**No. 16-9999**

IN THE

# Supreme Court of the United States

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**WASHINGTON COUNTY SCHOOL DISTRICT,**
Petitioner,

v.

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

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

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## BRIEF FOR RESPONDENT

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**Team T**
*Counsel for Respondent*

## QUESTIONS PRESENTED

I. A freshman member of a girls' high school basketball team composed a Facebook "status" stating her opinion of a controversial school policy. The student's words conveyed moral aversion to transgender people and mentioned a transfemale basketball team member by name. Did the Circuit Court err in concluding that, however distasteful the speech, it is protected by the First Amendment because it did not truly threaten transgender students?

II. The freshman basketball player composed this Facebook status in her own home after school hours on her personal computer. Did the Circuit Court err when it classified the status as "off-campus speech" and held that the speech is entitled to First Amendment protection?

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THE FIRST AMENDMENT PROVIDES, IN RELEVANT PART:

"Congress shall make no law . . . abridging the freedom of speech."

## STATEMENT OF JURISDICTION

The United States District Court for the District of New Columbia properly exercised jurisdiction over this matter under 28 U.S.C. § 1331. Respondents appealed to the Fourteenth Circuit under § 1291. When the Fourteenth Circuit granted summary judgment to Respondents, Petitioner timely filed a petition for writ of certiorari to this Court under § 1254(1).

## STATEMENT OF THE CASE

Respondent Kimberly Clark [hereinafter "Ms. Clark"] and her father, Alan Clark, brought the instant action seeking declaratory relief for Ms. Clark's unwarranted suspension from school under 42 U.S.C. § 1983. Petitioner Washington County School District violated Ms. Clark's First Amendment right to free speech by punishing Ms. Clark for authoring offensive comments pertaining to a controversial school policy and publishing those statements on her personal Facebook page.

Ms. Clark and Petitioners filed cross motions for summary judgment to the District Court. The District Court granted summary judgment to Petitioner, finding that Ms. Clark's statements align with narrow exceptions to First Amendment free speech protections. The Court of Appeals for the Fourteenth Circuit reversed and remanded, requesting the District Court to enter summary judgment in favor of Ms. Clark. The Fourteenth Circuit found that although narrow exceptions to First Amendment free speech protections do exist, Ms. Clark's statements do not align with those exceptions; thus, her speech is protected. Judge Eugenia Wong, writing for the panel, found Petitioner liable under § 1983 for punishing Ms. Clark in violation of her First Amendment rights.

Petitioner filed a writ of certiorari to this Court, requesting that it reconsider the Fourteenth Circuit's analysis of exceptions to First Amendment protections. This Court granted the petition to clarify its holdings in *Virginia v. Black*, 538 U.S. 343 (2003), and *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

## STATEMENT OF FACTS

Respondents limit themselves to a recitation of facts pertinent to this appeal.

Ms. Kimberly Clark is a freshman student at Pleasantville High School [hereinafter "Pleasantville"] and a member of the Pleasantville girls' basketball team. R. at 23. On the evening of a team intrasquad practice game, November 2, 2015, Ms. Clark composed a message—entirely unrelated to Pleasantville academics or in-school activities—and published it on her personal Facebook page. Ms. Clark presumed, at the time, that this act was none other than an exercise of her First Amendment right to protest a new school policy that negatively affects her athletic performance and offends her personal moral code: Pleasantville's "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" policy. *See* R. at 15–16. During the intrasquad basketball game, Ms. Clark was drawn into a verbal argument by teammate Taylor Anderson, a transfemale Pleasantville student. Ms. Anderson joined the girls' team after Pleasantville implemented its nondiscrimination policy. The policy requires the school to permit transgender students to join athletic teams consistent with their gender identities. R. at 23. As punishment for the verbal altercation, a referee ejected both Ms. Clark and Ms. Anderson from the basketball game.

Ms. Clark, in turn, expressed her frustration with these circumstances on her personal Facebook page by composing a Facebook "status" and sharing the status with her Facebook "friends." *Id.* She composed and posted the status on her personal computer in her home. *Id.* Ms. Clark deliberately selected this channel of communication to discuss Ms. Anderson's membership on the girls' team and Pleasantville's nondiscrimination policy; she "meant only for [her] own friends to see [her] Facebook post." *Id.* Neither Ms. Anderson nor any other transgender student at Pleasantville is a Facebook friend of Ms. Clark. *Id.* Ms. Clark did intend

for her Facebook friends to see the message, particularly because "it stated her views on an important school policy." R. at 19.

Ms. Clark's Facebook status, in her own words, is a statement of her "issues" and "concern" regarding the implications of the Nondiscrimination in Athletics policy, as well as her "belief" that the policy violates her personal moral and religious code. *Id.* The Facebook status mentions Taylor Anderson by name, in connection with her membership on the basketball team, and characterizes the nondiscrimination policy as "dumb[]," "unfair," and "immoral." Her "status" ends, plainly for dramatic effect, with the statement: "Taylor better watch out at school. I'll make sure IT gets more than ejected. I'll take IT out one way or another. That goes for the other TGs . . . too . . . ." R. at 18. The District Court found that these words constitute "offensive statements"; Ms. Clark does not dispute this characterization. R. at 1. Two Facebook users "liked" the status, and no Facebook member published a comment in response to Ms. Clark's words. R. at 18.

Two days after the intrasquad basketball game, Taylor Anderson, Ms. Anderson's parents, Josie Cardona (another transfemale student), and Cardona's parents met with Pleasantville principal Thomas Franklin to inform Franklin of the contents of Ms. Clark's Facebook message. R. at 13. The Andersons and Cardonas claimed that Ms. Clark's statements were so offensive as to discourage Ms. Anderson and Ms. Cardona from attending school—Ms. Anderson and Ms. Cardona remained home for two days after viewing Ms. Clark's message—or from practicing with the girls' basketball team. *Id.* In response, Franklin called a meeting with Ms. Clark and her parents. R. at 14. When Ms. Clark confirmed that she authored the message in question, Franklin suspended Ms. Clark from school for three days under Pleasantville's Anti-Harassment, Intimidation & Bullying Policy, *see* R. at 17; the suspension appears on Ms. Clark's

permanent academic record. *Id.* Franklin found, and the District Court rashly confirmed, that Ms. Clark's words amounted to a "material[] disrupti[on] of [the] high school learning environment and colli[sion] with the rights of Ms. Anderson, Ms. Cordona, and other transgender students to feel safe at school." *Id.*

Not only did Franklin's decision to suspend Ms. Clark punish her for "expressing . . . discomfort" with the school nondiscrimination policy, but it also punished Ms. Clark for "exposing the lack of fairness, danger, and immorality" of the policy. R. at 20. Ms. Clark's father, Alan, observed that the suspension "unfairly shamed" his daughter "before the entire school community." *Id.* Alan Clark accordingly appealed the suspension to the Washington County School Board. When the Board rejected his appeal, the Clarks brought the instant action.

## SUMMARY OF THE ARGUMENT

The Fourteenth Circuit held correctly that Petitioner violated Ms. Clark's First Amendment rights when school administrators suspended Ms. Clark to punish her for offensive language contained in an off-campus online publication. This Court should affirm the Fourteenth Circuit's decision because Ms. Clark was fully entitled to express her opinion of a controversial school nondiscrimination policy on the Internet, as well as criticize and identify by name a student affected by the nondiscrimination policy. The First Amendment entitles Ms. Clark to freely express her political and religious beliefs in the sanctity of her own home, using mediums of communication entirely detached from her school campus.

The First Amendment applies to students and teachers no differently than it applies to other citizens. Limited exceptions to the broad-sweeping First Amendment free speech protections exist, but this Court has narrowly limited the scope of those exceptions to protect the public from governmental infringement on their freedoms.

One such exception is the "true threat"; if speech constitutes a true threat to others, and the speaker *subjectively intends* the speech to have this effect, the speech is not protected by the First Amendment. Courts look to evidence of intent on the part of the speaker, the context of the speech, and its effects on the audience of the speech to determine whether a true threat has been issued. This Court will not lift the protections of the First Amendment from threatening language if context suggests that the threat is unlikely to come to fruition, or if the threat is conditional in nature. This Court will also not subject a speaker to punishment for issuing a true threat if there is no proof that the speaker intentionally exposed the speech to public scrutiny.

This Court should readily affirm the Fourteenth Circuit's decision to protect Ms. Clark's Internet speech because there is no evidence that she subjectively intended to threaten Ms.

Anderson or other transgender Pleasantville students. Furthermore, context suggests that Ms. Clark's "threat" was empty, and she did not intentionally project her words beyond a zone of sanctity into the public sphere.

Petitioners argue that even if this Court correctly applies the "true threat" test and agrees with the Fourteenth Circuit that Ms. Clark's speech was not a true threat, Ms. Clark's speech is somehow still subject to regulation under a limited exception to free student speech. Students are entitled to full First Amendment protections, with limited exceptions. One such exception arises when speech either materially disrupts classwork or collides with the rights of other students to be secure and let alone. As in the context of the "true threat" analysis, this Court has carefully circumscribed the disruption/collision analysis to ensure that First Amendment protections do not lose muster in public schools.

This Court should uphold the Fourteenth Circuit's disruption/collision analysis in this case because Ms. Clark's speech caused no material disruption—nor did it give school administrators reason to believe that disruption would occur—and her words did not collide with the rights of any other students to be secure in their school community.

Accordingly, without authority to regulate speech under the "true threat" exception to the First Amendment or the disruption/collision exception to free student speech, Petitioner violated Ms. Clark's rights. This Court should affirm the Fourteenth Circuit's decision to grant her relief.

## ARGUMENT

### I. WHERE A FRESHMAN HIGH SCHOOL STUDENT PUBLISHED HER OPINION OF A CONTROVERSIAL SCHOOL POLICY ON HER FACEBOOK PAGE, THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT HER SPEECH WAS PROTECTED BY THE FIRST AMENDMENT BECAUSE HER WORDS DO NOT CONSTITUTE A TRUE THREAT

The First Amendment protects nearly every form of speech, whether lude, menacing, or degrading—indeed, it has been interpreted to protect even "the flag-burner, the tobacco advertiser, the pornographer, and the hateful speaker." David Hudson, *True Threats*, The First Amendment Center (May 12, 2008), http://www.firstamendmentcenter.org/true-threats/. Despite such broad-sweeping protection, this Court has identified extremely limited exceptions to First Amendment freedom. Among these exceptions, which include such crimes as perjury, false advertising, and extortion, is the amorphous "true threat." In 2003, this Court held that a declarant who "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" is not entitled to First Amendment free speech protection. *Black*, 538 U.S. at 359 (citing *Watts v. United States*, 394 U.S. 705, 208 (1969)). Although it is well established that "intent to threaten is enough; the further intent to carry out the threat is unnecessary," lower courts struggle to determine whether the "intent" inquiry is subjective or objective. *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005). Some circuit courts have held that the inquiry is objective, *see United States v. Nishnianidze*, 342 F.3d 6 (1st Cir. 2003), *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004), *United States v. Dinwiddie*, 76 F. 3d 913 (8th Cir. 1996), *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002), *Magleby*, 420 F.3d, whereas the Ninth and Fourteenth Circuits require proof of subjective intent to threaten, *see United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005), *Clark v. Washington Cty. Sch. Dist.*, No. 17-307 (14th Cir. 2017) [hereinafter "*Clark II*"]. The Seventh Circuit has also indicated that interpreting *Black* to require

an objective intent test is "no longer tenable." *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008).

The Ninth and Fourteenth Circuits' analyses of *Black*'s "true threat" language, requiring proof of subjective intent, are not only more faithful to the plain language of *Black* than interpretations deriving objective intent from the language, but they are also more faithful to the principle of virtually unlimited freedom enshrined in the First Amendment.[1] *Black* clearly requires proof that "the *speaker* [of the words in question] means to communicate a serious expression of an intent" to threaten others, not that the audience of the words in question, or a reasonable person in the audience's position, *perceives* such an intent. 538 U.S. at 359 (emphasis added). In other words, *Black* "is requiring that the *speaker want* the recipient to believe that the speaker intends to act violently." *United States v. Heineman*, 767 F.3d 971, 978 (10th Cir. 2014) (emphasis added); *see also United States v. Bagdasarian*, 652 F.3d 1113, 1116–18 (9th Cir. 2011). The fact the *Black* Court also expressed concern for protecting audiences from "the fear of violence and from the disruption that fear engenders" does not override this Court's primary focus: identifying cases "where a *speaker directs a threat* to a person . . . *with the intent of* placing the victim in fear of bodily harm or death." *Id.* at 359–60 (emphasis added). Furthermore, the First Amendment demands nearly limitless protection of speech, even speech that "*society* finds . . . offensive or disagreeable," with the firm caveat that the amendment "does not protect violence." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (emphasis added); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

[1] Notably, as the Ninth Circuit in *Cassel* observed, "[t]he *Porter* court cited *Black* but did not discuss it . . . Neither the Seventh Circuit in *Fuller* nor the First Circuit in *Nishnianidze* cited *Black* at all. In short, it appears that no other circuit has squarely addressed the question whether *Black* requires the government to prove the defendant's intent." *Cassel*, 408 U.S. at 633 n.10.

However, even if this Court agrees with the Fifth and Eighth Circuits that *Black*'s language does not require proof of a speaker's subjective intent to threaten to establish that speech is a "true threat," the objective test remains. Petitioners must still convince this Court that "an ordinary, reasonable recipient who is familiar with the context of the [speech] would interpret is as a threat of injury." *United States v. Davila*, 461 F.3d 298 (2d Cir. 2006) (quoting *United States v. Malik*, 16 F.3d 45 (2d Cir. 1994). If speech is conditional in nature, or mere "hyperbole," this Court will not disturb protections afforded to the speaker by the First Amendment. *Watts*, 394 U.S. Moreover, even if this Court settles on the objective threat standard, a party seeking to limit First Amendment speech protections must establish that the statement's "exposure to public scrutiny" was "something more than . . . accidental and unintentional." *Porter*, 393 F.3d at 618.

a. Because Ms. Clark did not subjectively intend for her Facebook status to communicate a serious threat of unlawful violence to transgender students at Pleasantville, her speech is protected by the First Amendment.

The First Amendment protects speech that might be perceived by concerned parties to be threatening, regardless of the speech's effect on the speaker's audience, if the speaker did not "mean[] to communicate a serious expression of an intent to threaten" the audience. *Black*, 538 U.S. at 359. For example, in *United States v. Cassel*, defendant Cassel, whose girlfriend owned property adjacent to land the government intended to sell to other citizens, discouraged potential buyers from purchasing the property using tactics that included "threat[ening] to burn any house the [buyers] might build." 408 F.3d at 625. The Ninth Circuit concluded that despite Cassel's troubling statements, which buyers personally perceived as threats, Cassel's speech was protected by the First Amendment. The court held that it would be improper to characterize Cassel's words as "true threats," which do not receive the designedly broad protections of the First Amendment, because the prosecutor failed to establish Cassel's subjective intent to threaten

buyers. *Id.* at 633. Under *Black*, the Ninth Circuit found, subjective intent to threaten is a required element to establish the "tru[ly] threat[ening]" nature of any speech. *Id.* Similarly, in *United States v. Heineman*, where defendant Heineman sent emails containing white supremacist content to a college professor, causing the professor to fear for his own physical safety and the safety of his family, the Tenth Circuit held that Heineman's speech was protected by the First Amendment until the lower court could identify "whether *he [Heineman] intended* his e-mail to be threatening." *Heineman*, 767 F.3d at 982 (emphasis added). The court never assumed that Heineman subjectively intended to threaten the professor, despite such jarring language as, "[w]e put the noose around your neck / and drag you as you choke and grasp." *Id.* at 972.

Here, the First Amendment protects Ms. Clark's speech, regardless of its effect on Ms. Anderson, Ms. Cardona, or any other transgender students, because Ms. Clark did not subjectively mean to communicate a serious expression of intent to threaten any transgender students with physical harm. Like in *Cassel*, where the Ninth Circuit refused to pierce the veil of First Amendment protection with respect to the defendant's threatening statements to potential purchasers of federal land, this Court should extend full First Amendment freedom to Ms. Clark. The Ninth Circuit aptly recognized in *Cassel* that where there is no proof of the defendant's subjective intent to convey true threats of harm to potential land purchasers, it is unjust to classify the defendant's statements as true threats. Here, Petitioner fails to establish any subjective intent by Ms. Clark to threaten the physical safety of Ms. Anderson or other transgender students at Pleasantville. On the contrary, evidence has been presented that Ms. Clark merely intended for her Facebook status to generate conversation about the Nondiscrimination in Athletics policy. As such, in line with *Cassel*, this Court should affirm the

Fourteenth Circuit's judgment that Ms. Clark's speech is protected by the First Amendment.[2] This is doubly evident considering the Tenth Circuit's refusal to assume in *Heineman* that speech as menacing as white supremacist death threats, which appeared in an email sent directly to the target of the threats, was delivered by a defendant with subjective intent to threaten the recipient. This Court cannot assume, in light of *Heineman*, that Ms. Clark's language—which was far less graphic and far vaguer than defendant's speech in *Heineman*—was delivered with any subjective intent to instill fear in transgender students.

b. Even if this Court finds that the "true threat" standard requires proof of objective intent, Ms. Clark's speech is still protected by the First Amendment.

Notwithstanding individual reactions to speech with threatening connotations, this Court cannot reasonably characterize a statement as a "true threat" if context suggests that the statement is conditional in nature or that the threat is unlikely to come to fruition. In *Black*, for example, this Court held that even in the context of a political rally, it is unconstitutional to presume that every cross-burning is committed with intent to threaten physical harm, even if witnesses are aware that cross-burnings are "a tool for the intimidation and harassment of racial minorities." *Black*, 538 U.S. at 389 (Thomas, J., dissenting) (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995)). Even with respect to such an act, this Court requires close consideration of "all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate." *Id.* at 367 (O'Connor, J., for the plurality). This principle has been routinely applied in cases such as *Watts*, even before the Court's holding in *Black*. In *Watts*, this Court found that a war protestor, who verbalized his plot to shoot Lyndon B. Johnson if the government required him to carry an assault rifle, was entitled to First

[2] As the Fourteenth Circuit observed in *Clark II*, the fact that the *Cassel* Court dealt with a criminal, rather than civil, statute is immaterial to this analysis; the relevant t portions of *Cassel* interpret *Black* independently of the criminal law issues in that case.

Amendment protection despite the explicit threat of violence in his public statement. *Watts*, 394 U.S. at 706. This Court considered the context in which the protestor made this statement—it was conditional in nature, as he had not yet been forced to carry a weapon, and it elicited laughter from some of those who overheard his words. *Id.* at 708. This Court could not construe the statement as a "true threat" despite the speaker's intention, the fear his words might have instilled in others, or even whatever fear Lyndon B. Johnson felt.

*Watts* is readily distinguishable from cases such as *United States v. Turner*, in which the defendant threatened the lives of three Seventh Circuit judges on a public blog while referencing recent murders of a local district court judge's family members. 720 F.3d 411, 414–15 (2d Cir. 2013). Online, defendant Turner posted the room numbers of the circuit judges' chambers along a map of the Seventh Circuit courthouse, annotated with arrows pointing to anti-bomb truck barriers in the courthouse's immediate vicinity. *Id.* at 416. Turner was affiliated with powerful white supremacist organizations and had been discharged from his role as an FBI informant with respect to those organizations when the FBI could not overcome Turner's "serious control issues." *Id.* at 414. The Second Circuit held that, given the context of Turner's statements—Turner had a history of issuing threats on public Internet forums and sending threatening emails directly to public officers—characterizing the statements as "true threats" was objectively reasonable. *Id.* at 414. His detailed threats "reveal[ed] a gravity readily distinguishable from mere hyperbole or common public discourse." *Id.* at 421.

This Court may not reasonably characterize a statement as a "true threat" if the statement was accidentally or unintentionally exposed to public scrutiny. The Fifth Circuit made this clear in *Porter*, when it considered whether the First Amendment protected a boy who illustrated a school bombing scene and other violent acts toward his school and principal in a notebook

uncovered by school officials. The boy, who had illustrated the violent images but did not possess the notebook at the time of its apprehension (another student, unaware of the illustrations, brought it to school) claimed he could not be punished for *unintentionally* threatening the student body. The Fifth Circuit agreed that, regardless of whether the violent images could objectively be characterized as true threats to student safety, this question is irrelevant if the communicator of the speech (in this case, the illustrator) does not *intentionally expose* the images "*to public scrutiny*." *Porter*, 393 F.3d at 611, 618 (emphasis added). Moreover, although the lower court found that the boy had shared the illustrations with his mother, brother, and a friend, the boy was still entitled to First Amendment protection because communications to family and close friends are "confined." *Id.* at 617.

In contrast, the Eighth Circuit found in *Doe v. Pulaski County Special School District* that where high school student J.M. permitted his friend and classmate to read letters riddled with threats to assault and murder J.M.'s girlfriend that J.M. himself had written, J.M. was not entitled to First Amendment protection. The Eighth Circuit determined that unlike the boy in *Porter*, J.M. intentionally disseminated the threatening letters. 306 F.3d at 619. Two facts distinguished J.M. from the boy in *Porter*: first, J.M. knew that his classmate, with whom he shared the letters, was a friend of J.M.'s girlfriend; second, the lower court found that J.M. had previously shared the contents of the letters with his girlfriend directly. *Id.* at 625. The Eighth Circuit comfortably concluded that J.M.'s threats to his girlfriend were deliberate and intentional. He voluntarily projected the threatening statements beyond the "sanctity of his own home and . . . the sanctity of his own personal thoughts," where speech is generally protected, however threatening it might be to others. *Id.* at 624.

Here, notwithstanding Ms. Anderson's and Cardona's perceptions of Ms. Clark's speech as a generalized threat toward transgender students, it would be unreasonable for this Court to label her speech a "true threat" when context suggests that her words was both conditional in nature and unlikely to come to fruition. The words Ms. Clark published could be only by construed as truly threatening transgender students in limited contexts. If Ms. Clark held a societal or physical position of power at Pleasantville and personally confronted Ms. Anderson at school, announcing to her peers, "I'll take IT out," there might be room to argue that her words were objectively threatening. As the facts stand, the likelihood that Ms. Clark, a *freshman* high school student and *basketball teammate* of Ms. Anderson, could "take out" Ms. Anderson or any other transgender student is no greater than the likelihood of an unarmed political protester posing any concrete threat to Lyndon B. Johnson. Further, Ms. Clark's "threat" is dramatically distinct from the Seventh Circuit judges' murder notices in *Turner*. Unlike in *Turner*, there is no evidence that Ms. Clark has a history of violent behavior towards anyone, transgender or otherwise. Nor did Ms. Clark's message contain details regarding the time, place, or *manner* in which she would attempt to "take out" Ms. Anderson and other transgender students. The vague nature of Ms. Clark's statement indicates it was, at worst, an offensive outburst.

In addition, it would be unreasonable for this Court to characterize Ms. Clark's statement as a "true threat" because Petitioners cannot establish that Ms. Clark intentionally or purposefully exposed her statement to public scrutiny. This case is akin to *Porter*, in which the Fifth Circuit held that that a boy who illustrated a violent school bombing scene could not be punished for the threatening nature of his drawings because he had not intentionally exposed the images to anyone other than his close friends and family. Ms. Clark chose her outlet for political protest carefully on the night of November 2, 2015: her personal Facebook page. Regardless of

increasing accessibility to most material published online, one's personal Facebook page cannot be reasonably characterized as "public." Ms. Clark communicated her feelings to her Facebook "friends;" she did not deliberately expose her feelings to the public. This Court should adopt the Fifth Circuit's approach and affirm Ms. Clark's First Amendment rights. Like the young illustrator in *Porter*, Ms. Clark's statements were intentionally "confined."

This result is obvious in light of the clear distinction between Ms. Clark and J.M., the student who threatened his girlfriend with violent letters in *Doe*. J.M., unlike Ms. Clark, knew that his best friend, with whom he shared the letters, was close friends with J.M.'s girlfriend. Better yet, J.M. conveyed the violent statements to his girlfriend directly. Ms. Clark did not communicate her Facebook status to transgender students—she has no transgender "friends" on Facebook—nor has any evidence been presented that one or more of her Facebook "friends" was close enough to a transgender Pleasantville student to pass along the contents of the message. For these reasons, this Court need not proceed to the issue of whether Ms. Clark's statement constitutes a true threat. She is protected by the First Amendment simply because she intended her communication to be "confined."

## II. WHERE MS. CLARK PUBLISHED A STATEMENT ON HER PERSONAL FACEBOOK PAGE ON HER PERSONAL COMPUTER IN HER BEDROOM AFTER SCHOOL HOURS, THE CIRCUIT COURT CORRECTLY HELD THAT THIS OFF-CAMPUS SPEECH WAS PROTECTED BY THE FIRST AMENDMENT

Public school students are generally entitled to the same First Amendment protections as their adult citizen counterparts. *See Meyer v. Nebraska,* 262 U.S. 390 (1923); *Tinker,* 393 U.S. at 511 ("Students in school as well as out of school are 'persons' under our Constitution."). As in the context of general exceptions to the First Amendment, discussed *infra*, limitations to students' right to free speech and expression are designedly limited. For obvious reasons, schools may regulate "vulgar and offensive" speech, *Bethel School District No. 403 v. Fraser,*

478 U.S. 675 (1986), and school-sponsored speech, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). A third limitation arises in the context of speech that might "materially disrupt classwork," create "substantial disorder," or "inva[de] . . . the rights of others" within a school environment. *Tinker*, 393 U.S. at 503.

This action concerns the contours of the latter exception: *Tinker*'s limits on students' freedom of expression. *See Clark v. Washington Cty. Sch. Dist.*, C.A. No. 16-9999 (E.D. N. Col. 2016) ["*Clark I*"]; *Clark II*. *Tinker* laid ground rules for appropriate regulation of in-school speech by school administrators; since *Tinker*, the physical boundaries of this holding have been murky. Off-campus speech is generally not subject to regulation by school administrators, but recent circuit court decisions suggest that such regulation may be justified in limited circumstances. If a school district establishes that a student's off-campus speech (1) materially disrupts the school environment or creates substantial social disorder in the school environment, or (2) collides with the rights of other students to be secure and let alone, the speech is arguably punishable by the school itself, regardless of the student's location at the time of expression. Inevitably, application of the *Tinker* standard to off-campus speech "requires guesswork about how a third-party school official will prophesize over the effect of speech." *Bell v. Itawamba County School Board*, 799 F.3d 379, 419 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016). Several circuits have adopted a "reasonable forecast" test with respect to *Tinker* cases; that is, if an educator reasonably forecasts disruption that might result from on- or off-campus student speech, the educator may lawfully punish the student speaker despite First Amendment protections. *Boucher v. Sch. Bd. of Sch. Dist. Of Greenfield*, 134 F.3d 821, 828 (1998). Where a school attempts to combine this "forecast" with the extension of *Tinker*'s test to off-campus

speech, the nexus between speech and in-school disruption or collision with other students' rights to be secure is quite thin.

At its core, the *Tinker* test is a balancing act between concerns for safety and efficient, orderly instruction in the classroom and a desire to respect the First Amendment's extension to our youngest, and arguably most vivacious and curious, members of society. This Court's self-prescribed limitations reflect this balance. Every court must heed them as it applies the *Tinker* analysis. First, this Court held that "undifferentiated fear or apprehension of disturbance [of the school environment] is not enough" to justify punishment for on- or off-campus speech. *Tinker*, 393 U.S. at 508. Second, this Court held that an educator's justification for punishing student speech must extend beyond "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

a. Petitioners' decision to suspend Ms. Clark was entirely unlawful under *Tinker* because school officials may not regulate off-campus speech.

It should perhaps be obvious that the *Tinker* test, a narrow exception to the First Amendment arising under the "comprehensive authority of the States and of school officials . . . to prescribe and control conduct *in the schools*," does not control cases in which school administrators punish a student for speech that occurs entirely off-campus. *Tinker*, 393 U.S. at 507 (emphasis added) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Petitioners essentially argue that, due to "[t]he pervasive and omnipresent nature of the Internet [that] has obfuscated the on-campus/off-campus speech distinction," it is logical and permissible for schools to punish student speech with little or no connection to the school environment. *Bell*, 799 F.3d at 395. Petitioners ask this Court to ignore both the context in which students deliver their speech and the mediums through which they communicate, simply because the Internet is too pervasive for *Tinker*'s school-environment-centric language to retain practical value.

Respondent, in turn, urges this Court to faithfully consider its own language in *Tinker*, language that Fifth and Third Circuit judges have thoughtfully reviewed in recent years—long after the dawn of the Internet. As the Fourteenth Circuit observed in *Clark II*, administrators' ability to regulate student Internet speech under *Tinker* would be "far-reaching power" inconsistent with the First Amendment's universal guarantees of freedom. R. at 38. Long before mass social media communication and student Internet speech, students frequently used other mediums to exchange offensive and troubling language off-campus. It is improper to assume that off-campus Internet speech is "qualitatively different [from older forms of communication] simply because of the digital means so often used to transmit it." *Clark II*, R. at 38.

This Court plainly intended to limit the *Tinker* test to the confines of "the school environment." *Tinker*, 393 U.S. at 506; *see Bell*, 799 F.3d at 422 (Dennis, J., dissenting). Indeed, outside of a school building or school-sponsored activities, administrators' compelling interest in preserving order and protecting students from harm in the classroom diminishes tremendously. Off-campus, the protections granted to young people by the First Amendment should operate with full force. For example, in *Bell*, where high school administrators punished a student for including threatening language in his rap music video, four judges (dissenting) held that expanding *Tinker* to limit the student's free speech protection in this context "simply ignores . . . [a] critical distinction" between on- and off-campus speech sharpened by this Court in *Morse v. Frederick*, 551 U.S. 393 (2007) (Alito, J., concurring) (*Tinker*-test regulations of "in-school" student speech "would not be constitutional in other settings"). At any rate, the dissenting judges in *Bell* recognized that their colleagues' decision to uphold the school's punishment "allows schools to police their students' Internet expression anytime and anywhere—an unnecessary intrusion on students' rights." *Bell*, 799 F.3d at 405 (Dennis, J.,

dissenting). *Bell*'s dissenting opinions mirror the Third Circuit's en banc decision in *Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011). In that case, a student created a fake Internet profile of her principal from her home computer. The Third Circuit thoughtfully waded through *Tinker*'s language, ultimately concluding that the student's speech was protected by the First Amendment. The court's attention to the implications of extending *Tinker* to speech that occurs entirely off-campus is noteworthy; the judges feared that an extension would "significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion." *Id.* at 933. Judge Smith concurred in *Snyder* to argue further that even under *Tinker*, "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* at 937.

Here, Ms. Clark's statement, which she composed in the privacy of her bedroom and published on her Facebook page using her personal computer, without use of school communication resources or Internet servers, is not subject to regulation by her school administrators. As many judges and Justices have admitted, such regulation blatantly abrogates the First Amendment and converts school administrators into policemen, disrupting even "parents' constitutional right to direct their children's upbringing."[3] *Bell*, 799 F.3d at 405 (Dennis, J., dissenting).

b. Even if this Court finds that *Tinker* applies to off-campus speech, Ms. Clark's speech was protected because it did not materially disrupt classwork at Pleasantville, incite or generate reasonable fear of substantial disorder, or collide with the rights of other Pleasantville students to be secure.

[3] Ms. Clark brings this action by and through her father, Alan Clark. Mr. Clark testified that he "disagree[s] with the disciplinary action taken" by Petitioners, and that he "find[s] it completely inappropriate." R. at 20.

Petitioner's claim that Ms. Clark's speech was unprotected by the First Amendment presumes that her speech either materially disrupted classwork at Pleasantville or invaded other students' rights. *Tinker*, 393 U.S. at 513. School administrators may not regulate student speech that does not satisfy one of these criteria.[4]

If student speech does not materially disrupt classwork, and it unreasonable for school administrators to fear that disruption will occur, the speech is protected by the First Amendment. This Court set forth a threshold for "material disruption" in *Tinker*, holding that students punished for protesting the Vietnam War by wearing armbands to school had been deprived of their First Amendment rights. This Court acknowledged that the students' act of protest "caused discussion outside of the classrooms . . . a few students made hostile remarks," but "there were no acts of violence on school premises." *Id.* at 508, 514. This Court thus characterized the speech as "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of the [students]." *Id.* at 508, 514. Although administrators expressed genuine fear that the protest would disrupt student work, this fear—however subjectively crippling—did not overcome the students' right to First Amendment freedoms. This Court found that the administrators' "urgent wish to avoid the controversy which might result from the expression" violated the very principles the First Amendment protects; "free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Id.* at 510, 513. The students "neither interrupted school activities nor sought to intrude in the school affairs," so the school had no right to disturb their freedom. *Id.* at 514. Similarly, in *Burge v. Colton School District*, 100 F. Supp. 3d 1057 (D. Or. 2015), the District of Oregon held that a student could not

[4] Schools may, of course, regulate "vulgar and offensive" student speech or school-sponsored speech, but Petitioner does not argue that Pleasantville administrators regulated Ms. Clark's statements on those grounds. The issue is thus limited to the *Tinker* analysis. *See* R. at 9.

be lawfully punished for speech offensive enough to make his teacher "nervous and upset," but not so disruptive that it could convince a reasonable person that the speech was materially disruptive. *Burge*, 100 F. Supp. 3d at 1061. The student posted a Facebook status, expressing his opinion that one of his schoolteachers should lose her job due to the poor quality of her teaching. The student included an expletive in his statement, along with the words "she needs to be shot." *Id.* at 1060. Despite the vulgar nature of the student's words, the court concluded that the Internet statement did not materially disrupt classwork. By punishing the student, school administrators violated his First Amendment rights.

Student speech is also protected if it does not intrude upon other students' rights to be secure within the meaning of *Tinker*. In *Harper v. Poway United School District*, the Ninth Circuit upheld a school's decision to punish a student for wearing a t-shirt to school bearing the words, "Homosexuality is Shameful." 455 F.3d 1166 (9th Cir. 2006). The court held that this act, or speech, violated homosexual students' right "to be left alone" and to be "secure." *Id.* at 1178. Similarly, in *Wymar v. Douglas County School District*, 728 F.3d 1062 (9th Cir. 2013), the Ninth Circuit concluded that a student violated other students' right to be secure when he published a series of social media messages targeting his classmates. The student admitted online that he possessed weapons, and he threatened to use the weapons carry out his threats against specific student targets at specific times. *Wymar*, 728 F. 3d at 1065–66.

Here, Ms. Clark's off-campus speech did not materially disrupt Pleasantville students' classwork or give school administrators a legitimate reason to fear such disruption, so her speech was entirely protected by the First Amendment. The Fourteenth Circuit aptly summarized Petitioner's response to Ms. Clark's speech in *Clark II*: her suspension was a product of nothing more than "nebulous fear of potential, ambiguous disruption." R. at 36. Like in *Tinker*, Ms.

Clark's words were a "silent, passive expression of opinion." Ms. Clark never indicated that she desired to act upon her vague words; regardless of the likelihood of such action, it is evident that her "threat" never came to fruition. Although at least two students, Ms. Anderson and Ms. Cardona, chose not to attend classes in the wake of Ms. Clark's Facebook publication, precedent does not permit this Court to categorize their voluntary absence as "material disruption." At most, school administrators' decision to suspend Ms. Clark was a manifestation of their "urgent wish to avoid the controversy" they foresaw regarding transgender students and Pleasantville athletics. *Tinker* plainly demonstrates that such concern does not outweigh students' First Amendment rights. As in *Burge*, where the court held that a student's seemingly threatening Facebook status was not disruptive enough to subject to *Tinker* regulation, Petitioner offers no evidence that Ms. Clark's statements materially prevented students from executing classwork or materially disrupted Pleasantville's academic environment. *Burge* clarifies that Ms. Clark's decision to target one student and one social group with her statement is not dispositive of material disruption.

In addition, Petitioners acted unlawfully when they suspended Ms. Clark to punish her for the contents of her off-campus speech because her speech did not invade the rights of other students to be secure and let alone. Unlike in *Harper*, where the Ninth Circuit upheld punishment of a student who bore an offensive message on his t-shirt during school hours, Ms. Clark did not present her opinion of transgender students in public on the Pleasantville school campus. Whereas homosexual students could not avoid reading an offensive statement on a student's t-shirt during school hours, transgender students could freely opt not to read or dwell upon Ms. Clark's statement in this case. She published the statement on her personal Facebook page, rather than a public domain. Unlike in *Wymar*, where a student publicized the date and

manner in which he would "take out" several of his classmates, Ms. Clark's offensive language does not rise to the level of a violation of transgender students' right to be secure. Ms. Anderson and Cardona's subjective fear of the consequences of Ms. Clark's statement is immaterial to the practical implications of her speech. Without crucial details, such as time and mechanism, that might give teeth to Ms. Clark's language, no student could reasonably claim that his or her rights to be secure in school were violated when Ms. Clark published her opinion of a controversial school policy on her Facebook page.

## CONCLUSION

Cognizant of the dangerous chilling effect of punishing student speech, particularly in the context of political and religious protests by our nation's youth, as well as the increasingly blurry line between on- and off-campus speech, this Court should uphold the Fourteenth Circuit's interpretation of *Black* and *Tinker* to protect the freedoms enshrined in the First Amendment.

Respondents request this Court to affirm the Fourteenth Circuit's judgment for Respondents granting declaratory relief.

Respectfully Submitted,

_____

Team T
Counsel for Respondent

# Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition Certificate

The work product contained in all copies of this team's brief is the work product of this team's members.

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