas v. Board of Education*, 607 F.2d 1043, 1047 (2nd Cir. 1979). Thus, "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). So while there exists a tension between school authority and student constitutional rights, the power of

discipline by the school should not be permitted to expand beyond the metaphorical schoolhouse gates.

Tinker's applicable framework, and the other exceptions delineated by the Court, should stay within the confines of the school and school-sponsored activities. It is improper for the Circuit courts to extend *Tinker* outside those bounds. As such, it is demonstrative that there is significant disagreement among the sister circuits. The guidelines for the District Courts are murky. Beginning from whether *Tinker* should apply at all, to how far it should reach if it does, and ending in whether other tests need to be met before reaching the *Tinker* analysis. *Wynar v. Douglas County School District*, 728 F. 3d 1062, 1068-1069 (9th Cir. 2013). Indeed, "lower courts across the country are divided on this question of whether and how *Tinker*… applies to off-campus student speech." *R.L. v. Central York School District*, No. 1:14-cv-00450, 2016 U.S. Dist. LEXIS 58446 at 20 (M.D. Penn. May 3, 2016).

a. Allowing school authorities to extend Tinker to off-campus speech presents significant dangers to the First Amendment and student autonomy.

Applying *Tinker* to off-campus speech simply goes too far in eroding First Amendment protections. First, school officials, no matter how well meaning, are certainly subject to more persuasion by public opinion and influenced by a desire to maintain order in schools than an impartial arbitrator. Ulterior motivations present a course of action insidious to the free speech rights of students away from campus. In administering punishment, the school official becomes both prosecutor and judge. *Thomas*, 607 F.2d at 1051. However, there is difficulty in impartiality when school officials have "a vested interest in suppressing controversy. Accordingly, under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail." *Id.*

Second, it is not difficult to see how quickly a reliance on *Tinker*'s reasonable forecast of material disruption could be extrapolated so far as to the school interfering with the rights of parents to effectively raise their children. Students need an identity outside the confines of school walls, where they can be subject to less constant scrutiny. This is why "the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon." *Id.* Furthermore, the reliance on *Tinker* in the school context is justified because "fellow students constitute a captive audience, and in recognition of the fact that the school has a substantial education interest in avoiding the impression that it has authorized a specific expression." *Id.* at 1049. However, Internet speech is not the same. There is no captive audience. Students may choose to view or not view any number of media options and even decide to "block", "unfriend", or "remove" those viewpoints, people, or opinions they wish to avoid from their social media accounts. This is a critical distinction for why *Tinker* is not applicable to off-campus student speech on the Internet.

Finally, in opening the door for *Tinker* to apply to off-campus speech, there is simply too much room for abuse and suppression to future expression. Where a school administrator can reach beyond the classroom at almost anytime to discipline a student for something they said off school grounds, "the chill on expression is greatly exacerbated." *Id.* at 1051. Students will be forced to constantly monitor where, when, and to who they say things. Continuously unsure of what will, or will not, constitute impermissible speech according to the school.

Although the evolving nature of technology does present new problems, this does not justify reaching *Tinker*'s analysis into off-campus speech. However offensive Ms. Clark's Facebook post, she wrote it on her own account, and spoke about a community to which none of her Facebook "friends" identified with. R. at 23. The mere possibility that someone could pass

that information along to the school cannot justify an abridgment of free speech and potentially limitless authority to school officials solely because Ms. Clark attends mandatory education. "It would be an unseemly and dangerous precedent to allow the state… 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." *Layschock v. Hermitage School District*, 650 F.3d 205, 216 (3rd Cir. 2011).

b. Ms. Clark's post does not fall within an unprotected category of speech under the First Amendment.

Not all expression enlightens or adds discourse to the political landscape. To deal with certain subsections of those words that add no value to society, the Court has "defined narrow categories of words that the state may punish." *Thomas*, 607 F.2d at 1047. Some examples include: libel (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), obscenity (*Miller v. California*, 413 U.S. 15 (1973)), incitement (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), child pornography (*New York v. Ferber*, 458 U.S. 747 (1982)), fighting words (*Chaplinsky v. N.H.*, 315 U.S. 568 (1942)), and true threats (*Virginia v. Black*, 538 U.S. 343 (2003)). These few delineated categories showcase the Court's reluctance to avoid any chilling effect on speech, but also demonstrate the Court's recognition that some speech does not warrant constitutional protection.

The unprotected categories of speech under the First Amendment are enough to provide adequate safeguards against speech by students not connected to campus, and therefore *Tinker* should not be inappropriately extended outside it's limited context: namely the school. In the present case, school officials are disciplining Ms. Clark for speech communicated outside those confines. R. at 2-3. Her Facebook post originated in the privacy of her bedroom at home from her personal computer. R. at 23. Although constitutional rights within schools are subject to

lesser protection, when "school officials have ventured out of the school yard and into the general community where the freedom accorded [to] expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Thomas*, 607 F.2d at 1050. Thus, unless Ms. Clark's Facebook post rises to a level of speech unprotected by the First Amendment, then the School District cannot punish Ms. Clark for speech that took place off school property. *Id.* at 1051. Given that the above analysis shows Ms. Clark's speech fails to rise to the level of a true threat, her Facebook post should therefore be protected by the First Amendment.

It is undeniable that in recent times, the fear of school officials for violence committed on campus has been exacerbated by tragedies such as the Virgina Tech massacre and Columbine. Of course a tension between authority and constitutional freedoms exist. However, Petitioner erroneously relies on extending *Tinker* outside the school to deal with this tension. Rather than relying on already existing safeguards of the First Amendment, Petitioner seeks transform *Tinker* to apply to students at any time. This would lead to pervasively invading the life of students and essentially gaining control over their social media accounts. This is not an appropriate solution. Instead of pushing *Tinker* so far, school authorities may still rely on those delineated categories to take action against students that would threaten the lives of others to protect its student .

2. Assuming arguendo this Court extends *Tinker* to off-campus student speech, then Ms. Clark's Facebook post does not satisfy the prongs of *Tinker*.

a. The Facebook post by Ms. Clark did not create a substantial disruption or material interference on campus.

The first prong of the *Tinker* test is met when either "an actual disruption occurs; or the record contains facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Bell v. Itawamba County School*

Board, 799 F.3d 379, 397 (5th Cir. 2015). The District Court cited several circuit court cases about off-campus internet speech that was held to reasonably forecast to school authorities the creation of a substantial disruption or material interference on campus. R. at 9-10. However the District Court erred in relying on those case facts to support *Tinker*'s application to Ms. Clark's post. Her post is substantially different from the type of speech engaged in from those cited cases. For example, in *Wynar v. Douglas County School District*, the student's off-campus Internet speech cannot reasonably be said to be akin to Ms. Clark's post. The student in *Wynar* sent "increasingly violent and threatening instant messages" to his friends, giving details of graphic violent acts, well laid out plans of attack to students at school, named specific people, and even gave a potential date for carrying out a shooting which centered near the time of two other mass shootings in the United States. *Wynar*, 728 F.3d at 1064-1065.

This is significantly different from Ms. Clark's post. Granted, Ms. Clark's use of the phrase "take it out one way or another" is certainly regrettable speech, but it simply does not rise to the level necessary for *Tinker* to reach off-campus internet speech. R. at 2. Even in *Wynar*, the court cautioned that school officials must also "take care not to overreact and to take into account the creative juices and often startling writings of the students." *Wynar*, 728 F.3d at 1064. Ms. Clark's post in the evening, following earlier events where she was in an altercation with Ms. Anderson, and the first time she has voiced such opinions directed towards someone at school may be shocking and distasteful, but surely it does not rise to a detailed account of violent acts to be perpetrated on the student body.

If anything, Ms. Clark's speech was more likely an unnecessary gross exaggeration of her anger, not meant seriously, similar to the student in *J.S. v. Blue Mountain School District* whom created a fake profile making fun of her principal. *J.S. v. Blue Mountain School District*, 650

F.3d 915, 920 (3rd Cir. 2011). In that case, even though the profile's "about me" section stated things like the principal was a sex addict, that he loved being a "dick head", that he wanted to pervert the mind of other principals to be like him, the student's speech was found not to be materially disruptive. *Id.* at 921-922. The minimal disruption the classroom and school environment experienced, upon other students learning of the profile, was not enough to justify an intrusion to off-campus Internet speech by the student and apply *Tinker*. *Id.* at 922, 928. While Ms. Anderson and Ms. Cardona were visibly upset, and their parents understandably had concerns, the vague nature of Ms. Clark's post in conjunction with the low amount of impact the post had overall on the school environment, supports the contention that Ms. Clark's post does not fall under the first prong of *Tinker*. R. at 3.

In another case, *S. J. W. v. Lee's Summit R-7 School District*, *Tinker* applied where two students created a website that hosted posts detailing sexually graphic and degrading comments about specific female classmates, in addition to some other offensive and racists comments. *S. J. W. v. Lee's Summit R-7 School District*, 696 F.3d 771, 773 (8th Cir. 2012). There the resulting disruption to the school environment included teachers having difficulties in maintaining the classroom environment due to the website, local media arriving, and parents contacting the school for days after the website came to light. *Id.* at 774. This type of disruption is more clearly demonstrative on the type of interference with education that *Tinker* seeks to prevent, if it applies to off-campus Internet speech. However, yet again, Ms. Clark's post is distinguishable from the aforementioned cases both in the nature of the post, the amount of disruption potential, and the fear of potential interference to the educational environment.

b. Ms. Clark's free speech did not collide with the rights of others on campus.

The second prong of the *Tinker* test does not have a precise scope. *Harper v. Poway Unified School District*, 445 F.3d 1166, 1178 (9th Cir. 2006). However, some guidance comes from the court in *Harper v. Poway Unified School District*. There, the court found that a student who wore T-shirts with religious anti-gay messages during a week when the Gay-Straight Alliance club held a "day of silence" interfered with the rights of other students to be let alone. *Id.* at 1171. In particular the court held that students had a right to be free from verbal assaults on the basis of core identifying characteristics while at school. *Id.* at 1178. The rationale behind this tailoring of free speech was that, although name-calling is usually protected, in the school context where there are mandatory attendance requirements, "students cannot hide behind the First Amendment to protect their right to abuse and intimidate other students at school." *Id.* Again, the court focused on the nature of school as a forum in which students are often a captive audience and powerless to avoid speech they find distasteful. *Id.*

Unlike the facts in *Harper*, Ms. Clark did not come onto campus distributing her Facebook post, wearing a shirt sending an intentional message in conflict with a day of silence, or standing on a soapbox in the quad. Ms. Clark instead, however ill advised, wrote a post on her own Facebook account from the privacy of her bedroom in the evening following a confrontation with Ms. Anderson earlier that day. R. at 23. Although Ms. Clark understood that social media, being social in nature as the name implies, could lead to others beyond her friend group on Facebook finding out about the post, nothing Ms. Clark wrote was forced upon a captive audience. R. at 23. Any individual who did not want to see Ms. Clark's post was easily able to avoid it like many other pages on the Internet.

Furthermore, by Ms. Clark posting on social media, it could allow those who wish to voice a different viewpoint or inquire into her beliefs to challenge her on that topic. This is the essential core and nature of free speech: to encourage discourse and an exchange of ideas. Even though the post was mean-spirited towards Ms. Anderson, because it was off-campus, and not forced upon a captive audience, it did not collide with the rights of others on campus. Therefore, the second prong of *Tinker* is not met.

X. Conclusion

This Court should recognize that this case arises from the emotional reaction of a young teenage girl. Ms. Clark had an opportunity to act violently during the intrasquad practice basketball, but she did not. Instead, she issued a statement to her friends against a policy she viewed as running counter to her religious beliefs and made a poor attempt at humor. If there is no subjective intent to threaten, then the author of hurtful speech should not be subject to discipline if it occurs outside school. Rather, this student should be educated about the ramifications of the speech and the impact it has.

While both *Porter* and *Pulaski* propose an objective standard, it is important to truly consider what constitutes a reasonable interpretation of Ms. Clark's post given its context—as this Court's precedent so outlines. *See Watts*, 394 U.S. at 708. Ms. Clark is fourteen-years-old and in her first-year of high school. Ms. Anderson is fifteen-years-old and only one school year ahead of Ms. Clark. For the great respect that we should afford these young women—both who are attempting to stay true to their understanding of themselves and the world—we should also remember their tender ages and the nature of high school.

Nonetheless, it is equally important to remember that an objectively reasonable teenager may, at times, be an oxymoron in and of itself. Due to this, the objective standard alone is not

sufficient when it comes to a minor's alleged true threats, especially when these comments, like those at issue, are done outside of school and not conveyed to the "target." In order to punish a high school student for comments made outside of school, from the privacy of their own home, to their own friends, there must be a subjective intent to threaten demonstrated. If not, we risk quelling what are arguably the quintessential hallmarks of adolescence: the newfound power to forge one's identity; the capability to form and espouse one's ideology; the subsequent ability to empathize with those who are different from oneself; and the inevitable practice of learning from one's mistakes.

The First Amendment's double-edged nature allows for both popular and unpopular speech. For example, while society may wish to prevent the preaching of the KKK on racial superiority, allowing that type of speech to be suppressed leaves the door open for a different sector of society to forbid teachings on racial equality. Many forms of hate speech are tolerated. Not because the majority of citizens agree with it, but because to do the opposite allows for the suppression of ideas in general. Whether they are ingenious or asinine.

It is two sides of the same coin: in order to have free speech, disagreeable and even hateful speech must often be tolerated to promote the marketplace of ideas and a free exchange of information. Here, the response to bad speech is more speech. The proper remedy is application of general First Amendment principles, not an expansion of *Tinker* to off-campus speech. However offensive Ms. Clark's speech may be, her right to express her views remains protected under the Constitution.

Brief Certificate

Team J submits this certificate in accordance with the rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition Rules section III, D, 3. The work product contained in all copies of Team J's brief is in fact the work product of the three members of Team J. Team J has fully complied with the team members' law school governing honor code. Team J has also fully complied with all rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.