Brief on the Merits

No. 16–9999

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON COUNTY SCHOOL DISTRICT,

Petitioner,

v.

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

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

BRIEF FOR THE RESPONDENT

Team A
Counsel of Record for Respondent

QUESTIONS PRESENTED

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

II. Whether a public school district violated a high school student's First Amendment rights by disciplining her for a Facebook post initiated off campus on her personal computer?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgement on this matter on January 5, 2017. *Kimberly Clark v. School District of Washington County, New Columbia*, No. 17-307, slip op. at 1 (14th Cir. Jan 5, 2017). Petitioner timely filed a petition for writ of certiorari which this court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent Kimberly Clark brought this action, by and through her father Alan Clark, against the Petitioner Washington County School District challenging the constitutionality of the Principal of Pleasantville High School in the School District of Washington County, issuing disciplinary measures, in the form of a three-day suspension pursuant to the School District's Bullying Policy on November 5, 2015. *Kimberly Clark v. School District of Washington County, New Columbia*, C.A. No. 16-999, (D. New Columbia Apr. 14, 2016). The parties submitted cross-motions for summary judgement and on April 14, 2016, the District Court granted the School District of Washington County's motion. *Id.* The court held that the School District did not unconstitutionally infringe on Ms. Clark's freedom of speech because the First Amendment does not protect Ms. Clark's statements as they constituted a "true threat." Additionally, the District Court found that even if the statements did not rise to the level of a "true threat" her post created a material disruption at Pleasantville High School and caused other students to feel unsafe and insecure in their environment.

Ms. Clark filed a timely appeal to the United States Court of Appeals for the Fourteenth Circuit, seeking reversal of the District Court's grant of summary judgment. On January 5, 2017, the Fourteenth Circuit held that Washington County School District violated Ms. Clark's First Amendment rights because Ms. Clark's speech was not a true threat and *Tinker* did not authorize the Washington County School District to discipline Ms. Clark for her Facebook post. The Fourteenth Circuit thus reversed the District Court's decision and remanded the case with instructions to grant the Board's Motion for Summary Judgment. Washington County School District timely filed a petition for writ of certiorari, which this Court granted.

STATEMENT OF THE FACTS

On August 1, 2015, the Washington County School District implemented the Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students Policy hereafter "Nondiscrimination Policy" (Exhibit A) (R. at 15). The Policy stated that "students shall be allowed to participate in physical education, club sports and interscholastic athletics consistent with the gender identity they consistently assert at school. (Exhibit A) (R. at 16). Ms. Anderson is a transgender student who identifies as a female (R. at 26). As a result of the Nondiscrimination Policy Ms. Anderson was a member of the girls' basketball team. In an inter-squad practice basketball game on November 2, 2015, the Respondent Ms. Clark and Ms. Anderson engaged in a verbal argument on the court and were both ejected from the game by the referee. (R. at 23). On the night of the basketball inter-squad practice game Ms. Clark wrote a Facebook post while home. (R. at 23). This post stated that Ms. Clark did not believe that Ms. Anderson should be allowed to be on the girls' basketball team. (Exhibit C) (R. at 18). Ms. Clark stated in this post that she disagreed with the Nondiscrimination Policy allowing transgender students to play on teams with which they identify. (Exhibit C) (R. at 18). Ms. Clark called Ms. Anderson a "FREAK OF NATURE" and also referred to Ms. Anderson as an "IT." (Exhibit C) (R. at 18). Ms. Clark is not friends with Ms. Anderson on Facebook, but she "was aware that Facebook posts sometimes go beyond one's own friends". (R. at 23).

The aspect of Ms. Clark's post that is specifically at issue is the second half. Ms. Clark stated that "Ms. Anderson better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another." (Exhibit C) (R. at 18). Ms. Clark also stated that this statement also applies to the other transgender students. (Exhibit C) (R. at 18). On November 4, 2015, Ms. Anderson and Ms. Cardona, another transgender student at Pleasantville High

School, alongside with their parents, met with Principal Franklin. (R. at 26). They showed Mr. Franklin a hard copy of Ms. Clark's Facebook post and explained to Mr. Franklin that they feared for the safety of transgender students at the high school and the safety of their students. (R. at 26).

On November 5, 2015, Principal Franklin called in Ms. Clark and her parents to his office to discuss the Facebook post. (R. at 19). Following this meeting Principal Franklin suspended Ms. Clark for 3 days. (R. at 19). Ms. Clark was suspended as a result of violating the School District's Anti-Harassment, Intimidation & Bullying Policy which prohibits "harassment, intimidation, bullying and threats communicated by any means." (Exhibit B) (R. at 17). Mr. Alan Clark appealed the disciplinary action and was rejected by the School District who upheld Ms. Clark's suspension. (R. at 20). The Board agreed with the Principal and found that Ms. Clark's post materially disrupted the learning environment and collided with the rights of other students to be secure in their school. (Exhibit A) (R. at 21). Mr. Clark filed an action on behalf of his daughter against the Washington County School District in the United States District Court for the District of New Columbia claiming that the School District violated his daughter's First Amendment Rights. (R. at 27).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit and find that Ms. Clark's speech did not constitute a "true threat" and therefore the First Amendment does apply to Ms. Clark's speech. Additionally, Ms. Clark's speech could not be regulated by the School District as *Tinker* does not extend to off speech. However, even if *Tinker* does extend off campus Ms. Clark's speech constituted neither a "material and substantial disruption" nor did it "collide with the rights of others." Therefore, it was a violation of her First Amendment rights when the Principal disciplined her for her speech.

Ms. Clark's speech was not a true threat under Watts because her post was both political and conditional in nature. Ms. Clark's post clearly stated her political and ideological position against a school policy under which she was compelled to adhere. In addition, her alleged threats were dependent on another meeting of the two students and therefore clearly established a conditional requirement. Furthermore, if this court is inclined to adopt a new test in determining when speech rises to the level of a true threat, a subjective test, as adopted by the Ninth Circuit and followed by the lower court, is the most appropriate. In Justice Douglas' concurrence in Watts he was clearly skeptical of an objective test too easily allowing for the censorship of legitimate political speech. Likewise, Justice Marshall in Rogers found a subjective test requiring the intent to threaten preferable to an objective test because such a test would be akin to a negligence standard. Regardless of which standard this Court applies however, Ms. Clark's post would not rise to the level of a true threat because she lacked the requisite intention or knowledge that her speech would reach Ms. Anderson or similarly situated students. Finally, if the court follows a multi-factored objective test Ms. Clark's speech would similarly fail to rise to

the level of a true threat because Ms. Clark had no prior history of violence and had never made similar threats in the past.

Moreover, because Ms. Clark's speech did not constitute a true threat the First Amendment applies. The School District argues that under *Tinker* they have the authority to discipline off campus student speech which could reasonably cause a "material and substantial disruption" or which "collides with the rights of others." *Tinker* however, does not extend beyond the schoolhouse gates. The ability for a school to regulate speech of students is grounded in reasoning that emphasizes the "special circumstances" of the school environment. These "special circumstances" do not exist where the speech originates off campus. Additionally, language throughout this Court's discussion of the topic has clearly indicated that while at school students do not have absolute First Amendment rights but that this is a circumstance that is only allowed in the school setting. Moreover, despite the fact that the internet has caused some distinctions to be harder to make the internet should not be utilized as an excuse for infringing on the First Amendment rights of students arbitrarily.

Furthermore, even if the court decides that Tinker should apply off campus it should not apply to Ms. Clark's post as Ms. Clark's post caused neither a "material and substantial disruption" nor did it "collide with the rights of others." Ms. Clark's post was not visible to the students with whom the post discussed and was not posted with limits as to who could see it. It is unclear as well how many people could actually see this post. Additionally, Ms. Clark did not bring the post to campus of her own volition, the post was brought to campus by the parents of another student. While it is unfortunate that two students missed class because they felt threatened and the Principal had to meet with parents, none of this activity is sufficient to be

considered such a material and substantial disruption as to warrant the infringement of Ms. Clark's First Amendment rights.

Additionally, Ms. Clark has no record of violence or of violent interactions that would suggest she planned on physically assaulting students in anyway. There is also no clear indication in her language that suggests that Ms. Clark plans on becoming violent with any student. As a result, Ms. Clark's post did not infringe of the rights of any other students in a way that justifies an infringement of her rights.

ARGUMENT

I. MS. CLARK'S FACEBOOK POST DOES NOT RISE TO THE LEVEL OF A TRUE THREAT AND THEREFORE MUST BE AFFORDED THE PROTECTIONS OF THE FIRST AMENDMENT

In this case of first impression, the Supreme Court should affirm the Fourteenth Circuit's ruling and hold that Ms. Clark's politically motivated Facebook post does not constitute a true threat and therefore is afforded the full weight and protection of the First Amendment. A Circuit split currently exists concerning the appropriate test to be used when discerning whether speech has risen to the level of a true threat. The Fifth and Eighth Circuits have applied an objective test, *see Porter v. Ascension Parish Sch. Bd.* 393 F.3d 608 (5th Cir. 2004), *Doe v. Pulanski County Special School District,* 306 F.3d 616 (8th Cir 2002), while the Ninth Circuit applied a subjective test in *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005).

The Fourteenth Circuit's ruling in favor of Ms. Clark should be upheld and the subjective test applied. First, as seen in *Watts v. United States*, 394 U.S. 705, 708 (1968) (per curiam), the Facebook post was political and conditional in nature. Second, the Fourteenth Circuit properly applied the subjective test in determining if Ms. Clark's speech was a true threat. And finally, even if this Court adopted the objective test, Ms. Clark did not knowingly or intentionally

communicate her comments to any transgender students. Therefore, even if this court adopted an objective approach to restricting speech, her post would similarly fail to be a true threat.

a) Ms. Clark's Post was Political and Conditional in Nature

It is well settled that the First Amendment does not permit the silencing of speech simply because the speech may cause "an adverse emotional impact on the audience." *Hustler Magazine v. Fahvell*, 485 U.S. 46, 55 (1988). Admittedly, there are narrow exceptions to this fundamental principle of American legislative and jurisprudential history. The School District of Washington County contend that one such exception is relevant to the case at bar. Namely, that Clark's Facebook post constituted a "true threat" and is therefore subject to suppression under *Watts v. United States*, 394 U.S. 705. In *Watts*, the seminal case that carved out the true threat exception to speech protections, a political protester demonstrated his opposition to the Vietnam War by stating that "[I]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court held that although this was a crude way of expressing discontent over the Vietnam War, the marks were merely offensive and did not constitute a true threat. *Id.* at 708. The Court, in determining that the inflammatory and offensive speech aimed at the president was nevertheless protected, noted that the speech was made in the course of a political protest, was conditional in nature, and elicited laughter from individuals with whom the petitioners ideas were shared. *Id.* Although the court in *Watts* did not concern the silencing of underage student protest, subsequent lower court decisions have applied the true threat analysis to student speech. *See Porter,* 393 F.3d 608; *Cassel*, 408 F.3d 622; *Doe*, 306 F.3d 616.

Justice Jackson was correct in his assertion that "probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *West*

Virginia State Board of Education v. Barnette, 63 U.S. 624 (1943). Such assertions still ring true seventy-four years later. In the case at bar, Ms. Clark took a stance in opposition to a school policy she was forced to adhere too when she said that "[T]his 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." Franklin Aff., Ex. C. The post was made in reference to the new school policy titled Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students. This policy "requires all athletics programs and activities be conducted without discrimination based on sex, sexual orientation, gender expression, or gender identity" in such situations as locker room accessibility and participation in school sponsored sports. Franklin Aff., Ex. A. Ms. Clark took the political position that "it is wrong, as well as dangerous and unfair, for the Washington School District to allow transfemales or gender nonconforming biological male students to play on girls' sports teams." Clark Aff., ¶ 9. Although Respondents may try to argue that the political nature of her post is secondary to the allegedly threatening comments, Ms. Clark's political stance come prior to the comments that upset Ms. Anderson and make up more than half of the post. Franklin Aff., Ex. C. Clearly such assertions are political in nature. In fact, the political ramifications of compelling students to accept transgender students being allowed to use whichever gendered restroom they identify with is an issue so contentious that this Court recently granted certiorari on that exact question. *See Gloucester County School Board v. Grimm*, 822 F.3d 709 (4th Cir. 2016) *cert granted*, 85 U.S.L.W. 3202 (U.S. Oct. 28, 2016) (No.16-273), deciding whether the Obama Administration can compel public schools to allow trans- and gender non-conforming students to use whichever bathroom they personally align with. So, although Ms. Clark was not in the midst of a physical protest as seen in *Watts*, her

comments concerning the new school policy were clearly political and were a modern form of protest concerning a currently contentious issue.

Also, as seen in *Watts*, Ms. Clark's comments were conditional in nature. By stating that "Ms. Anderson better watch out" Ms. Clark's comments contain a conditional notion of proximity to Ms. Anderson and other gender non-conforming students. Franklin Aff., Ex. C. Again, the similarity to the comments seen in *Watts* are relevant. The protester in *Watts* said he *wanted* the President in his rifles sights if they ever made him carry a rifle. *Watts*, 394 U.S. 705 at 706 (emphasis added). Ms. Clark, by contrast, stated only that Ms. Anderson should "watch out." Franklin Aff., Ex. C. As opposed to reading these comments as Ms. Clark wanting to injure Ms. Anderson, the phrase "watch out" has an element of seeking to avoid those with whom her political and religious ideology is at odds with. Never did Ms. Clark state or even imply that she wanted to injure anyone. In fact, Ms. Clark has no history of any school disciplinary action nor any violent behavior. Clark Aff., ¶ 1. What's more, although respondents may try to argue that Ms. Clarks comments were not conditional because she would inevitably see Ms. Anderson again, such an argument fails to give credence to the realities of Mr. Watt's conditional comments. Although the district court found it "unlikely that the protester would meet the President face-to-face," a meeting was not required to make his alleged threat come to fruition: the only thing shooting the President was conditional on was being within rifle range of the President. *Kimberly Clark*, C.A. No. 16-999. In addition, the school could have simply required the two students to stay away from each other, as opposed to punishing Ms. Clark based on her constitutionally protected right to the freedom of speech.

Finally, the third factor the Court found relevant in *Watts* was that the comments elicited laughter. *Watts,* 394 U.S. 705. It is simply unclear if the post generated by Ms. Clark caused her

friends who read it to laugh. Although the School District of Washington County may contend that no one would laugh at such offensive language, in *Watts* an entire crowd laughed at the idea of assassinating our Commander in Chief. *Watts* at 708. Any such contention that no one would laugh at an offensive Facebook post is mere conjecture. What's more, silencing speech because we are unaware if the intended audience laughed would go directly against the notion that speech may not be suppressed simply because society would likely find the idea offensive or disagreeable. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

b) This Court Should Adopt the Subjective Standard in determining When Speech Constitutes a True Threat

In *Virginia v. Black*, this Court refined what it meant for speech to constitute a true threat as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *Virginia v. Black, 538 U.S. 343,* 359 (2003). Following this Court's decision in *Virginia v. Black,* federal appellate courts have split in their application of *Virginia v. Black*. In determining when speech loses its constitutionally afforded protections vis à vis a true threat analysis, the Ninth Circuit adopted a subjective test. *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005). In *Cassel*, a disgruntled tenant living on property in California threatened multiple individuals interested in potentially buying land adjacent to where Mr. Cassel lived. *Id.* at 625. He claimed that child molesters and murderers lived nearby, and that if anything were to be built on the adjacent and for sale land he would personally see to it that the structure burned down or was stolen from. *Id.* While the district court in this case noted in its opinion that this ruling was about a federal statute and not disciplinary actions within a school, the Ninth Circuit nevertheless properly interpreted the true threat analysis in *Virginia v. Black* to require subjective intent. *Id.* at 633. The court felt "bound to conclude that speech may be

deemed unprotected by the First Amendment as a "true threat" only upon proof that the speaker subjectively intended the speech as a threat" *Id.*

What's more, this subjective test is not without support from at least two Supreme Court Justices. In *Rogers v. U.S.,* 422 U.S. 35 (1975), Justice Marshal, in a concurrence joined by Justice Douglas, interpreted a federal statute making it illegal to threaten the President to "require proof that the speaker intended his statement to be taken as a threat." *Id.* at 48. Justice Marshal correctly weighted the interests of protecting citizens against the harm of threatening speech and upholding the constitutional protections of speech so essential to a democratic and free nation. Justice Marshal and the Ninth Circuit are in accord that a speaker need not intend to carry out the threats. *Id.*, *see also Cassel, 408 F.3d at* 627-628. Indeed, they simply require a showing that the speaker subjectively intended the speech to be taken as a threat. *See Rogers,* 422 U.S. 35; *Cassel*, 408 F.3d 622. This is an optimal balance. Justice Marshall correctly asserted that a purely objective test, as proposed by Respondents and adopted by various circuit courts, would too easily allow for the restriction of ideas and political discourse by essentially holding the suppression of speech to a negligence standard. Justice Marshal demonstrated his disdain for an objective standard when he wrote

> "In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes, see *Morissette v. United States*, 342 U.S. 246 (1952); we should be particularly wary of adopting such a standard for a statute that regulates pure speech. See *Abrams v. United States*, 250 U.S. 616, 626-627, (1919) (Holmes, J., dissenting).

This presumption taken against an objective approach is nothing new. Justice Douglas writing a concurrence in *Watts*, warns us of the dangers of adopting an objective approach to suppressing speech by providing a historical context to his argument. Claiming that the charge in *Watts* "is of an ancient vintage" Justice Douglas gives multiple examples of when speech was suppressed and

individuals killed or incarcerated based on speaking out against their respective governments. One such story concerned an innkeeper who told his son that "if thou behaves thyself well, I will make thee heir to the Crown." *Watts,* 394 U.S. 705, 709. That innkeeper was quartered and eventually hung. As one scholar put it, Justice Douglas used this appalling historical story as "a clear reminder that words can be misconstrued" and that the story "highlights the need to protect speakers from the vagaries of the reasonable person test" *See, Watts,* 394 U.S. 705, 709, Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. L. REV. 283.

Thus, the lower court correctly used the balanced subjective approach. Ms. Clark did not have the requisite subjective intent to threaten Ms. Anderson or any other gender non-conforming students. As clearly stated in her affidavit, Ms. Clark's comments about Ms. Anderson and other "TGs" "getting it" were merely jokes and there is nothing in the record that would indicate a different subjective state. Clark Aff., ¶ 7. What's more, as the appellate court properly pointed out, while Ms. Clarks language "is not comparable to specific threats of physical harm or property damage found in other case." *Kimberly,* No. 17-307, (*citing Watts,* 394 U.S. at 706*; Cassel*, 408 F.3d at 625*; Lovell by & Through Lovell v. Poway Unified Sch. Dist.,* 90 F.3d 367, 369 (9th Cir. 1996) (I'm so angry, I could shoot someone," and "If you don't give me this schedule change, I'm going to shoot you!)). The comments in question stating that "Ms. Anderson better watch out at school, I'll make sure IT gets more than ejected" and that "I'll take IT out one way or another," were correctly interpreted by the appellate court. The court found that Ms. Clark's comments could as readily be seen to "imply social ostracism as violence, particularly when one considered that they were posted by a fourteen-year-old-girl with no known propensity to violence." *Kimberly,* No. 17-307.

In light of the above, the appellate court was correct in holding that a subjective test is the appropriate test. "Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection." *American Civil Liberties Union v. Reno*, 31 F.supp.2d 473 (E.D. PA. Feb. 1, 1999).

c) Ms. Clark's Post Would Similarly Fail to Meet an Objective Standard Because She Lacked the Required Intent to Communicate

If this Court held that an objective approach to a true threat analysis is more appropriate, Ms. Clark's speech would still fail to constitute a true threat. This is true whether the court adopts the reasonable recipient test, as articulated by the Fifth and Eighth Circuit's, or a multi-factor test similarly put forth by the Eighth Circuit. *See Porter,* 393 F.3d 608; *Doe*, 306 F.3d 616; *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1995). Ms. Clark's Facebook post fails to reach the requirements of either of the aforementioned objective standard's because she did not knowingly or intentionally communicate her Facebook post to either Ms. Anderson or any other transgender or gender non-conforming students.

In *Porter Ascension School District,* without mention of Justice Douglas's concurrence in *Watts* or Justice Marshall's concurrence in *Rogers*, the Fifth Circuit applied an objective reasonable recipient test to a student's speech in determining if the speech reached the level of a true threat. At issue was whether a student's drawing, depicting the destruction of the school, racial slurs, and a brick being hurled at the principle, was speech protected under the First Amendment. *Porter,* 393 F.3d 608, 611. Two years after the student depicted his school under siege by helicopters, gasoline tankers, and missile launchers, his brother, unbeknownst to him, brought the notebook to school. *Id.* A bus driver got hold of the drawing, immediately confiscated it, and reported it to the school authorities the next day. *Id.* The artist in question had no idea the drawing had been taken to school or confiscated until, upon arriving at school the

next day, he was called into the Principles office and questioned about the drawing. *Id.* at 612. At the time of its apprehension the drawing two years old. *Id*. The Fifth Circuit held that in order to distinguish constitutionally protected speech from a true threat, one must ask 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 *citing Doe,* 306 F.3d 616. However, the court declined to decide if the drawing met this test because, as seen in the case at bar, the student did not adequately communicate his speech in a manner that would permit the court to apply the objective test. *Id.* at 617

The Fifth Circuit's refusal to decide whether the drawing was a true threat was based on the fact that the student "did not intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the First Amendment." *Id.* The court opined that since the brother took the drawing to school, and the artist only shared it with his mother, brother, and a friend who at the time was living in their home, the speech was not intentionally or knowingly communicated. *Id.* at 611, 617. At the opposite end of the spectrum in regard to knowingly communicating speech, in *Doe,* 306 F.3d 616, a student wrote "two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder K.G." *Id* at 619. In contrast to *Porter* and the case at bar, the intended recipient of the letters, K.G., was made aware of the existence of the letters by the author himself. *Id.* Clearly, writing a letter expressing a desire to rape and murder, and telling the intended recipient of the existence of the letters and admitting you authored them, is an intentional communication. However, to rule that Ms. Clark knowingly or intentionally communicated her discontent to Ms. Anderson would be inapposite. Although Ms. Clark openly admitted that "some of her friends *might* pass her post on to others" this is a dangerously low bar to set for restricting speech generated inside the privacy

of one's home. Franklin Aff., ¶ 14. Adopting such a rule would allow for the restriction of political discourse if the speaker even suspects that a listener, or participant in an ideological debate, may share aspects of the conversation with others who may misconstrue what was said and objectively feel threatened.

Furthermore, Ms. Clark admission that "she knew that some of her friends who viewed her message were likely to alert Ms. Anderson or other transgender students to her post," does not meet the definition of knowingly as articulated by this court. Franklin Aff., ¶ 14. In *U.S. v. Bailey*, a person is "said to act knowingly if he is aware that that result is practically certain to follow from his conduct, whatever his desire may be as to that result." *U.S. v. Bailey,* 444 U.S. 394, 404 (1980) (*citing United States Gypsum Co.,* 438 U.S. 422, 445). Although *Bailey* was a criminal case, *Watts* similarly concerned a criminal statute enforcing restrictions on speech and has subsequently be held to apply to student speech generated on and off campus. We urge this court to adopt the practically certain test as articulated in *Bailey* and *Gypsum* when deciding whether or not speech sheds its constitutional protections and lends itself to censorship. Holding otherwise, that an admission of likelihood is equivalent to practical certainty, would severely curtail the very "function of speech to free men from the bondage of irrational fears" by too easily limiting inflammatory speech essential to modern democracy. *Whitney v. California*, 274 U.S. 357 (1927).

Another variation of an objective test applied to true threats was articulated by the Eighth Circuit in *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1995). In that case, which concerned an abortion protester, the court looked to five factors in determining whether the statements made by the protester constituted threats of force. *Id.* at 925. These factors, although not dispositive, included: (1) reaction of the recipient; (2) whether threat was conditional; (3)

whether threat was directly communicated to its victim; (4) whether the maker of the threats made similar threats in the past; and (5) whether the victim had reason to believe the maker of the threats had a tendency to engage in violence. Ms. Clark's comments would fail to be restricted under such an objective test. Ms. Clark had never made similar threats in the past nor did she directly communicate her speech to Ms. Anderson. Furthermore, although the Ms. Clark and Ms. Anderson got into a confrontation during a basketball game, nothing in the record strongly indicates that Ms. Clark had a propensity to engage in violence. In addition, as articulated in Section A of this brief, Ms. Clark's speech was conditional in nature. Considering Ms. Clark fails to meet four of the five prong test articulated by the Eighth Circuit, if the Court adopted the multi-factored objective test to restricting speech, Ms. Clark's speech should be upheld as constitutionally protected.

II. THIS COURT MUST UPHOLD THE CIRCUIT COURT RULING THAT MS. CLARK'S FIRST AMENDMENT RIGHTS WERE VIOLATED

The majority of Circuits have extended the reasoning of the Supreme Court Case *Tinker* beyond the schoolhouse gates and have found that where a material disruption occurs on campus or where one could be reasonably foreseeable by school authorities' regulation of the off-campus speech of students is permissible. *Boucher v. School Bd.*, 134 F.3d 821, 929 (7th Cir. 1999), *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 399 (2d Cir. 2007), *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012), *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011). The Fifth Circuit has acknowledged that the internet changes the discussion by blurring the distinction between campus and off-campus and found that when a student "intentionally directs at the school community speech" a student's speech may be subject to regulation. *Bell v. Itawamba County Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015).

Despite these decisions, this court should adopt the position of several of the Fifth Circuit's judges in *Bell*, the judges who disagreed with the majority, and Justice Smith of the Third Circuit. These judges found that the "special circumstances" of the school environment that give rise to the ability to regulate speech are absent beyond the schoolhouse gates. *Id.* at 422 (quoting Tinker, 393 U.S. at 506). In Blue Mountain School District, Judge Smith recognized important language of Justice Alito inferring school speech on campus is different and stated that "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Blue Mt. Sch. Dist.*, 650 F.3d ay 936.

a. The Tinker Standard Does Not Apply to Ms. Clark's Speech, As Tinker Never Extends Beyond the Schoolhouse Gates

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Students are "persons" under the constitution who therefore are "possessed of fundamental rights which the State must respect." *Id.* at 511.

In *Tinker* the Court set forth the foundation for evaluating First Amendment Rights of students who attend public schools. The court found that the "special characteristics" of the public-school environment creates some exception to freedom of expression. *Morse v. Fredrick*, 551 U.S. 393, 395 (2007) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1986)). The court recognized that there is some hindrance to your First Amendment Rights within those gates given certain circumstances. This hindrance however, is attributable to the "special characteristics" of the school environment. *Id.* at 395. Special characteristics, that in fact do not exist when a student is off campus. There is no precedent by the Supreme Court to suggest that "minors' constitutional rights *outside of school* are somehow qualified if they

coincidentally are enrolled in a public school." *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 415 (5th Cir. 2015).

The reasoning behind an infringement of first amendment expression within the public school comes about because of the nature of the school environment and the need for authority to allow schools to function properly and serve their important purpose. *See Tinker*, 393 U.S. at 509. The allowance of the regulation of free speech is "grounded in 'the special characteristics of the school environment.'" *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 937 (3d Cir. 2011) (Smith, J., concurring). Throughout the language of various of school speech cases the Court has emphasized this grounding and has "underscored *Tinker*'s narrow reach" to this environment. *Id.* at 938.

A strong example of this type of language appears in dicta throughout *Morse v. Frederick*. *Morse*, 551 U.S. 393, 399. When disputing the claim that the case is not one of school-speech the Court in *Morse*, looks to certain factors to explain why the speech is in fact school speech, stating "the event occurred during normal school hours," repeating that the event was one that was approved as a "class trip." *Id.* Of specific importance is that the Court says that Frederick cannot claim that this is not school speech because he cannot legitimately "claim he is not at school." [1] *Id.* This language strongly implies that what makes Frederick's case one of school speech and of the ability to be regulated by the school is the fact that the event occurs at school and within its hours. Had *Tinker* applied beyond school and its' hours than "this discussion would have been unnecessary." *J.S.*, 650 F.3d at 938.

The court has been clear that it's school speech cases applies only on campus. In the *Bethel v. Fraser*, Justice Brennen emphasizes that the decision would not be applicable to off-campus situations. Stating in his concurrence that "these statements…*could not*, refer to the

government's authority generally to regulate the language used in public debate outside of the school environment." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 689 n.1 (1986).

Justice Alito has also acknowledged that the ability to regulate expression is based on the "special characteristics" of the school when he implies that "*Tinker*'s substantial disruption test did not apply to student's off-campus speech" by stating in his *Morse* concurrence that "*Tinker* allows schools to regulate school student speech…in a way that would not be constitutional in other settings." *Id.* at 689, 938 (quoting *Morse*, 551 U.S. 422 (Alito, J., concurring)). Additionally, in Hazelwood School District, the court while discussing Tinker finds that Tinker is a case that "addresses educators' ability to silence a student's personal expression that happens *to occur on the school premises*." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (emphasis added).

Allowing *Tinker* to apply off campus and beyond the schoolhouse gates would mean that public schools could have the ability to regulate any student's off campus speech that could potentially cause a material disruption on campus. This gives the school the ability to regulate all of student's free speech despite the location, while some circuits have required it to be reasonably foreseeable that the speech could make its way to campus this distinction is arbitrary as those cases often find any internet speech to reasonably foreseeably be able to make its way to campus due to the nature of the internet. *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012), *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011).

In these cases, the courts applying *Tinker* to off-campus speech have come up with different arbitrary ways to determine when *Tinker* applies, attempting to fit *Tinker*, a square peg, into a round hole. For example, in *Doninger v. Niehoff* the Second Circuit found that the test to determine if Tinker applied was if "it was similarly foreseeable that the off-campus expression

might also reach campus." *See Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008). The court further states that "the question is not whether there has been actual disruption" and that school officials can regulate off-campus speech when they "might reasonably portend disruption." *Id.* This language, like various language of courts when they extend *Tinker*, vastly underestimates "the significance of the various constitutional interests" *Bell*, 799 F.3d 425. In addition to being inconsistent with *Tinker*, an analysis over whether it is "reasonably foreseeable" that expression could come to the attention of school officials should not be included in the consideration as it is "reasonably foreseeable" that any speech made by students off campus to the people who they know, which will almost always include the school community, could come to the attention of officials at the school.

Ms. Clark's comments occurred from a post she made off-campus, a post she wrote while in her home. Additionally, the post was only accessed by other students while they were also off campus. While the post eventually was printed out and brought to campus it was done so by a parent. In *Porter*, the court found it to be significant that the student did not "intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the First Amendment." *Porter v. Ascension Sch. Dist.*, 393 F.3d 608, 617 (5th r. 2004). Extending *Tinker* would allow "schools to police their students' Internet expression anytime and anywhere—an unprecedented and unnecessary intrusion on students' rights." *Bell*, 799 F.3d at 405.

b. <u>The nature of the internet should not create a reason for extending Tinker and regulating student's self-expression beyond campus</u>

In 2011 ninety-five percent of teenagers used the internet. Almost all high school students, middle school students and their friends are utilizing this resource to communicate with the world and each other. We want to encourage students to utilize their freedom of expression in

this way, especially in regards to issues they have with school policies, as "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

The Supreme Court has discussed before that internet speech is not to be treated differently than any other speech, precedents "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet." *Bell,*799 F.3d at 416 (*quoting Reno v. ACLU*, 521 U.S. 844, 849 (1997)).

Courts have extended *Tinker* to internet off campus speech for a few reasons all using various language, however the core of the argument with internet speech seems to stem from the fact that the internet blurs the distinction between campus and off campus. S.J.W. *ex rel. Wilson v. Lee's Summit Sch. Dist.*, 696 F.3d 771, 777–778 (8th Cir. 2012) (quoting *Doninger*, 527 F.3d at 50) also (quoting *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 937 (3d Cir. 2011)). The Fifth Circuit stated in *Bell*, the case in which they extended *Tinker* beyond the campus, that "the pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction." *Bell*, 799 F.3d 395-96.

To extend Tinker off campus and to give the power of regulation of speech to school administrators beyond the schoolhouse gates simply because students choose to discuss their frustrations, or poke fun at a teacher by way of the internet, their chosen mode of communication, and a resource that is more easily accessible to discovery by school administration, is an unconstitutional limit to the freedom of expression that students have as citizens.

The courts have not yet recognized however the extent of their decisions and have incorrectly tried to compare internet speech with speech that has the ability to be regulated under *Tinker*. For example, the court in *Doninger* attempts to justify their allowance of a restriction of free speech by comparing Avery's online post with a leaflet, stating "if Avery had distributed her electronic posting as a handbill on school grounds this case would fall squarely within the Supreme Court's precedents. *Doninger*, 527 F.3d 49. This comparison however speaks around the issue, the right comparison is not if Avery had printed out her blog and distributed it on campus, but if Avery had printed it out and distributed it *off campus*. If the internet hadn't yet existed Avery would have created a leaflet of her grievances and passed it around off campus to students urging them to contact the administration, speech that would clearly fall within the protection of the First Amendment. *See Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 215 (3d Cir. 2011) (discussing *Thomas v. Board of Educ.*, 607 F.2d 1043 (2d Cir. 1979)).

Thomas took place in 1979 before the internet. A student's ability to express themselves and discuss ideas freely was not limited in that case and it should not be limited now simply because in today's day what used to be on newspapers is now online. While it is more easily accessible to administration it is not the fault of students that the internet is more far reaching. Additionally, in Ms. Clark's case the post did not reach the school by way of the internet, it was printed out and brought in. The internet should not become an exception to students off campus freedom of speech as such an exception would be arbitrary and does not actually get at the justifications that courts are giving for why this off campus speech is restricted.

c. <u>Because Tinker extends beyond the schoolhouse gates Ms. Clark's first amendment right was not violated because her speech constituted a material disruption and an infringement of the rights of others</u>

A student's speech is not protected by the First Amendment if it either "materially disrupts classwork or involves social disorder," or amounts to a collision with "the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508. However, Tinker also found that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression" *Id.* at 508.

As mentioned previously, various circuits in extending Tinker to off campus speech, have done so in various ways. Some courts have found that there in fact was a material disruption, or that a material disruption was reasonably foreseeable or could be "reasonabl[y] forecast." *Boucher v. School Bd.*, 134 F.3d 821, 829 (7th Cir. 1999). *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007). In *Wisniewski*, the Second Circuit found that there could be a "foreseeable risk of substantial disruption within a school." *Id.* Similarly, the Eighth Circuit asks if it is reasonably foreseeable that the speech will reach the school community. *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012). The Fourth Circuit analyzes if there is a sufficient nexus with the school community and the speech itself. *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011). Finally, the Fifth Circuit found held in *Bell*, that "when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher" their speech is governed by Tinker regardless of if that speech was off campus. *Bell*, 799 F.3d 396.

While the Seventh Circuit in *Boucher* uses reasonably foreseeable or reasonably forecast language that case is distinguishable from this case as the speech that would cause the disruption was in the form of a newspaper and specifically was handed out *on campus* "the June issue of *The Last* was distributed...in bathrooms, in lockers and in the cafeteria at Greenfield." *Boucher*, 134 F.3d at 822.Should the court choose to adopt the Fifth Circuit's test Ms. Clark's

First Amendment right was certainly violated as she did not "intentionally direct" her comments at the school. Ms. Clark did not even intend for the individuals discussed in the post to see it, despite the fact that it was possible. *Bell*, 799 F.3d 396.

A major problem with off campus speech is that it is a lot more difficult to discern when it may or may not cause a material disruption. It appears that some courts give strong deference to the school officials, this however is inappropriate as the schools are ineffective at assessing the importance of speech and also oversensitive to situations which might somehow make their way to campus. Ms. Clark's post, while discussing school policies, did not call other students to action, did not incite any sort of call to protest, and did not ask students to contact the school or cause any sort of disruption. While she did post it to her Facebook page and her page could be viewed by students at the school only two people "liked" it on her page. Additionally, the page could only be viewed by her friends. This is starkly different from a case like *Bell* where the student posted a rap on YouTube and the video could be viewed by anyone in the world including any school administrator or parent. *Bell*, 799 F.3d at 383. Therefore, it was not reasonably foreseeable that any substantial or material disruption would occur that would warrant an infringement of her First Amendment right, as pure "apprehension of disturbance" is simply not sufficient.

The District Court determined that a material disruption did in fact happen and also that Ms. Clark's Facebook post collided with the rights of other students. In many cases where students online make calls to action that could foreseeably involve hundreds of phone calls tying up the time of administration or encourage other students to take similar conduct it has been found to be a potential "material" disruption. *Bell*, 799 F.3d at 400 ("it encourages and incites

other students to engage in similar disruptive conduct"), Boucher, 134 F.3d at 829 (detailing how to hack the school computers).

The events that followed the posting were simply not sufficient to be considered a material and substantial disruption. Multiple students were not removed from classes for any reason, no school activities were interrupted, while the administration did get involved it was only one meeting involving all of the parents, something that is not a substantial disruption from their job, as their job often involves meeting with parents.

In addition to deciding there was a material disruption at the school, the District Court also held that Ms. Clark's Facebook post collided with the rights of other students, specifically Ms. Anderson, Ms. Cardona, and other transgender females. This case is very similar to *Burge v. Colton School District*, and this court should follow that court's lead. In Burge, the court found that despite writing on the internet that their teacher "needed to be shot," the student "did not intend to threaten or otherwise communicate with Ms. Bouck and did not seriously believe that Ms. Bouck should be shot." *Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057, 1061 (D. Or. 2015). Similarly, here, Ms. Clark never intended to communicate anything in her post to any of the students whose rights would potentially have been collided with as she posted it to her private Facebook page where none of them could see it.

The Burge court also found it significant that the student had a clean record and there was no particular investigation by the school into if the student actually had access to any sort of guns. *Id.* at 1061. There is no evidence that Ms. Clark is susceptible to any sort of violence or that she has a history of any discipline. While one could point to the verbal argument on the basketball court, that was an argument related to a bad call made, and is not something unusual to happen in sports. The source of that discussion was different from the one which took place on

Ms. Clark's post. Additionally, the student in the Burge case specially stated that the teacher "needed to be shot." *Id.* at 1061. Ms. Clark's post did not specifically state any sort of violent action. While she did state she would "take IT out" that could mean a number of different things, is significantly less specific and violent than that a teacher "needed to be shot" and Ms. Clark stated to the principal that she did not intend in any way to actually take any sort of violent action. It is not the case that Ms. Clark's post caused a substantial material disruption to the school or that her post interfered with the rights of others. As a result, it was a violation of her First Amendment rights for her off campus online speech to be regulated.

CONCLUSION

For the above states reasons, the Respondents asks the Supreme Court of the United States to affirm the lower court's ruling upholding the validity Ms. Clark's First Amendment Protections.