No. 16-9999

In the Supreme Court of the United States

WASHINGTON COUNTY SCHOOL DISTRICT,
Petitioner,

v.

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

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

BRIEF FOR RESPONDENT

TEAM L
COUNSEL OF RECORD

ORAL ARGUMENT REQUESTED

STATEMENT OF THE ISSUES

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 where school authorities conclude that the post was materially disruptive and collided with the right of other students to be secure at school?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES

OTHER CASES

CONSTITUTIONAL PROVISIONS

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on January 5, 2017. *Clark v. School District of Washington County, New Columbia, ("Clark II")*, 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 ("Ms. Clark"), a minor, by and through her father Alan Clark, brought this First Amendment action against Petitioner Washington County School District ("the School District") challenging the constitutional validity of the School District's disciplinary measures taken against her and seeking declaratory relief. *Clark v. Washington County School District ("Clark I")*, C.A. No. 16-999, at slip op. at 3 (D. New Columbia Apr. 14, 2016). The parties filed cross motions for summary judgment. *Id.* at 1. The District Court granted the School District's motion, holding that the School District's actions did not violate the First Amendment. *Id.* at 12.

Ms. Clark submitted a timely appeal to the United States Court of Appeals for the Fourteenth Circuit. *Clark II*, at 3. The Fourteenth Circuit reversed the District Court's decision and remanded the case with instructions to grant Ms. Clark's Motion for Summary Judgment. *Id.* The School District filed a petition for writ of certiorari, which this Court granted.

STATEMENT OF THE FACTS

In August 2015, Ms. Clark was a fourteen-year-old student in good standing at Pleasantville High School. R at 2. She had never had any history of disciplinary infractions or violent behavior. *Id.* She was a member of the girls' basketball team. *Id.* That month, the School District adopted a new policy allowing transgender students to participate in school

sports based on their chosen gender identity. *Id.* Pursuant to this policy, Taylor Anderson ("Ms. Anderson"), a transgender sophomore student who previously played on the boys' basketball team, moved into the girls' team with Ms. Clark. *Id.*

At an intrasquad basketball game the next month, Ms. Anderson engaged Ms. Clark in a verbal argument following an adverse call by the referee. *Id.* at 2, 23. As a result, the referee ejected both players from the game. *Id.* at 2. Later that night, Ms. Clark wrote a post on her personal Facebook page from her personal computer in her bedroom at home about her beliefs on the School District's new policy. *Id.* at 23. The post states:

> I can't believe Taylor was allowed to play on a girls' team! That boy (that IT!!) should never be allowed to play on a girls' team. TRANSGENDER is just another word for FREAK OF NATURE!!! This new school policy is the dumbest thing I've ever heard of! It's UNFAIR. It's IMMORAL and it's AGAINST GOD'S LAW!!!
>
> Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too… *Id*. at 18.

Two of Ms. Clark's Facebook friends 'liked' the post and none commented. *Id.* Ms. Clark is not Facebook friends with Ms. Anderson or any transgender student. *Id.* at 3. Ms. Clark thought only her Facebook friends would see her post, though she knew they could pass it on. *Id.*

Ms. Anderson's parents chose to keep her home from school for two days following Ms. Clark's Facebook post. *Id.* at 3. After that time, Ms. Anderson's parents and the parents of another transgender student ("Ms. Cardona") asked to speak with the principal. *Id.* at 2-3. At the meeting, the students were visibly upset and the parents expressed their concern that Ms. Clark might resort to violence. *Id.* at 3. A few other students also complained about the post. *Id.* at 14. The principal called Ms. Clark's parents and asked them to meet with him. *Id.*

At that meeting, Ms. Clark restated her views that the School District's policy was unfair, dangerous, and immoral. *Id.* at 19. Ms. Clark also clarified that she was simply joking in her

comments about Ms. Anderson and the other transgender students. *Id.* at 3. After the meeting, the principal suspended Ms. Clark for three days. *Id.* On the same day, Ms. Clark's father filed an appeal contesting the suspension with the School District's governing board. *Id.* Over one week later, the School District responded by letter stating that it was upholding the decision. *Id.*

After the suspension, Ms. Clark resumed her education at Pleasantville High School and is currently enrolled as a sophomore student. *Id.* at 4. However, Ms. Clark's suspension will remain as a disciplinary sanction on her permanent record, which could negatively impact her future high school years, college admissions, and employment opportunities. *Id.* at 4, 20.

On December 7, 2015, Mr. Clark, on behalf of his daughter, filed a complaint in the District Court seeking declaratory relief for the School District's violation of his daughter's First Amendment right to freedom of speech. *Id.* The parties filed cross motions for summary judgment. *Id.* at 1. The District Court granted the School District's motion, holding that the School District's actions did not violate the First Amendment because Ms. Clark's post was a "true threat" and because it caused a "material disruption" and "collided with the rights of other students to feel secure" under *Tinker*. *Id.* at 12. Ms. Clark appealed to the Fourteenth Circuit. *Id.* at 27. The Fourteenth Circuit reversed the District Court's decision and remanded the case with instructions to grant Ms. Clark's motion. *Id.* at 39. The court declined to apply *Tinker*, finding that it does not apply to purely off-campus student internet speech. *Id.* The court also held that Ms. Clark's post was protected speech under the First Amendment, as it was not a "true threat." *Id.* The School District filed a petition for writ of certiorari, which this Court granted.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's decision and find that Petitioner violated Ms. Clark's First Amendment right to freedom of speech when it suspended her for criticizing its new policy in a post made at her home on her personal Facebook page.

Ms. Clark's post is fully protected speech under the First Amendment as it relates to a matter of public concern. *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011). Ms. Clark's post, publically criticizing the School District's new policy through political hyperbole falls squarely within the First Amendment's protections. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (Supreme Court holding that a speaker's threat to shoot the President was mere political hyperbole when understood in its context at a political rally).

Further, Ms. Clark's post was not a "true threat." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Courts apply either a subjective or objective test in their true threat analysis. *See United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (applying a subjective analysis); *but see Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616-17 (5th Cir. 2004) (applying an objective analysis). The Fourteenth Circuit approved of the subjective test, but also considered objective factors. Subjectively, Ms. Clark made it clear that she never intended her words to be a threat. Objectively, this conclusion also stands. Ms. Clark, a fourteen-year-old girl with no violent history, shared her strong views on a school policy with her Facebook friends who "liked" it. Viewing this post as a whole, as required by *Watts*, it is clear that Ms. Clark was simply venting to friends and not making a true threat. Therefore, under either test, the same conclusion must be reached: Ms. Clark's words are protected by the First Amendment.

Furthermore, this Court should find that *Tinker* does not apply to off-campus student internet speech, like Ms. Clark's, which was created on a personal computer during after-school hours. First, *Tinker* never applies to off-campus speech because the "special characteristics of the school environment" are absent when a student like Ms. Clark engages in internet speech from inside her home. Additionally, this Court does not have to apply *Tinker* to off-campus student speech because it can apply the true-threat analysis instead like the Fifth and Eighth

Circuit have. Applying *Tinker* to off-campus student internet speech will lead to severe consequences. Alternatively, if this Court finds that *Tinker* applies to some off-campus speech that can satisfy additional threshold tests like "sufficient nexus" or "reasonable foreseeability," here, it should nonetheless find that *Tinker* is inapplicable because it fails to satisfy either test.

Finally, even if this Court finds that *Tinker* applies to Ms. Clark's post, the Court should find that Petitioner nevertheless violated Ms. Clark's First Amendment right to free speech because Ms. Clark's post neither created a material and substantial disruption to school activities nor collided with the rights of others. Ms. Clark's post had a de minimis impact on the school community, both in the classroom and online, and her post cannot be understood as a violent threat directed at other students. For the foregoing reasons, Respondent respectfully requests this Court affirm the Fourteenth Circuit's decision.

ARGUMENT

I. Ms. Clark's Words Are Protected Speech Under the First Amendment as a Matter of Public Concern, Not Unprotected True Threats

As the Fourteenth Circuit below recognized, "[t]he First Amendment and its guarantee of free speech are at the core of the freedoms we enjoy as Americans." R at 28. This broad freedom is subject to narrow exceptions for limited types of speech such as obscene, libelous, and "fighting" words. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). "True threats" are also an exception. *See Black,* 528 U.S. at 359. However, speech regarding matters of public concern falls squarely within the First Amendment's protections. *See Watts*, 394 U.S. at 708. The critical constitutional issue is distinguishing true threats from political hyperbole. *Id.* at 707–08. For the following reasons, Respondent respectfully requests that this Court affirm the Fourteenth Circuit's holding and find that Ms. Clark's words are protected by the First Amendment as political speech, and not a true threat.

A. Ms. Clark's words criticizing the School District's policy are political speech regarding a matter of public concern entitled to First Amendment protection

Matters of public concern are protected speech under the First Amendment. *See Snyder,* 562 U.S. at 451-52 (Supreme Court finding that speech on a matter of public concern is entitled to special protection because it "occupies the highest rung of the hierarchy of First Amendment values" and is safeguarded "at the heart" of the First Amendment). This Court has found that speech deals with a matter of public concern in a broad variety of situations—whether the speech "relat[es] to any matter of political, social, or other concern to the community." *Id.* at 453.

This Court found that the speaker's words in *Watts* were a matter of public concern. *Watts,* 394 U.S. at 708. In *Watts,* the 18-yr-old speaker was at a political rally discussing police brutality when he said, "If they ever make me carry a rifle the first man I want to get in my sights is [the President of the United States]." *Id*. at 706. In holding that this was merely political hyperbole and not a true threat, this Court reasoned that "the debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.* at 707 *citing New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This Court ultimately concluded that the speaker's "only offense here was a kind of very crude offensive method of stating a political opposition." *Id.*

In deciding whether the speech addresses a matter of public concern, courts look to the content, context, and form of the speech. *Snyder,* 562 U.S. at 453. Here, all three factors weigh strongly in favor of finding that Ms. Clark's words deserve First Amendment protection.

First, the content of Ms. Clark's post itself shows that she was commenting on a matter of public concern by using political hyperbole. Ms. Clark wrote, "This new school policy is the dumbest thing I've ever heard of! It's UNFAIR. It's IMMORAL and it's AGAINST GOD'S LAW!!!" Even the District Court admits that this part of Ms. Clark's statement was political

commentary. These words directly precede the words, "Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too...". These words are mere hyperbole. The idea that Ms. Clark would seriously use physical violence against not only Ms. Anderson but also numerous other transgender students is absurd, especially when considering that Ms. Clark has no violent history. This Court consistently finds that hyperbolic rhetoric is protected when it is used to bring attention to political views. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). As the Fourteenth Circuit recognized, the fact that Ms. Clark's ideas are "reprehensible and offensive" does not remove their First Amendment protection. Likewise, this Court states that the "inappropriate or controversial nature [of speech] . . . is irrelevant to the question whether it deals with a matter of public concern." *Snyder*, 562 U.S. at 453 (Supreme Court holding that Westboro Baptist Church's signs at a fallen marine's funeral stating that "God Hates Fags" and "Thank God for Dead Soldiers" were protected as matters of public concern).

Next, just as in *Watts*, Ms. Clark's statements were of public concern due to their political context. Courts find that statements are matters of public concern when they are made in response to political turbulence. *See Bauer v. Sampson*, 261 F.3d 775, 783-84 (9th Cir. 2001) (holding that a teacher's post in the school newspaper stating that he wanted to drop two tons of granite on the head of "Sherry 'Realpolitik' Miller" was a matter of public concern since the statement was made during a time of "especially contentious campus politics"). It is undisputed that Ms. Clark's statements were made just one month after the passage of the School District's new policy and on the same day as she was in an argument with a student affected by that policy. This close time proximity shows that Ms. Clark's statements were made in reaction to the turbulent times and changes in her school, putting them squarely within a political context.

Finally, the form of Ms. Clark's Facebook post shows that it was protected political speech. Courts find political speech more readily when the speech is made publicly. *Snyder*, 562 U.S. at 444 (Supreme Court holding that a protester's signs were political speech since, though they were displayed at a private funeral, they were made "in a manner designed...to reach as broad a public audience as possible" since they "spoke to broader public issues"). Ms. Clark posted her views on her Facebook page, visible to her friends and family. She stated that she was aware that her ideas may spread even beyond that reach. Further, Ms. Clark *wanted* her friends to see the post so they could see her views on an important school policy. R at 19. Since a Facebook post is a public form of speech speaking to broader public issues, the form of Ms. Clark's statement shows that it addressed a matter of public concern.

Consequently, all three factors show that Ms. Clark's words were political speech addressing a matter of public concern. This Court should thus affirm the Fourteenth Circuit's holding that they are protected by the First Amendment.

B. Ms. Clark's words are not a true threat as established in *Virginia v. Black*

Unlike matters of public concern, "true threats" are not protected by the First Amendment. However, not all threats are *true* threats. *See Watts*, 394 U.S. at 708. In *Virginia v. Black*, this Court explained that a true threat is only made "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group." *Black*, 528 U.S. at 359.[1] True threats are not "political argument, idle or careless talk, exaggeration or something said in a joking manner." *United States v. Daughenbaugh*, 49 F.3d 171, 173 n.2 (5th Cir. 1995). Rather, true threats receive no protection because they contribute nothing to social discourse. *Chaplinsky*, 315 U.S. at 572.

[1] Although *Virginia v. Black* was a criminal case, subsequent circuit court decisions have applied its First Amendment analysis in the civil context. *See e.g., Porter*, 393 F.3d at 608.

Circuits are currently split in their interpretation of *Black.* The Ninth Circuit interprets *Black* to mean that a true threat must be judged from a speaker's subjective viewpoint. *Fogel v. Collins,* 531 F.3d 824, 831 (9th Cir. 2008). However, the Fifth and Eighth Circuits use the perspective of an objectively reasonable recipient.[2] *Porter,* 393 F.3d at 616-17; *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (en banc). Despite this split, this Court has not resolved whether the true threat inquiry requires a subjective or objective analysis.[3]

1. Ms. Clark's words are not true threats under the subjective test because the record clearly shows that she did not intend to make them as a threat

The Fourteenth Circuit and the Ninth Circuit agree that *Virginia v. Black* requires courts to consider the speaker's subjective intent.[4] Though Justice O'Connor's opinion in *Black* was only for a plurality of the Court, eight Justices agreed that intentionality is essential in determining whether a true threat exists. *Black*, 538 U.S. at 343. Moreover, the Ninth Circuit rejected the objective test since no other circuit using it, even after *Black*, had "squarely addressed" whether *Black* requires a showing of intentionality. *Cassel,* 408 F.3d at 633 n. 10.[5]

Recently, the Oregon District Court applied the subjective test, finding that a student's Facebook post was not a true threat. *Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F.Supp. 3d 1057, 1068 (D. Or. 2015). After receiving a poor grade, the 14-year-old student posted on Facebook that he wanted to "start a petition to get [his teacher] fired." *Id.* at 1060. His friend

---

[2] A district court in the Fourth Circuit also used this test in a civil case. *Doe v. Rector and Visitors of George Mason Univ.,* 132 F.Supp. 3d 712, 729 (E.D. Va. 2015). The Second Circuit used this approach in a criminal case. *See United States v. Malik,* 16 F.3d 45, 49 (2nd Cir. 1994).

[3] This issue was not resolved in this Court's recent decision in *Elonis,* which came to its holding on criminal statutory grounds, without reaching the First Amendment issue. *Elonis v. United States,* 135 S. Ct. 2001, 2013 (2015).

[4] A threshold issue is a speaker's "intent to communicate" generally. *Porter,* 393 F.3d at 617. It is undisputed that Ms. Clark intended to communicate when she posted to Facebook. However, this does not resolve whether Ms. Clark meant to communicate *a threat,* for she clearly did not.

[5] Though *Cassel* was a criminal case, the Ninth Circuit has carried forward its use of subjective analysis in its later decisions in civil cases. *See e.g., Fogel*, 531 F.3d at 824.

laughed and the student replied "Ya haha she needs to be shot." *Id.* The court emphasized that it was undisputed that the student did not intend his posts to threaten his teacher. *Id.*

Similarly, the record here makes it clear that Ms. Clark did not subjectively intend her words as a threat. It is uncontested that Ms. Clark said that her remarks were merely intended as jokes. This Court has found that even statements discussing violence are not true threats when they are made in jest. *See Watts,* 394 U.S. at 707-08 (Supreme Court holding that the speaker's statement that he would "set [his rifle's] sights" on the President was not a true threat where the crowd laughed in reponse). As the Fourteenth Circuit recognized: Ms. Clark, as any 14-year-old girl would, merely intended to vent her frustration with the School District's policy on Facebook and to elicit a response from her friends. *See also, id.* Ms. Clark had no subjective intent to threaten Ms. Anderson or any other transgender student. Her statements are not true threats.

2. Ms. Clark's words are not true threats under the objective test and the* Watts *factors

Unlike the Ninth Circuit, the Fifth and Eighth Circuits use an objective test. In these circuits, a true threat exists if an objectively reasonable recipient "would interpret the speech as a serious expression of an intent to cause a present or future harm." *Porter,* 393 F.3d at 616. In determining whether a true threat exists, the Supreme Court in *Watts* announced three factors to consider: (1) the context of the statement, (2) the recipient's reaction to the statement, and (3) whether the statement was conditional. *Watts,* 394 U.S. at 708. The Fourteenth Circuit considered these objective factors in concluding that Ms. Clark's words were not a true threat.

i. The context of Ms. Clark's words show that they are not true threats because there is no reason to believe that Ms. Clark is violent

The objective context of Ms. Clark's post shows that it was not a true threat. When analyzing context, courts consider whether there was reason to believe the speaker is violent based on their history. *See United States v. Dinwiddie,* 76 F.3d 913, 925 (8th Cir. 1996); *Burge,*

100 F.Supp. 3d at 1068 (holding that a student's Facebook post was not a true threat where the student had no violent history). It is undisputed that Ms. Clark had no prior record of any violence, threats, or disciplinary actions whatsoever. Even the argument that she had with Ms. Anderson was merely verbal, and Ms. Anderson began that argument. Since Ms. Clark had zero history of violence, there is no reason to believe that she would suddenly become violent. This is especially true since Ms. Clark's post never directly advocates for violence. Ms. Clark vaguely refers to Ms. Anderson being "taken out one way or another" which the Fourteenth Circuit correctly observed "could as readily imply social ostracism as violence." R at 32. These vague terms do not rise to the level of a true threat. *See Lovell By & Through Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373 (9th Cir. 1996) (finding a true threat where the student directly told her counselor that she would shoot her, but recognizing that it would be a closer case if the student said that she would "shoot" generally). Even the District Court recognized that Ms. Clark's words are not comparable to the gruesome and detailed threats of violence found to be true threats in other cases. *See e.g., Pulaski*, 306 F.3d at 626-27 (finding a true threat in a letter from a student to his ex-girlfriend explaining that he would rape her, sodomize her, and hide under her bed to kill her in her sleep).

Petitioner may argue that the tragedy of violence at schools should inform the context of Ms. Clark's words. Certainly, these events weigh heavily on our minds. The Fourteenth Circuit even opened its analysis by recognizing the "heavy responsibility" of creating a safe school environment. R at 28. However, not every reference to violence made by a student is a true threat that one of these tragedies will occur. As Judge Heaney's en banc dissent in *Pulaski* noted, courts must be careful of creating a "dangerously broad precedent by holding that any private utterance of an intent to injure another person is not entitled to First Amendment

protection." *Pulaski*, 306 F.3d at 627 (Heaney, J., dissenting). Ms. Clark's words should not be taken into context with the tragedy of mass school shootings like Columbine, as her words make no reference nor do they bear any resemblance to those events. *But see, Riehm v. Engelking*, 538 F.3d 952, 964 (8th Cir. 2008) (finding a true threat where a student's essay titled "Bowling for Cuntchenson" about shooting his teacher at school in a murder-suicide referred to the movie "Bowling for Columbine"). Since Ms. Clark's statements made no reference to violence and she has no history of violence, there is no reason to believe that Ms. Clark was violent. Therefore, the objective context of Ms. Clark's statements shows that they are not true threats.[6]

ii. Ms. Clark's words were not a true threat because the reactions of the post's recipients show that they did not take them seriously as a threat

When analyzing the recipient's reaction, this Court looks to the reaction of the *direct* recipient of the words. *See Watts*, 394 U.S. at 707 (Supreme Court analyzing the reaction of the crowd, not the President, who heard the speaker's alleged threat against the President). Courts do not look to the reaction of the alleged target of the words, unless the alleged target is also the direct recipient.[7] *See e.g., Riehm*, 528 F.3d at 964. The direct recipients of Ms. Clark's post were her Facebook friends. Ms. Anderson and the other transgender students were not among her Facebook friends. Therefore, this Court should only look to the reaction of Ms. Clark's Facebook friends when analyzing this factor.

---

[6] As explained, *supra*, the political context of Ms. Clark's post as a statement on a matter of public concern also shows that it was not a true threat.

[7] To the extent that courts consider the reaction of indirect recipients, they have done so only *in addition* to the direct recipient, and still did not consider the reaction of the target but of third parties. *See D.J.M. ex rel. D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 761 (8th Cir. 2011). Here, the school authorities, like any objectively reasonable recipient, did not take Ms. Clark's words as a true threat. They merely suspended her for three days and then allowed her to resume her position at school with Ms. Anderson and the other transgender students. They did not take the serious precautions seen in other cases where true threats were found. *See id.* (finding a true threat, looking to the reaction of the direct recipient who reported the speaker to school authorities who then called the police and increased campus security).

Where statements are made to like-minded friends who react positively, this Court will not find a true threat. *See Watts,* 394 U.S. at 708 (Supreme Court finding no true threat where the audience of like-minded young people laughed at the speaker's words); *Rankin v. McPherson,* 483 U.S. 378, 381 (1987) (Supreme Court holding that the speaker's statement that she hoped the President would be assassinated was not a true threat, where it was made to her coworker-boyfriend, who agreed). The copy of Ms. Clark's post in the record shows that two of her Facebook friends 'liked' the post. Her friends' reactions show that they took her words lightly. People are not likely to publically 'like' a post that advocates for violence, especially if that violence would take place against their classmates or children in their community. Additionally, there are no comments to the post. None of Ms. Clark's Facebook friends commented in disagreement or reproach, which they would likely do if they thought she was threatening her classmates. Therefore, the reaction of the recipients of Ms. Clark's post, *i.e.* her Facebook friends, shows that the post was not a true threat.

Petitioner may argue that this Court, following the Eighth Circuit's opinion in *Pulaski,* should look to Ms. Anderson's reaction in this factor; however, that case is inapposite here. In *Pulaski,* though the target of the threatening letter was not handed a copy directly by the speaker and only received it physically secondhand, she was told about it directly by the speaker over the phone on multiple occasions. *See Pulaski,* 306 F. 3d at 625. However, the record here is clear that Ms. Clark never discussed her post directly with Ms. Anderson or any other transgender student. Further, Petitioner's approach is misguided under the objective test, as it calls for this Court to look at the reaction of Ms. Anderson herself, not an *objectively* reasonable recipient.

iii. The unconditional nature of Ms. Clark's words is not dispositive

As both the lower courts recognize, Ms. Clark's words were not advertently conditional on their face. However, this fact is not dispositive. The Fourteenth Circuit and other courts still

conclude that words are not true threats, even where they are unconditional. *See e.g., Bauer*, 261 F.3d at 784 (holding that the teacher's unconditional statements that others were on his "permanent shit list" and that he hoped to drop two tons of granite on their heads were not true threats). Therefore, Ms. Clark's words are not a true threat.

3. Ms. Clark's words are not true threats regardless of the whether they are viewed from the objective or subjective perspective

The Fourteenth Circuit advocated for the use of the subjective test, but ultimately used both objective and subjective analysis in coming to its conclusion that Ms. Clark's words were not true threats. Common sense also demands this result. If this Court finds that Ms. Clark's words were a true threat, it will put her in the company of: a teenage boy who wrote a letter to his ex-girlfriend detailing how he would rape her, sodomize her, and wait under her bed to kill her in her sleep, *Pulaski*, 306 F.3d 616; a teenage boy who wrote an essay for his teacher that referred to her in explicit terms, referenced Columbine, and described in detail how he would shoot her in the eye at school, lick the splatter of her brain, bone, and blood off his face, and then kill himself, *Riehm*, 538 F.3d 952; and a teenage girl who directly said to her school counselor's face that she would shoot the counselor if the counselor would not give her a schedule change, *Lovell*, 90 F.3d 367. Ms. Clark's post in no way resembles these actions. Ms. Clark's post to her Facebook friends and family, expressing her strong disagreement to a school policy, does not rise to the level of a true threat. Therefore, it is protected speech under the First Amendment.

II. *Tinker* Does Not Apply to Off-Campus Student Internet Speech Created On A Student's Personal Computer

A. *Tinker* never applies to off-campus student speech because "the special characteristics of the school environment" are absent when a student engages in internet speech from inside her own home

Tinker does not apply to off-campus speech. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979). The Fourteenth Circuit correctly rejected other

circuits' holdings to the contrary. As the Fourteenth Circuit emphasized, this Court crafted the *Tinker* framework specifically around "the special characteristics of the school environment" and the need to defer to school officials' authority to control conduct *in the schools*. *Tinker v. Des Moines Ind. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Moreover, this Court was solely concerned about the potentially disruptive consequences of student speech occurring *on-campus* when it created this framework. *Id.* at 514 ("[The students] neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder.").

This Court has consistently preserved the line separating on-campus and off-campus speech. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) ("If respondent had given his speech outside of the school, he could not have been penalized simply because the school considered his language to be inappropriate."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside of school."). In its most recent decision on student speech, this Court emphasized that restrictions on student speech *on campus* are permissible only due to the "special characteristics of the school environment." *Morse v. Frederick*, 551 U.S. 393, 408 (2007). Consequently, finding that *Tinker* does not apply to off-campus speech is consistent with this Court's precedent.

In his concurring opinion in *J.S.* ex rel. *Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (en banc), Judge Smith argued that student off-campus speech is entitled to the same First Amendment protection as speech by citizens in the community at large. *Id.* at 936. He argued that if *Tinker* is extended to off-campus speech, it would allow school officials to regulate student speech no matter where it took place, when it occurred, or what subject matter

it involved so long as it caused a substantial disruption at school. *Id.* at 939; *see also Layshock* ex rel. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (en banc) ("It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."). The Fourteenth Circuit agreed with Judge Smith's analysis and held that *Tinker* therefore did not apply to off-campus student speech like Ms. Clark's Facebook post.

Ms. Clark's Facebook post was clearly off-campus speech. It was created at home, on her personal computer, and during after-school hours. The post was created on Facebook, a social media site unaffiliated with the school. Furthermore, she posted onto her own personal Facebook page. Consequently, the "special characteristics of the school environment" that would otherwise permit the school to restrict student speech were non-existent here. Just because Ms. Clark was "friends" with students from the school does not thereby turn her speech into on-campus speech. *See Layshock*, 650 F.3d at 219 (finding that a student's post onto a social media site was off-campus speech even though it was shared with "friends" and most, if not all of the student body had seen the post). If a school district merely had to show that a student was "friends" with her fellow classmates to turn the student's otherwise off-campus speech into on-campus speech, there would be no distinction between any speech, no matter where it occurred, as long as two students were speaking to one another.[8] Such result would be inherently

[8] Judge Wong of the Fourteenth Circuit aptly pointed out that before the internet, students gossiped off-campus and oftentimes said "offensive, even vicious and cruel, things about their teachers, their schools, and one another" yet no one supposed that schools could regulate this speech or discipline student speakers. R at 38. As Judge Wong correctly concluded, the speech of contemporary students cannot be considered qualitatively different just because it is conveyed digitally. *Id.*

contradictory to *Tinker*'s holding. Therefore, this Court should affirm the Fourteenth Circuit's holding and find that *Tinker* does not apply to off-campus student speech like Ms. Clark's post.

1. This Court does not have to apply **Tinker** *to off-campus student speech because it can apply the true threat analysis instead*

Petitioner's concern that disallowing *Tinker* from applying to student off-campus internet speech would leave schools powerless from protecting their students is misplaced. Schools unquestionably have a compelling interest in protecting their students. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001). However, this Court need not apply *Tinker* to off-campus student internet speech to protect the school's interest in student safety. For example, both the Fifth and the Eighth Circuits have upheld school districts' rights to discipline students for off-campus speech using only a true threat analysis and without applying *Tinker*. *See Pulaski*, 306 F.3d at 627 (holding that student's rap songs expressing desire to molest, rape, and murder his ex-girlfriend constituted a true threat and therefore the school district did not violate the student's First Amendment rights by disciplining him); *Porter*, 393 F.3d at 620 (holding that student's violent drawing that was created off-campus was protected under the First Amendment because the drawing was not intentionally communicated to the school and therefore was not a true threat). However, for reasons stated earlier, Ms. Clark's post did not constitute a true threat, so her speech would be fully protected under the First Amendment.

2. Applying **Tinker** *to off-campus student speech will lead to severe consequences*

If this Court extends *Tinker* to apply to off-campus student speech, the line demarcating the schoolhouse gate from the outside world would disappear. *See Layshock*, 650 F.3d at 216 ("[T]he concept of the "school yard" is not without boundaries and the reach of school authorities is not without limits."). Accordingly, a substantial amount of student speech would inevitably be chilled. Students would be silenced for fear of discipline each time they wanted to

say something on the Internet that the school could possibly construe as being disruptive or colliding with the rights of other students. This would lead students to engage in self-censorship rather than voicing their unpopular opinions. This result is antithetical to the spirit of *Tinker* and the First Amendment. *See Tinker*, 393 U.S. at 509 ("A mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint is not sufficient reason for a public school to infringe on an individual's free speech rights.").

Moreover, as Judge Smith explained in his concurrence in *Blue Mountain*, if *Tinker* applied to student off-campus speech, school officials would be able to regulate *all* student off-campus speech as long as they could show the speech caused a substantial disruption. *Blue Mountain*, 650 F.3d at 939. This would even apply to students like Ms. Clark who engaged in political speech when she criticized the School District's policy through her Facebook post. Using this expansive application of *Tinker*, students who would otherwise be able to validly post religious or political opinions under the First Amendment could be censored under *Tinker*. This would contradict *Tinker*'s underlying principle protecting student political speech.

B. Alternatively, *Tinker* only applies to off-campus student speech that can satisfy additional threshold tests like the sufficient nexus or reasonable foreseeability test

If this Court holds that *Tinker* applies to off-campus speech, this Court should limit its application only to certain circumstances. Some lower courts require an additional threshold test before applying *Tinker* to off-campus speech. The Fourth Circuit requires that school officials show that there was a "sufficient nexus" between the off-campus speech and a substantial disruption of the school environment before the school can discipline the student. *See Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2012). A few circuits, including the Eighth Circuit, require school officials to show that it was reasonably foreseeable that the off-campus speech would reach the school community. *See S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d

771, 777 (8th Cir. 2012). However, if this Court applies either test to Ms. Clark's Facebook post, the result is the same: neither test is satisfied so *Tinker* does not apply.

1. There is no sufficient nexus between Ms. Clark's Facebook post and the school to render it on-campus speech because the post failed to engage the school community either in the classroom or online

There is no sufficient nexus between Ms. Clark's off-campus Facebook post and the school. The Fourth Circuit requires that school officials show that there was a "sufficient nexus" between the off-campus speech and a substantial disruption of the school environment before school officials can discipline the student. *Kowalski*, 652 F.3d at 577. The rationale behind this test is that if there is a sufficient nexus between the off-campus speech and the school campus, the student's speech can be considered as occurring on-campus and therefore punishable. *See J.S.* ex rel. *H.S. v. Bethlehem Area Sch. Dist.*, 599 Pa. 638, 667 (2002).

In *Kowalski*, the Fourth Circuit held that *Tinker* applied to off-campus speech because there was a sufficient nexus between a student's MySpace post and the school community. *Kowalski*, 652 F.3d at 565. A student created a MySpace group designed to gossip and ridicule another classmate. *Id.* at 567. She invited 100 fellow classmates to join the group and encouraged the students to leave negative comments and upload photos about the targeted classmate. *Id.* The Fourth Circuit therefore held that there was a sufficient nexus between the student's off-campus post and the school community.

Unlike the student in *Kowalski*, Ms. Clark's use of the Internet was much more passive. She did not create a specific group to target Ms. Anderson or other transgender students. She merely posted onto her own Facebook page and neither tagged nor directed her speech toward any specific "friend." This is not like in *Kowalski* where the student invited 100 of her fellow classmates to join an attack against another student. Ms. Clark's post engaged very few people within the school community, as evidenced by the lack of communication in both the classrooms

and on Facebook. In contrast, the student's MySpace group in *Kowalski* had robust conversation, with many students uploading photos and leaving comments. Furthermore, it is unclear from the evidence how many of Ms. Clark's Facebook "friends" were even fellow classmates. It could be that only one or two friends were fellow students, which surely cannot be enough to establish a sufficient nexus to the school. Consequently, there is insufficient evidence to show that a sufficient nexus existed between Ms. Clark's Facebook post and the school environment and therefore *Tinker* is inapplicable here.

2. It was not reasonably foreseeable that Ms. Clark's Facebook post would reach the school and cause a substantial disruption because none of Ms. Clark's friends took the post seriously

Several lower courts, including the Eighth Circuit, have held that *Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting. *See S.J.W.*, 696 F.3d at 777; *Wisniewski v. Bd. of Educ. of Weedsport Cent. School Dist.*, 494 F.3d 34, 39 (2d Cir. 2007).

In *D.J.M.* ex rel. *Hannibal Public Sch. Dist. No. 60*, 647 F.3d 754, 767 (8th Cir. 2011), the Eighth Circuit held that it was reasonably foreseeable that a student's threats would create a risk of substantial disruption within the school. In *D.J.M.*, the student sent instant messages on several separate occasions to various classmates expressing his desire to get a gun and kill other students at school, specifically naming individuals and groups. *Id.* at 756, 758. His friends became concerned and notified the school. *Id.* The entire school community learned of the student's comments. *Id.* at 759. The school received numerous phone calls from parents concerned that their children were on the rumored hit list. *Id.* The student was also placed in juvenile detention and the school increased its campus security in response. *Id.*

Ms. Clark's post is clearly distinguishable from the student's post in *D.J.M.* First, Ms. Clark's post did not advocate gun violence in the school. Her comment that "Taylor better watch

out," or "I'll take IT out one way or another" is in no way the same as a student explicitly saying he would shoot specific individuals. Also unlike the student in *D.J.M.*, who expressed his violent thoughts individually to several different students across multiple days and had the opportunity to clarify himself, Ms. Clark merely made one vague post. No other students left comments on the post, nor did she leave any follow-up posts clarifying her intent to harm Ms. Anderson or others. In *D.J.M.*, the student's friends ultimately informed the school about the student's threatening comments only after they spoke with him over several days and felt that he was serious. Here, there was no further communication between Ms. Clark and her friends, showing that her friends likely did not take Ms. Clark's post seriously as a threat. This would explain why the post had no comments and only two likes, and why no students talked about the post in school. As such, it was not reasonably foreseeable that Ms. Clark's post would reach the school community and cause a substantial disruption, so *Tinker* should not apply.

Finally, Petitioner cannot argue that, simply because Ms. Clark posted onto an online social media site, it was reasonably foreseeable that her post would reach the school. Because of the pervasive and widely-accessible nature of the Internet, any post can have a vast reach – even to schools, students, and officials. If this was all that was necessary to satisfy the reasonable foreseeability test, there would be no student internet speech that would fall outside its scope.

III. Even if this Court Finds that *Tinker* Applies, the School District Violated Ms. Clark's First Amendment Right to Free Speech

A. Ms. Clark's Facebook post did not create a material and substantial disruption to school activities because it had a de minimis impact on the school community

Under *Tinker*, it is not enough for there to be merely *some* disturbance for a school district to restrict a student's speech. The disturbance must *materially* and *substantially* interfere with school activities. *Tinker*, 393 U.S. at 508, 513 ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."); *see also Saxe v.*

State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001) ("*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance"). However, the undisputed evidence here indicates that Ms. Clark's post did not create a substantial disturbance in the larger school community.

In *Blue Mountain*, J.S., an eighth-grade student, created a fake profile of his principal on MySpace using his parent's home computer during non-school hours. *Blue Mountain*, 650 F.3d at 920. The profile used crude and vulgar language and made personal attacks against the principal and his family. *Id.* Initially, the profile could be viewed publicly by anyone with access to MySpace. *Id.* at 921. J.S.'s principal eventually learned of the profile and suspended J.S. *Id.* at 922. The school district argued that J.S.'s profile created a substantial disruption at school because: 1) there were general rumblings in school about the profile; 2) teachers caught students discussing the profile and had to reprimand them for disrupting classwork; and 3) the school's counselor needed to cancel her appointments in order to supervise students while the principal met with J.S. and his parents. *Id.* at 922-23. Despite this, however, the Third Circuit held that the facts did not show that the school district could reasonably forecast a substantial disruption or material interference with school activities as a result of J.S.'s speech. *Id.* at 931.

Here, there are even fewer facts than in *Blue Mountain* supporting the School District's contention that Ms. Clark's post created a material and substantial disruption. First, the post did not impede any classroom instruction. There was no evidence presented that any classes were cancelled or even disrupted because of Ms. Clark's post. No teachers or administrators were forced to alter their schedules. Furthermore, unlike in *Blue Mountain*, where there were general rumblings in school about the profile and some students were reprimanded for talking about the profile in class, here, there is no evidence that suggests that students were talking about the

profile in class. In fact, the record shows that students were not even discussing the post online. The post garnered only two likes on Facebook, even though it had been public for nearly 22 hours. R at 18. Moreover, no one added any comments to Ms. Clark's post.

The School District has failed to satisfy its burden of showing that Ms. Clark's post created a substantial or material disruption to the school. The only evidence of a disruption that the School District presented was that the principal had a meeting with the students involved as well as their parents, and that a few students were upset about the post. However, the Court in *Blue Mountain* already held that these facts, and even additional evidence of some classes being disrupted and school officials altering their schedules, was still not enough to show that a material and substantial disruption occurred. *Blue Mountain*, 650 F.3d at 931.

Even though Ms. Anderson and Ms. Cardona may have experienced some disruption to their classwork, the evidence does not show that any other students were affected by the post beyond feelings of mere discomfort or unpleasantness. *Tinker* itself explained that "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint is not sufficient reason for a public school to infringe on an individual's freedom of speech rights." *Tinker*, 393 U.S. at 509; *see also J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1119 (C.D. Cal. 2010) ("For the *Tinker* test to have any reasonable limits, the word "substantial" must equate to something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure").

Moreover, the school's limited response to the post further illustrates that the post did not create a substantial or material disruption. In response to the post, the school did only three things: 1) the principal met with Ms. Anderson, Ms. Cardona, and their parents; 2) he met with Ms. Clark and her parents; and 3) he suspended Ms. Clark for three days. The school did not

refer Ms. Clark to a counselor, it did not increase any campus security, nor did it contact law enforcement. *See Burge*, 100 F. Supp. 3d at 1064 ("Without taking some sort of action that would indicate that it took the comments seriously, the school cannot turn around and argue that [the student's] comments presented a material and substantial interference with school discipline"). Consequently, because Ms. Clark's post had a de minimis impact on the school community, it did not create a substantial and material disruption to school activities, nor was one reasonably foreseeable. As such, the School District failed to satisfy *Tinker's* first prong.

B. Ms. Clark's Facebook post did not collide with the rights of other students because it cannot be understood as a violent threat directed at students

Under *Tinker*, schools may regulate student speech if the speech "collides with the rights of others." *Tinker,* 393 U.S. at 513. However, this Court has never explained what this means. *Saxe*, 240 F.3d at 217 ("The precise scope of *Tinker's* 'interference with the rights of others' language is unclear"). The Court in *Tinker* explained that, at a minimum, collision with the rights of others cannot be based on a mere desire to avoid discomfort or unpleasantness from an unpopular viewpoint. *Tinker*, 393 U.S. at 509. Furthermore, student speech that is simply offensive to a listener or a group of listeners is insufficient to satisfy this prong. *Saxe*, 240 F.3d at 217. Lower courts have generally refrained from even applying this prong when analyzing student speech. *See Beverly* Hills, 711 F. Supp. at 1123 (declining to apply the rights of others test from *Tinker* and holding that student's First Amendment rights were violated because there was no substantial disruption or reasonably foreseeable risk of disruption).

The Ninth Circuit is the only circuit to date that has addressed the second *Tinker* prong in its analysis of speech cases. In *Wynar v. Douglas County Sch. Dist.*, 728 F.3d 1062, 1072 (2013), the Ninth Circuit held that: "[w]hatever the scope of the "rights of other students to be secure and to be let alone, without doubt the threat of a school shooting impinges on those

rights." *Wynar* is an extreme case with exceptional facts. In *Wynar*, a student sent increasingly violent and disturbing messages to his friends on MySpace over multiple days about wanting to commit a shooting at school. *Id.* at 1065. The student was known to possess weapons and ammunitions. *Id.* Furthermore, he explicitly named his school, specified a date for the attack, and identified specific students he intended to kill. *Id.* at 1071.

It is undisputed that Ms. Clark did not have any prior record of violence, threats, or disciplinary actions against her. And, unlike the student in *Wynar*, Ms. Clark did not have any access to weapons or ammunitions. Ms. Clark posted once on Facebook, and her post ambiguously mentioned Ms. Anderson should be "taken out one way or another." As the Fourteenth Circuit noted, Ms. Clark's post could have simply implied social ostracism and not violence. In contrast, the student in *Wynar* sent countless instant messages to his friends on MySpace using increasingly violent terms and disturbing detail. As such, Ms. Clark's post, though offensive, did not collide with the rights of other students because it cannot be understood as a violent threat directed at Ms. Anderson or other students. Consequently, this Court should find that the School District violated Ms. Clark's First Amendment rights, because even if *Tinker* applies to Ms. Clark's post, the School District failed to show that Ms. Clark's post satisfied either prong of its test.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court find Ms. Clark's speech is protected by the First Amendment and affirm the decision of the Fourteenth Circuit.

APPENDIX

U.S. Const. Amend. I

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

CERTIFICATE OF COMPLIANCE

The members of Team L hereby certify that this brief conforms to the requirements of the Rules of this Competition and out law school's governing honor code. Additionally, the work product in all copies of this brief is in fact the sole work product of Team L.

Respectfully submitted,

_____

Team L
Counsel for Respondent