No. 16-9999

IN THE

SUPREME COURT OF THE UNITED STATES

March Term 2017

WASHINGTON COUNTY SCHOOL DISTRICT,

Petitioner,

v.

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

Respondent.

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

BRIEF FOR RESPONDENT

Team N
Counsel for Respondent

QUESTIONS PRESENTED

I. Does a fourteen-year-old student's Facebook post constitute a "true threat" beyond the protection of the First Amendment given that her statement was not addressed to the threatened individual(s), she has no history of violent behavior and she intended her statement as a jest?

II. Does a public school district violate the First Amendment rights of its student by disciplining her for a Facebook post authored off campus and away from any school-sanctioned activity on her personal computer?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS CASES

UNITED STATES DISTRICT COURT CASES

CONSTITUTIONAL PROVISION INVOLVED

SECONDARY SOURCES

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourteenth Circuit was entered on January 5, 2017, reversing the granting of summary judgment for Petitioner by the District Court for the District of New Columbia on April 14, 2016. R. at 12, 25. This Court granted certiorari, R. at 50, and has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

At the time of the events giving rise to this action, Kimberly Clark was a fourteen-year-old sophomore student at Pleasantville High School in Pleasantville, New Columbia where she had never been subject to any school disciplinary action, nor evinced any history of violent behavior. R. at 23. Ms. Clark is a female by birth, who identifies as a member of the female gender, R. at 26, and she is a member of Pleasantville High School's Girls' Basketball team, R. at 23. On August 1, 2015, Washington County School District adopted a policy titled "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" (the "Nondiscrimination in Athletics Policy"), which permits transgender students to participate in school sports based on their chosen gender identity. R. at 2. Subsequently, Taylor Anderson, a then fifteen-year-old sophomore student, who was born a member of the male sex but later identified her gender as female, joined the Pleasantville High Girls' Basketball team. R. at 2.

On November 2, 2015, Ms. Clark and Ms. Anderson participated in an intrasquad practice basketball game, in which Ms. Anderson, following an adverse call by the referee, engaged Ms. Clark in a verbal argument. R. at 23. As a result, the referee ejected both players. R. at 23. That same evening Ms. Clark authored a message on her Facebook page from her own home and personal computer stating her views on the Nondiscrimination in Athletics Policy:

> I can't believe Taylor was allowed to play on a girls' team! That boy (that IT!!) should never be allowed to play on a girls' team. TRANSGENDER is just another word for

> FREAK OF NATURE!!! This new school policy is the dumbest thing I've ever heard of! It's UNFAIR. It's IMMORAL and it's AGAINST GOD'S LAW!!!
>
> Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too.

R. at 2, 23. Ms. Clark is not "friends" with Ms. Anderson or any other transgender student on Facebook. R. at 23. Ms. Clark only intended for her own Facebook "friends" to view her statement and at least two individuals "liked" (supported) her statement. R. at 18, 23.

Two days after Ms. Clark authored her statement, Ms. Anderson and another transgender student at Pleasantville High School, accompanied their parents to meet Principal Thomas Franklin. R. at 3. The parents presented Principal Franklin with a physical copy of Ms. Clark's Facebook post and expressed their fear that Ms. Clark would resort to violence against their transgender children. R. at 3. Although Ms. Clark had no history of violent behavior, Ms. Anderson's parents kept their daughter at home for two days after Ms. Clark posted her Facebook statement. R. at 3. On November 5, 2015, Principal Franklin met with Ms. Clark and her parents. R. at 3. At the meeting, Ms. Clark discussed her concerns with the school's Nondiscrimination in Athletics Policy and assured Principal Franklin that her statements regarding Ms. Anderson were made in jest. R. at 3. Despite Ms. Clark's assurance, Principal Franklin suspended Ms. Clark for three days for purportedly violating the school's Anti-Harassment, Intimidation & Bullying Policy ("Bullying Policy"). R. at 3.

Ms. Clark's suspension will remain a part of her permanent academic record, negatively impacting her future, including college admission and employment opportunities. R. at 19. The Washington County School Board upheld Ms. Clark's appeal of her suspension under the rationale that Ms. Clark's post constituted a "true threat" and that her post "has been materially

disruptive of the high school" and has "clearly collide[d] with the rights of other students to be secure in the school environment." R. at 3.

On December 7, 2015, Ms. Clark's father filed a complaint in the United States District Court for the District of New Columbia alleging that the Washington County School District violated Ms. Clark's First Amendment rights by upholding her suspension. R. at 3. Following cross motions for summary judgment, the district court found that the school district did not violate Ms. Clarks' First Amendment rights and the Fourteenth Circuit reversed in favor of Ms. Clark. R. at 27. This Court granted certiorari. R. at 40.

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 Facebook statement is protected under the First Amendment as it does not qualify as a "true threat" and that *Tinker v. Des Moines Ind. Comm. Sch. Dist*., 393 U.S. 503 (1969) does not apply to Ms. Clark's off-campus speech.

Ms. Clark's Facebook post is not a "true threat" because (1) she did not have a subjective intent to threaten Ms. Anderson or other transgender students, and (2) an objective analysis would find that a reasonable person would not consider her statement a "true threat." This Court's recent inquiry into a speaker's subjective intent in *Elonis v. United States* supports a subjective analysis in "true threat" jurisprudence, as recognized by the Ninth and Tenth Circuits. *Elonis* does not render the objective analysis applied by previous courts as moot, but rather supports the interpretation of *Virginia v. Black* that a showing of a specific intent to threaten must be required to prove that a "true threat" exists. Thus, the test to determine a "true threat" must consider (1) the subjective intent of the speaker to threaten, and (2) whether a reasonable person familiar with the context would consider the statement a "true threat."

Ms. Clark did not have the subjective intent to threaten Ms. Anderson or any other student because she did not communicate her post directly to them, she has no history of violent behavior, and her statement was made in the heat of the moment following a verbal quarrel. In addition, a reasonable person would find that her post did not constitute a "true threat" because the language in Ms. Clark's statement is not comparable to specific threats of violence found in a number of other First Amendment cases. Context in this case is key, and the purpose behind the post was to reflect on a school-wide policy that is contrary to Ms. Clark's religious beliefs.

Moreover, the standard developed by this Court in *Tinker v. Des Moines Independent Community School District*—and its ensuing doctrine—does not apply to off-campus speech. The plain language of *Tinker* demonstrates that this Court merely intended for school administrators to regulate student speech made on campus. Additionally, the three student speech decisions developed by this Court after *Tinker* limit student speech regulation to speech given on campus or during a "school-sanctioned activity." Throughout each of these decisions, this Court has expressly noted that such school regulation would be impermissible had the student speech been authored in an off-campus setting.

Even if this Court decides to depart from its longstanding precedent and applies *Tinker* to Ms. Clark's off-campus Facebook post, it should find that Ms. Clark's speech did not create a material and substantial disruption at school or collide with the rights of its students. Ms. Clark's speech did not create a material and substantial disruption since the nature and content of the Facebook post is vague and non-specific. Also, the objective seriousness of Ms. Clark's speech is diminished given Ms. Clark's spotless disciplinary record coupled with her assurance to Principal Franklin that her comments regarding Ms. Taylor were made in jest. Finally, this Court should decline to expand the *Tinker* framework by applying the "colliding with the rights of

others" prong for the first time since its inception in 1969. However, if this Court chooses to apply this dormant standard, Ms. Clark's speech does not carry the requisite specificity as required by the Ninth Circuit—the only circuit court to apply this prong.

ARGUMENT

The First Amendment provides, in relevant part, that "Congress shall make no law. . . abridging the freedom of speech." U.S. Const. amend. I. Accordingly, the government may not restrict expressions due to their message, ideas, subject matter, or content, because such limits would undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-6 (1972) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The limitation imposed on Congress also applies to state actors, including school boards. *See Virginia v. Black*, 538 U.S. 343, 358 (2003) (concluding that the First Amendment applies to state actors under the Due Process Clause of the Fourteenth Amendment).

I. MS. CLARK'S FACEBOOK POST IS NOT A "TRUE THREAT" AND IS PROTECTED UNDER THE FIRST AMENDMENT BECAUSE SHE DID NOT HAVE A SUBJECTIVE INTENT TO THREATEN AND A REASONABLE PERSON WOULD NOT PERCEIVE HER POST AS A THREAT.

Restrictions to the protections afforded by the First Amendment are only allowed in few, narrowly limited cases. *See Cohen v. California*, 43 U.S. 15, 20, 29 (1971) (stating that fighting words likely to provoke violent reactions are proscribable); *see also Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that the Constitution does not protect advocacy directed to inciting imminent lawless actions). Statements that constitute a "true threat" are also not protected by the First Amendment. *Watts v. United States*, 394 U.S. 705, 708 (1969). This Court first analyzed "true threats" in *Watts*, in which an eighteen-year-old defendant was convicted of threatening then-President Lyndon B. Johnson while protesting and stating: "[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. A number of factors were considered in determining whether the statement was a "true threat:" (1) whether the speech constituted political hyperbole; (2) the overall context; (3) the reaction of the audience; and (4) whether the statement was conditional, particularly on an event that was unlikely to occur. *Id.* at 708. Given its context, including the political background at the time and the fact that the statement incited laughter, the speech was a "crude" way of expressing a political viewpoint. *Id*.

Thirteen years later, the "true threat" standard was revisited when an African American citizen gave a speech opposing white merchants in front of several hundred people stating, "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982). While such speech may incite unlawful action, it did not constitute a "true threat" given its political backdrop, the fact that its audience was not the primary target of the threat, and that the speaker had previously promoted non-violent political action. *Id*. at 934-40. Most notably, in 2003, *Virginia v. Black* provided the current definition of "true threat:" "[t]rue threats" include statements "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359-60 (plurality opinion). Despite this definition, "true threat" jurisprudence remains muddled, with circuits split as to the correct approach to define a "true threat." *See United States v. Cassel*, 408 F.3d 622, 632-33 (9th Cir. 2005) (requiring subjective intent to threaten by the speaker); *see also Porter v. Ascension School District*, 393 F.3d 608, 616 (5th Cir. 2004) (finding a "true threat" if a reasonable person would interpret the speech as a serious expression of intent to cause harm).

Since *Watts*, most courts employ a reasonable person test, with the exception of the Ninth and Tenth Circuits, which require consideration of the speaker's subjective intent to threaten the

recipient. *See United States v. Heineman*, 767 F.3d 970, 979 (10th Cir. 2014) (agreeing with the Ninth Circuit's interpretation of *Black*). Most recently, albeit in a criminal matter, a reasonable person test alone was insufficient to consider an individual's Facebook posts as "true threats." *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015). As discussed below, pursuant to this Court's decisions in *Elonis, Black*, *Claiborne* and *Watts*, the subjective intent of the speaker must be considered in determining whether a "true threat" exists.

A. The "true threat" analysis must consider a speaker's subjective intent to threaten since a reasonable person standard alone may wrongly punish a speaker and discourage further comments on debated issues.

Prior to *Elonis*, the Ninth Circuit addressed the subjective intent requirement citing *Black*'s definition of "true threat," recognizing that a natural reading of the definition "embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim." *Cassel*, 408 F.3d at 631. Since *Black* demands that, "the speaker need not actually intend to carry out the threat," this means that the specific intent element lies in making the threat, not in the attempt to carry it through. *United States v. White*, 670 F.3d 498, 522 (4th Cir. 2012) (Floyd, J. dissenting). Further, in an attempt to clarify what constitutes a "true threat," this Court's notion of intimidation, a type of "true threat," requires a specific intent to threaten. *Id*. (citing *Black*, 538 U.S. at 360 (defining intimidation as speech through which the "speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.")). Indeed, this Court's majority indicated that proof of an intent to intimidate was required for the defendants in *Black* to be convicted under the First Amendment. *Cassel*, 408 F.3d at 632; *see also* Frederick Schauer, *Intentions, Conventions, and the First Amendment*, 2003 Sup. Ct. Rev. 197, 217 (2003) ("It is plain that. . . the *Black* majority. . . believed that the First Amendment imposed upon

Virginia a requirement that the threatener have specifically intended to intimidate.").

As compared to a purely objective test, imposing a specific intent to threaten requirement strikes a more appropriate balance between the ideals that the First Amendment serves, and the interest in protecting victims from the threatening speech. Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1271-72 (2006). One of the issues highlighting the need for a subjective intent test is that the reasonable person test alone may wrongly punish an individual based on the fact that certain ambiguous statements not intended to be threats can be interpreted as such by different people. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 302 (2001). For example, in *United States v. Fulmer*, 108 F.3d 1486, 1490 (1st Cir. 1997), an individual was convicted of threatening an FBI officer for using the phrase "the silver bullets are coming," when instead the phrase was meant to describe evidence to implicate the man's father-in-law regarding income tax fraud. Under the same consideration, even rash stadium talk such as "kill the umpire!" can be considered a "true threat," although it would never be the fan's intention to act on such statement. Schauer, *supra*, at 219.

Also, the application of the reasonable person test alone was questioned in *Rogers v. United States*, 422 U.S. 35, 41-43 (1975) (Marshall, J. concurring), in which an individual with a history of alcoholism was convicted of threatening the President when he visited a Holiday Inn and announced that he was against the President's visit to China and that he would visit Washington to "whip Nixon's ass," or to "kill him." Justice Marshall was concerned with a jury's ability to convict under a reasonable person standard without being required to question whether there was intent to injure the President. *Id*. at 43-44. This creates a risk that crude, but constitutionally protected speech might be criminalized, which in turn chills legitimate speech on contentious issues. *Id*. at 47-48. A specific intent requirement would alleviate this chilling effect

by providing speakers the peace of mind of knowing that they cannot be convicted for negligently making a threat. Crane, *supra*, at 1273. This is the same concern discussed in *Elonis*, in which a subjective intent requirement was necessary to convict a man who threatened to kill his wife on Facebook since he could not be convicted for negligence. 135 S. Ct. at 2012.

Requiring a subjective intent to threaten test also has its basis in First Amendment jurisprudence, as certain classes of speech that fall outside of the First Amendment require evidence of a heightened subjective mens rea. *See Brandenburg*, 395 U.S. at 447 (stating that unlawful incitement requires a speaker's specific intent to incite imminent lawless action); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding defamation plaintiffs must prove that the speaker had actual malice in making such statements). Although *Black* and *Elonis* both involved criminal statutes, circuits have applied the "true threat" analysis in civil matters, using the same standard in both civil and criminal cases. *See Porter*, 393 F.3d at 616 (applying the "true threat" analysis in a dispute involving a student and a school district).

For the reasons provided above, in order to prove a "true threat," a proponent should be required to demonstrate that: (1) the speaker made the statement with the subjective intent to threaten the victim; and (2) a reasonable person, familiar with the context behind the statement, would interpret the statement as a threat. *See United States v. Bagdasarian*, 625 F.3d 1113, 1117 (9th Cir. 2011); *See also United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008).

B. Ms. Clark did not have a subjective intent to threaten because she did not knowingly communicate the post directly to Ms. Anderson or other transgender students, she has no record of violence or disciplinary actions, and her statement was made in the heat of the moment following a verbal quarrel.

Under the First Amendment, hostile expressions may be punished only if the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. It is insufficient to

consider only whether an objective observer would reasonably perceive such speech as a threat. *Bagdasarian*, 652 F.3d at 1116. Since the "true threat" standard is imposed by the Constitution, *Black*'s subjective test must be read into all threat statutes, with consideration that certain statutes may require an objective test in addition to the speaker's subjective intent. *Id.* at 1117. Even if a statute does not contain a *mens rea* requirement, it must be interpreted under the First Amendment, defining what is constitutionally protected speech. *Heineman*, 767 F.3d at 973.

Under the subjective intent test, speech may be unprotected as a "true threat" only upon proof that the speaker subjectively intended the speech as a threat. *Cassel*, 408 F.3d at 633. While the speaker need not intend to carry out the threat, evidence of such intent may support a "true threat" claim. *See Bagdasarian*, 652 F.3d at 1122-23 (stating that limited evidence to carry out a threat supports a lack of subjective intent). For example, in *Bagdasarian*, even if the statement "shoot the nig" and "[he] will have a 50 cal in the head soon," referring to President Obama's candidacy, could meet an objective test, there was no subjective intent because although the speaker possessed weapons, he had been intoxicated while posting the statement, and his words did not convey the notion that he would fulfill such action. 652 F.3d at 1122-23. Further, in *United States v. Stewart*, 420 F.3d 1007, 1019 (9th Cir. 2005), an inmate's statement towards a federal judge stating that he wanted to "string the motherfucker up and cut her throat" included subjective intent to threaten because he had a plan to execute such action, including access to weapons, a monetary reward, and physical and geographic data about the victim.

In addition, in *Heineman*, an individual's conviction of threatening a professor through an email that made him fear for his safety was reversed because subjective intent to threaten was a requirement that had to be proven for the email to constitute a "true threat," even if the statute did not contain an intent requirement. 767 F.3d at 982. Further, in the civil context, a student's

Facebook post stating that his teacher "needed to be shot" when he received a "C" did not include subjective intent and was therefore not a "true threat" because: (1) he intended only to express a concern to his friends; (2) he had no history of violence; (3) the post was not shown to school officials until a number of days after posting; (4) he was not friends with his teacher on Facebook and did not intend for her to see the post; and (5) the post seemed to simply be "an expression of rage or frustration." *Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057, 1068 (D. Or. 2015). In affirming the Magistrate Judge's opinion, the court determined that disciplinary action against the student was inappropriate because the post did not cause a widespread issue at the school, and neither the principal or school board queried whether the student had access to guns, had mental health issues, or made similar comments in the past. *Id*. at 1064.

Here, Ms. Clark lacked the subjective intent to threaten Ms. Anderson or other students because she has no record of violent behavior and she assured that her statement was made in jest. Unlike the inmate in *Stewart*, who had a history of disciplinary action and had a strategy to carry out his threat against a federal judge, Ms. Clark is a teenage student without any history of violence, whose words reflected a crude joke rather than a plan to inflict harm on any transgender student. Like in *Burge*, in which the student's post did not disrupt the school environment and was not addressed toward his teacher, Ms. Clark did not intend her comment to be seen by Ms. Anderson or other transgender students; instead, the post was a reaction to the school's Nondiscrimination in Athletics Policy. While Ms. Clark later realized that her post could be shown to students not friends with her on Facebook, the fact that she was expressing her religious beliefs, together with the fact that she took no action for days after the post, suggest that the situation had subsided prior to principal Franklin's notice.

Further, Ms. Clark did not have the subjective intent to threaten Ms. Anderson or other

students because her post was made in the heat of the moment as an expression of frustration to an incident earlier that day. As in *Bagdasarian*, in which a crude statement against President Obama constituted an offensive reaction to a frustrating occurrence for the speaker, Ms. Clark's statement was a rash response to a verbal quarrel that had occurred earlier that day. The fact that it was Ms. Anderson's parents who kept their daughter at home in fear of Ms. Clark's behavior is not determinative of a widespread issue affecting the school, and is clearly not determinative of Ms. Clark's actions, or even Ms. Anderson's plausible fear of Ms. Clark's behavior. Although the Bullying Policy in this case does not include a *mens rea* requirement, like in *Heineman*, in which the defendant's conviction for threatening a professor was overturned for a lack of intent even when proof of intent was not required from the statute, the specific intent requirement here must be inferred from the First Amendment, even if the Bullying Policy is silent as to intent. The fact that neither the principal or school board inquired into Ms. Clark's non-violent record or lack of mental health issues, suggests that Ms. Clark's suspension exceeded rational bounds.

Thus, due to her clean record, and given that her comment was made in the heat of the moment following a quarrel, Ms. Clark did not have the subjective intent to issue a "true threat."

C. A reasonable person would not consider Ms. Clark's Facebook post a "true threat" because the language in her post is not comparable to specific threats of violence found in other First Amendment cases.

Courts that apply an objective test focus on either a reasonable sender or recipient test, or a reasonable person familiar with the circumstances test. *See Porter*, 393 F.3d at 616 (applying a reasonable person familiar with the context test); *see also United States v. Alaboud*, 347 F.3d 1293, 1297-98 n.3 (11th Cir. 2003) (concluding that the reasonable sender and speaker tests amount to the same reasonable inquiry). Thus, the objective test asks whether a reasonable person who heard the statement and was familiar with its context would have interpreted the

speech as a serious expression of an intent to cause harm. *Porter*, 393 F.3d at 616.

The objective test requires a fact-finder to look at the entire context of the statements, including the surrounding events, the listener's reaction and whether the words were conditional. *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992). In *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996), a number of factors evaluated whether a statement constituted a "true threat," similar to the factors in *Watts*: (1) the listener's reaction, including the recipient; (2) whether the threat was communicated directly to the victim; (3) whether the threat was conditional; (4) whether the speaker had made similar statements in the past; and (5) whether the victim had reason to believe the speaker would engage in violent behavior. For example, in *Dinwiddie*, an abortion opponent's comments against doctors and other individuals supplying reproductive health services constituted a "true threat" because the comments targeted specific people, the speaker had used physical force in the past, she obstructed patients from entering clinics, and was a well-known advocate of using lethal force to prevent abortions. *Id*. at 926.

Further, in *Porter*, a student's drawing depicting his school under military siege did not constitute a "true threat" because he made the drawing in his home, showing it only to a few friends and relatives, and time had passed when the drawing reached the school, although the student carried a notebook with references to drugs, sex and death, as well as a box cutter. 393 F.3d at 612, 617. *Porter* particularly noted that the student's drawing had not been intentionally or knowingly communicated to school officials, and thus did not constitute a "true threat." *Id*. However, in *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 625-26 (8th Cir. 2002), a student's letters to his ex-girlfriend containing violent and obscene rants, including a desire to assault and murder her, constituted a "true threat" because the student allowed his friend to read the letter knowing that he was also close to his ex-girlfriend, and he had discussed the letters

with his ex-girlfriend multiple times without easing her concerns.

Further, in a criminal case such as *Parr*, an inmate's speech to his cellmate that someone in a federal building was "gonna get it" constituted a "true threat" because although the comment was not directed at the victim, the inmate was skilled in bomb-making, followed a terrorist, and even had a detailed plan to attack the building. 545 F.3d at 495, 502. In addition, in *United States v. Jeffries*, 692 F.3d 473, 482 (6th Cir. 2012), an individual's Facebook messages linking to a music video aiming to intimidate a federal judge constituted a "true threat" because the messages expressed a desire to harm the federal judge if a certain trial did not conclude in a favorable manner, and included a statement that the speaker had "been to war and killed a man."

Here, Ms. Clark's post is not a "true threat" under the reasonable person test because she did not direct her comment to Ms. Anderson or other transgender students, she has no disciplinary history, and she made her statement in jest. Unlike *Dinwiddie*, in which the abortion opponent targeted specific people, had a history of violence and was an advocate of using lethal force, Ms. Clark is a fourteen-year-old student with no history of violence, and whose post, albeit crude, was not directed towards its victim. Context in "true threat" scenarios is key, and the fact that Ms. Clark explicitly referred to her statement as a joke supports the inference that a reasonable person would not have expected her to assault another student. While Ms. Clark later realized that Ms. Anderson could receive a copy of her post, like in *Porter*, in which the student's drawing did not constitute a "true threat" because it was not knowingly or intentionally shown to school officials, Ms. Clark directed her post to her Facebook friends as a means of venting towards a school policy with which she disagrees. By analyzing the *Dinwiddie* factors, Ms. Clark did not communicate directly with Ms. Anderson, she has never made similar statements in the past, she has no propensity towards violence, and although her comment was

not conditional, at least two of her Facebook friends supported her post.

Also, a reasonable person would not find Ms. Clark's post to constitute a "true threat" because her words and actions are far beneath the specific threats of violence in other First Amendment cases. Converse to *Pulaski*, in which the student's letter constituted a "true threat" because it discussed a desire to assault and murder his ex-girlfriend, Ms. Clark's phrase that she would "take IT out" does not carry the same meaning, and does not explicitly refer to a violent act. Unlike in *Parr*, in which the inmate's plan to cause an explosion at a federal building supported his statement as a "true threat," while the phrase "take IT out" might seem similar to the phrase "someone's gonna get it," Ms. Clark never discussed a plan to inflict harm to Ms. Anderson or any other transgender student, and indeed, a number of days passed before the school, Ms. Anderson, and Ms. Cardona were notified of the comment. In addition, Ms. Clark's Facebook comment is not similar to the comment in *Jeffries*, in which the defendant threatened a federal judge to rule favorably in a particular case, because Ms. Clark's comment was not coercing anyone into action, and it did not disrupt the environment at her high school.

In sum, context here is key; an objective test would not define Ms. Clark's post as a "true threat" because she meant her comment as a joke, she did not address the post to its victims, she has no history of violence, and the post is not comparable to threats of violence in other cases.

II. *TINKER* DOES NOT APPLY TO OFF-CAMPUS SPEECH ORIGINATING ON A STUDENT'S PERSONAL COMPUTER FROM THE PRIVACY OF HER HOME AND AWAY FROM ANY SCHOOL-SANCTIONED ACTIVITY.

This Court first addressed the right of freedom of speech within the school setting in *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 508-09 (1969). In *Tinker*, a group of students planned to wear black armbands to school to demonstrate their objections to the United States' involvement in the Vietnam War. *Tinker*, 393 U.S. at 504. Shortly thereafter,

administrators of the Des Moines schools caught wind of the students' plan and established a policy that prohibited students from wearing black armbands on campus. *Id.* Subsequently, three students wore black armbands to school and were all sent home and suspended until they returned without the armband. *Id.* This Court held that the school policy violated the students' right to free speech under the First Amendment. *Id.* at 505-06. Notably, this Court proclaimed, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. However, a student's First Amendment protection is not absolute given the school administrators' need to "prescribe and control conduct in the schools." *Id.* at 507 (citation omitted).

In light of this clash between the right of the student to free speech and the school administrator's need to maintain order, this Court developed a disjunctive, two-part test. Under *Tinker*, school speech may be regulated if it materially and substantially disrupts school activity—or if the school can reasonably forecast that such speech will do so—or if the student speech collides with the rights of others. *Id.* at 509, 513. Following *Tinker*, this Court, and all others, have almost exclusively relied on the former "material and substantial disruption" prong rather than the latter "colliding with the rights of others" prong. *See J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 931 n.9 (3d Cir. 2011) (characterizing the "colliding with the rights of others" prong as "arguably dicta").

A. This Court's precedent sets the boundaries of regulated speech within the confines of the schoolhouse gate or "school-sanctioned activity."

Justice Fortas' oft-quoted test in *Tinker* irrefutably contemplates students' right to free speech within the boundaries of the schoolhouse gate:

> The principal use to which the schools are dedicated is to accommodate students *during prescribed hours* for the purpose of certain types of activities. . . . A student's rights, therefore, do not embrace merely the classroom hours. When he

> is in *the cafeteria*, or *on the playing field*, or *on the campus during the authorized hours*, he may express his opinions, even on controversial subjects . . . if he does so without 'materially and substantially interfere(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.

Tinker, 393 U.S. at 512-13 (emphasis added). As evinced by its own language, only on-campus student speech fell within the purview of this Court's *Tinker* doctrine from its inception.

This Court next addressed the First Amendment rights of students seventeen years later in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). In *Fraser*, a student attempted to galvanize approximately six hundred fellow students in an on-campus student government nomination speech by employing sexual metaphors and double entendre. *Id.* at 677-78. The assistant principal determined that the student violated the high school's obscenity policy and suspended the student for three days. *Id.* at 678. Without applying the *Tinker* test, this Court held that the school district acted within its authority by disciplining the student for his "offensively lewd and indecent speech" and distinguished the students' armbands in *Tinker* from the student's lewd nomination speech by reasoning that the suspension was "unrelated to any political viewpoint." *Id.* at 685. This Court further reasoned that the school's acquiescence of the lewd speech would "undermine the school's basic educational mission." *Id.*

Two years after *Fraser*, this Court addressed school-sponsored speech in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In *Kulmeier*, the Hazelwood East High School principal censored two pages of the student-run newspaper, which contained stories describing anonymous students' experience with pregnancy and the divorce of their parents. *Id.* at 263. This Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. In

applying this standard, this Court reasoned that the principal acted reasonably in censoring the article since the article's content failed to protect the students' anonymity since it referenced a small number of students. *Id.* at 274.

In its most recent school-based First Amendment decision, this Court developed a more expansive "school-sanctioned activity" standard in setting the boundary of the school's permissible regulatory power. *See Morse v. Frederick*, 551 U.S. 393, 401 (2007). In *Morse*, Principal Deborah Morse of Juneau-Douglas High School (JDHS) permitted her students to line each side of the street during school hours to watch the Olympic Torch Relay pass by the school. *Id.* at 397. During this school-sanctioned activity, Joseph Frederick and a group of JDHS students unfurled a fourteen-foot banner that read: "BONG HiTS 4 JESUS." *Id.* Principal Morse confiscated the banner and ultimately suspended Frederick for ten days under the school's policy that "prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . ." *Id.* This Court held that Principal Morse did not violate Frederick's First Amendment rights since schools may prevent the dissemination of "speech that can reasonably be regarded as encouraging illegal drug use." *Id.* In reaching its holding, this Court disagreed with Frederick's argument that he cannot be disciplined by school authorities since his banner was not unfurled on school property and reasoned that "Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." *Id.* at 401 (quotation omitted).

This Court's decisions in *Fraser*, *Kulmeier*, and *Morse* each share a common trait: the regulated student speech occurred on school grounds or during a "school-sanctioned activity." *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (Smith, J. concurring) ("Courts agree that *Fraser*, *Kuhlmeier*, and *Morse*, apply solely to on-campus speech

(I use the phrase 'on-campus speech' as shorthand for speech communicated at school or, though not on school grounds, at a school-sanctioned event . . . .") (citation omitted).

This Court must distinguish Ms. Clark's Facebook post from *Fraser*, *Kulmeier*, and *Morse* in order to preserve the present post-*Tinker* framework that requires on-campus speech or speech that occurs during a "school-sanctioned activity." Chief Justice Roberts acknowledged this discernable line that must be drawn in the *Tinker* framework in *Morse* when he reasoned, "Had Fraser delivered the same speech in a public forum outside of the school context, he would have been protected. In school, however, his First Amendment rights were circumscribed 'in light of the special characteristics of the school environment.'" *Morse v. Frederick*, 551 U.S. 393, 394 (2007) (citing *Fraser*, 478 U.S. at 682-83). In spite of the polarized viewpoints of its justices, this Court consistently drew the off-campus distinction in *Morse*. *See Morse*, 551 U.S. at 434 (Stevens, J. dissenting) ("I take the Court's point that the message on Frederick's banner is not necessarily protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere."); *see also Id.* at 422 (Alito, J. concurring) (recognizing that *Tinker* permits schools to regulate "in-school student speech . . . in a way that would not be constitutional in other settings."). Hence, this Court's most recent school speech decision reinforced the off-campus distinction more than twenty years after it was expressly drawn. *See Fraser*, 478 U.S. 675 at 688 n.1 (Brennan, J. concurring) (noting that students' lessened First Amendment rights "obviously do not apply outside of the school environment").

Here, Ms. Clark, from the privacy of her parent's home, posted on Facebook to vent her frustrations with Washington County School District's Nondiscrimination in Athletics Policy. As opposed to *Fraser*, in which the student spoke in the general assembly room in the heart of campus, Ms. Clark expressed herself from her bedroom. Rather than speaking on behalf of the

school, such as in the student newspaper in *Kulmeier*, Ms. Clark expressed her own views on her personal Facebook page. And, conversely to *Morse*, Ms. Clark expressed a political view concerning transgender issues in her free time rather than promoting drug use during a "school-sanctioned activity." Accordingly, Ms. Clark's Facebook post is patently inapposite to the type of school speech applied by this Court under the post-*Tinker* framework.

B. This Court must limit *Tinker*'s reach to avoid the categorical depredation of American students' right to free speech.

This Court must decline to apply *Tinker* to Ms. Clark's Facebook post in order to prevent the categorical depredation of the First Amendment rights of American students. A 2010 Pew Research Center study found that ninety-three percent of middle school and high school students use the Internet and nearly sixty-three percent of them discuss school-related topics.[1] Therefore, "[a]pplying *Tinker* to off-campus speech would create a precedent with ominous implications" given the pervasive nature of off-campus online speech between students. *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (Smith concurring).

If this Court applies *Tinker* to off-campus internet speech, schools will become empowered to "regulate students expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school. *Id.*; *see also Bell v. Itawamba County School Bd.*, 799 F.3d 379, 405 (5th Cir. 2015) (Dennis dissenting) (reasoning that the application of *Tinker* to off-campus speech "allows schools to police their students' Internet expression anytime and anywhere—an unprecedented and unnecessary intrusion on students' rights."). As the Third Circuit articulated, "It would be an

[1] Amanda Lenhart ET AL., *Social Media & Mobile Internet Use Among Teens and Young Adults,* Pew Research Ctr. (February 10, 2010), http://www.pewinternet.org/files/old-media/Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf

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." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F. 3d 249 (3d Cir. 2010).

Such an "ominous situation" can be avoided by simply leaving off-campus threats to the police rather than the schools. This Court should consider the late Judge Woodrow Seals' articulation of off-campus speech in determining whether *Tinker* should apply to Ms. Clark's Facebook post. Judge Seals reasoned, "A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations during his private life away from the campus. *Sullivan v. Houston Indep. Sch. Dist.*, 307 F. Supp. 1328, 1340-41 (S.D. Tex. 1969). If any student, including Taylor Anderson and Josie Cardona, genuinely feels that their safety is in danger following an online communication made off campus, that student should turn to law enforcement rather than his or her school.

III. EVEN IF *TINKER* APPLIES, MS. CLARK'S ONLINE SPEECH IS NOT SUBJECT TO SCHOOL REGULATION SINCE IT DOES NOT CONSTITUTE A "SUBSTANTIAL AND MATERIAL DISRUPTION" NOR COLLIDES WITH THE RIGHTS OF OTHER STUDENTS.

Student speech may only be regulated under *Tinker* if it "materially and substantially disrupts school activities"—or if the school can reasonably forecast that such disruption will occur—or if the student speech collides with the rights of others. *Tinker*, 393 U.S. at 509. In *Bell v. Itawamba Cnty. Sch. Bd.*, the Fifth Circuit endeavored to catalogue eleven factors considered by courts to determine the substantiality of an actual disruption or the objective reasonableness of a forecasted substantial disruption. *Bell*, 799 F.3d at 398.[2]

[2] These factors include: (1) "the nature and content of the speech"; (2) "the objective and subjective seriousness of the speech"; (3) "the severity of the possible consequences should the

A review of each circuit court's finding of a substantial and material disruption shows that the nature and content of the student's speech—particularly the specificity of the speech—is the most influential factor. *See Bell*, 799 F.3d at 393 (5th Cir. 2015) (upholding disciplinary action following student's rap lyrics posted online threatening to shoot a specific teacher in the mouth); *see also Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007) (upholding disciplinary action following student's drawing depicting a pistol firing a bullet at a person's head captioned "Kill Mr. VanderMolen"); *see also Boucher v. Sch. Bd.*, 134 F.3d 821, 829 (7th Cir. 1999) (upholding disciplinary action following student's article detailing procedures to hack school computers); *see also Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1071 (9th Cir. 2013) (upholding disciplinary action following student's internet posts threatening to shoot students on the anniversary of the Columbine Shootings with detailed descriptions regarding how he would kill two students). Conversely, courts have found First Amendment violations where the student speech is vague and non-specific. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 924 (3d Cir. 2011) (finding First Amendment violation where student's MySpace page—available only to her MySpace "friends"—ridiculed teacher); *see also Burge*, 100 F.Supp.3d at 1064 (finding First Amendment violation where student's Facebook page stated a teacher "needs to be shot").

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speaker take action"; (4) "the relationship of the speech to the school"; (5) "the intent of the speaker to disseminate, or keep private, the speech"; (6) "the nature, and severity, of the school's response in disciplining the student"; (7) "whether the speaker expressly identified an educator or student by name or reference"; (8) "past incidents arising out of similar speech"; (9) "the manner in which the speech reached the school community"; (10) "the intent of the school in disciplining the student"; (11) "the occurrence of other in-school disturbances, including administrative disturbances involving the speaker." 799 F.3d at 398.

A. Ms. Clark's speech does not amount to a "substantial and material disruption."

In light of the factors set out in *Bell,* Ms. Clark's Facebook post did not create a substantial and material disruption at Pleasantville High School.[3] First, the nature and content of Ms. Clark's speech is vague and non-specific. As opposed to the student's threats in *Bell*, in which the student depicted a scene of him shooting a teacher execution style, Ms. Clark made no specific threat against Ms. Anderson. The objective and subjective seriousness of Ms. Clark's speech does not meet the requisite level of a substantial disruption since Ms. Clark told Principal Franklin that she was simply joking when she said she would "take 'IT' out one way or another." Also, the objective seriousness of Ms. Clark's post is lessened in light of her spotless history of disciplinary action or violent behavior. The severity of the possible consequences should Ms. Clark take action is speculative at best given the vagueness of her speech. Moreover, like the student's post in *Burge*, Ms. Clark told Principal Franklin that she thought only her Facebook "friends" would see her Facebook post and Ms. Clark was not "friends" with Ms. Anderson nor any other transgender student. Also, Ms. Clark never took her speech to campus. Rather, Ms. Clark's Facebook post only reached Pleasantville High after Anderson's parents brought the post to Principal Franklin's attention. The only effect caused by Ms. Clark's post was Ms. Anderson's decision to stay home from school for two days based on an undifferentiated fear of Ms. Clark's post. In other words, no *on-campus* disruption ever occurred.

Most notably, the severity of Pleasantville High's disciplinary action against Ms. Clark significantly outweighs the seriousness of Ms. Clark's post. In response to Ms. Clark's post, for which she told Principal Franklin was a joke, Pleasantville High imposed a three-day suspension

[3] The specific language at issue reads, "Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too . . ." R. at 2.

that will remain on Ms. Clark's academic record. Such disciplinary action would impose irreparable harm upon Ms. Clark in seeking educational and employment opportunities. In sum, a thorough consideration of the substantiality factors set out in *Bell* demonstrates that Ms. Clark's speech did not create a substantial and material disruption nor could Pleasantville High's administration reasonably forecast a potential substantial disruption.

B. Ms. Clark's speech does not collide with the rights of others.

The Ninth Circuit is the only circuit to have ever materially applied the "colliding with the rights of others" prong since its inception in 1969. *See Harper v. Poway United School Dist.*, 445 F.3d 1166, 1177 (9th Cir. 2006), cert. granted, judgment vacated sub nom. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007); *see also Wynar*, 728 F.3d at 1072. In *Harper*, the Ninth Circuit held that a student's shirt bearing anti-homosexual sentiments collided with the rights of other students. *Harper*, 445 F.3d at 1178. The *Harper* court reasoned that "[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses." *Id.* Although the *Wynar* court only briefly touched upon this prong of *Tinker*, it nevertheless concluded that specific threats depicting a Columbine Shooting-style attack made against students collided with the rights of the speaker's fellow students. *Wynar*, 728 F.3d at 1072.

Aside from *Harper*'s lack of precedential value,[4] this Court should reject its reasoning under the basic tenants of its own First Amendment doctrine. In general, First Amendment rights create a "hazardous freedom" that encourages openness and comprises "the basis of our national strength and . . . the independence and vigor of Americans who grow up and live in this

[4] This Court vacated *Harper v. Poway United Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) as moot since the student speaker had graduated from high school.

relatively permissive, often disputatious society. *Tinker*, 393 U.S. at 508-09. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The Ninth Circuit sought to expand this Court's scant precedent under the "colliding with the rights of others" prong by reasoning that "[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society." *Harper*, 445 F.3d at 1178. Such reasoning is in direct conflict with this Court's pronouncement stating, "The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of multitude of tongues, (rather) than through any kind of authoritative selection." *Keyishian v. Brd. Of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (quotations omitted).

Finally, this Court should distinguish the present case from *Wynar* on the basis of specificity. In *Wynar*, the Ninth Circuit reasoned that the student speaker's detailed threat of shooting specified students by alluding to the Columbine Shootings collided with the students' right to be "secure and let alone." *Wynar*, 728 F.3d at 1067. In contrast to *Wynar*, Ms. Clark's speech was vague and non-specific as discussed above.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the Fourteenth Circuit's holding that Ms. Clark's Facebook post did not constitute a "true threat," and that *Tinker* does not apply to Ms. Clark's off-campus speech.

Respectfully Submitted,
Team N
Counsel for Respondent

APPENDIX

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment reads: "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." U.S. Const. amend. I.

BRIEF CERTIFICATION

The members of Team N hereby certify that all work contained in all copies of this brief is in fact the original work product of the members of Team N. Team N further certifies that its members have fully complied with Team N's school's governing honor code, and additionally that its members have complied with all Rules of the Competition.

/s/ Team N

Date: January 31, 2017