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 P

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a public high school student's Facebook post constituted a "true threat" beyond the protection of the First Amendment?
2. 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?

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STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on January 5, 2017. *Clark ex rel. Clark v. Washington Cty. Sch. Dist.*, 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. R. at 40. This Court now has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent Kimberly Clark ("Ms. Clark"), by and through her father Alan Clark ("Mr. Clark") filed an appeal with the Washington County School Board to contest Ms. Clark's suspension from school. R. at 3. The Board upheld the prescribed punishment by explaining Ms. Clark's expression was a true threat that materially disrupted the learning environment of Pleasantville High School. R. at 3. On December 7, 2015, Mr. Clark filed a complaint in the United States District Court for the District of New Columbia, seeking declaratory relief and alleging that the Petitioner Washington County School District ("Washington District") violated Ms. Clark's First Amendment right to freedom of speech. R. at 3. Petitioner Washington District and Respondent Ms. Clark filed cross motions for summary judgment on January 10, 2015. R. at 1. The District Court granted Petitioner's motion for summary judgment and denied Ms. Clark's motion for summary judgment on April 14, 2016. R. at 12. The District Court held that the First Amendment did not protect Ms. Clark's speech because it constituted a true threat, and that even if it was not a true threat, the speech created a material disruption at Pleasantville High. R. at 12.

Ms. Clark timely submitted an appeal to the United States Court of Appeals for the Fourteenth Circuit, seeking that the Fourteenth Circuit remand the case back to the District Court with instructions to enter summary judgment in favor of Ms. Clark. R. at 25. This case was

argued on November 14, 2016. R. at 25. On January 5, 2017, the Fourteenth Circuit remanded the case back to the District Court with instructions to enter summary judgment in favor of Ms. Clark. R. at 25, 39. The Fourteenth Circuit held that Ms. Clark's speech was not a true threat, and that *Tinker v. Des Moines Indep. Comty. Sch. Dist.* did not authorize the Washington District to discipline Ms. Clark for her speech. R. at. 39. Petitioner Washington District timely filed a petition for writ of certiorari to the Fourteenth Circuit, which this Court granted. R. at 40.

STATEMENT OF THE FACTS

I. Factual Background.

This case arose out of high school freshman Kimberly Clark's Facebook post containing her disapproving thoughts of the Washington County School District's ("Washington District") new nondiscrimination policy among transgender students—Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students ("Policy"). R. at 1, 2. The Washington District adopted the Policy on August 1, 2015, to quash harassment and discrimination against transgender students and to ensure that all students have equal access to each component of their educational programs. R. at 2, 15. As a result, Pleasantville High students are able to decide to which gender identity they subscribe and the school will address them accordingly. R. at 2. Thus, when Taylor Anderson, a fifteen-year-old sophomore who was born male, later identified as female, she was thereby allowed to participate on the Pleasantville girls' basketball team. R. at 2.

Ms. Clark was a fourteen-year-old freshman girl at Pleasantville High at the start of this litigation. R. at 13. She has no history of violent behavior and has never been subject to any school disciplinary action. R. at 23. She is also a member of the girls' basketball team. R. at 23.

II. The Nondiscrimination and Anti-Harassment Policies.

The Policy was enacted to advise Washington District staff on issues relating to transgender and gender nonconforming students. R. at 15. While the Policy offers approaches to specific instances that could arise relating to such students, it does not seek to anticipate every potential situation. R. at 15. Overall, the Policy ensures that all students can rely on a safe and inclusive learning environment, where all students, regardless of gender identification, can participate in all athletic clubs and activities run by the school. R. at 15, 16.

All Washington District schools are also required to monitor and prevent harassment, intimidation, and bullying through the Anti-Harassment, Intimidation & Bullying Policy. R. at 17. This policy prohibits the aforementioned practices, regardless of the manner communicated (e.g., in person or online), whenever the practice "could actually or reasonably could be expected to (1) harm a student, (2) substantially interfere with a student's education, (3) threaten the overall educational environment, and/or (4) substantially disrupt the operation of the school." R. at 17. Students in violation will be disciplined accordingly by their respective school. R. at 17.

III. Verbal Exchange and Resulting Ejection at the Basketball Game.

On November 2, 2015, Ms. Clark and Ms. Anderson participated in an intrasquad basketball game held by the girls' basketball team. R. at 2. A referee made a controversial call that resulted in a strictly verbal exchange between the two students, who were players on opposing teams. R. 23. The referee ejected both Ms. Anderson and Ms. Clark from the game. R. 23. Later that night, Ms. Clark wrote the following post on her Facebook profile from her home computer in her bedroom, voicing her concerns of having a transgender individual on an all-female basketball team:

> 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, 26. Ms. Clark was not Facebook friends with Ms. Anderson or any other transgender individuals at the time she wrote this post. R. at 23. Although Ms. Clark was aware that sometimes Facebook posts reach others beyond one's private friend group, she meant only for her Facebook friends to see this post. R. at 23. She also knew that viewers of her post could alert Ms. Anderson or other transgender students. R. at 14. But, Ms. Clark merely intended her remarks about "IT" and "other TGs" as jokes. R. at 23.

IV. Effect on Individuals and Transgender Community at Pleasantville High School After The Facebook Post.

On November 4, 2015, parents of Ms. Anderson and another male-to-female transgender freshman student, Josie Cardona, came to Principal Thomas Franklin's office to discuss Ms. Clark's Facebook post. R. at 13, 14. Both Ms. Anderson and Ms. Cardona were in attendance and appeared to be distressed. R. at 13. During this meeting the parents expressed their concerns about allowing their children to participate on the girls' basketball team, and allowing their children to continue attending Pleasantville High. R. at 14. The Andersons kept their daughter home for the two days following the post, but she did return to Pleasantville High. R. at 14. Principal Franklin also noticed that a few other students appeared upset at school. R. at 14. He resolved to talk to Ms. Clark and her parents and take disciplinary action if appropriate. R. at 14.

Principal Franklin met with Ms. Clark's parents on November 5, 2015. R. at 14. Principal Franklin explained that the Facebook post was materially disruptive to the school's learning

environment and collided with the rights of transgender students to feel secure at school. R. at 14. Ms. Clark was subsequently suspended for three days. R. at 14, 23. This disciplinary sanction will remain on Ms. Clark's permanent high school record, unless extinguished. R. at 14.

V. Ms. Clark's Father's Request to Reconsider his Daughter's Suspension.

Mr. Alan Clark believes his daughter should not be punished for expressing her discomfort with the idea of allowing transfemales to play on a girls' sports team. R. 20. Further, he claims the suspension inappropriately deprived his daughter of educational opportunities and unfairly shamed her before the entire school community. R. 20. Thus, Mr. Clark asked Principal Franklin to reconsider the suspension, to which Principal Franklin refused. R. 20.

Mr. Clark attempted to appeal the suspension to the Washington District Review Board. R. at 20. The Board explained that other parents had complained of Ms. Clark's Facebook post, and that the post was materially disruptive to the learning environment, as evidenced by the Andersons feeling the need to keep their daughter home. R. at 21. Mr. Clark still feels that the school's disciplinary action infringed upon his daughter's First Amendment rights. R. at 20.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's decision that Ms. Clark's Facebook post was not a true threat and that *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* did not authorize the Washington District to suspend Ms. Clark for her off-campus Facebook post, and that this case should be remanded back to the District Court with instructions to enter summary judgment in favor of Ms. Clark.

Federal circuits have failed to reach a consensus approach to determine when speech is a "true threat" and thus falls outside of First Amendment protection. This Court should apply the

reasonable speaker, as opposed to the reasonable recipient, standard to determine whether Ms. Clark's speech qualified as a true threat. The reasonable speaker framework entails a comprehensive inquiry into the intent of the speaker, the conditional nature of an expression, and the context surrounding the communication, while also satisfying the seminal "true threat" factors this Court delineated in *Watts v. United States* and *Virginia v. Black*. A reasonable speaker analysis also permits this Court to probe into the past relations and history of the speaker to ensure a thorough interpretation of the true intent behind the words at issue.

Under the reasonable speaker lens, Ms. Clark's speech does not rise to the level of a true threat. According to *Watts*, this Court should look to whether Ms. Clark's speech was political and/or conditional, and whether the context surrounding the statement illustrates a legitimate threat. Here, Ms. Clark's statement directly targeted the Washington District's new school policy, as well as her expression on a violation of her religion. These thoughts are inherently political. The Facebook post is also conditional, in that that it was devoid of a sense of immediacy and details that would lead a reader to discern when, where, and how this particular alleged threat could be carried out. Further, an analysis of the context incorporates the *Black* element of an intent to intimidate. Ms. Clark, a fourteen-year-old girl just beginning high school, with absolutely no record of prior discipline or bullying, merely meant her comment to her private Facebook audience in jest.

Even if the speech is not a true threat, under *Tinker*, a school can regulate the speech if there is a nexus between the student expression and the school that results in actual or foreseeable material disruption to the school's activities or collides with the students' right to feel secure. As the Fourteenth Circuit correctly noted, this Court cannot apply the *Tinker*

framework to Ms. Clark's Facebook post because her speech originated off campus and was intended for a limited, private audience—members of her Facebook community.

Even if the *Tinker* Test is applied to Ms. Clark's speech, this Court should find that neither a material disruption occurred at Pleasantville High, nor were any students stripped of their right to feel secure. Although several members of the Pleasantville student body complained and were observed to be "distressed," this is ambiguous and insufficient evidence to warrant a grant of summary judgment that finds a material disruption or that students felt insecure. Further, the Washington District's lack of: (1) inquiry into Ms. Clark's intent or purpose; (2) precautionary measures taken to prevent any perceived impending disruption; and (3) any issue since the events that gave rise to this litigation indicate there was not a reasonably foreseeable disruption to Pleasantville High.

ARGUMENT

I. There Are Genuine Issues of Material Fact Such That This Case Should Be Remanded to the District Court.

This Court should affirm the Fourteenth Circuit and remand this case to the District Court with instructions to enter summary judgment in favor of Ms. Clark. Summary judgment should be granted if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If this Court is not persuaded in favor of Ms. Clark, this case still must be remanded for further fact finding because there is a genuine issue of material fact that makes the District Court's grant of Petitioner's motion for summary judgment improper. Specifically, the record is devoid of an affidavit or testimony from Ms. Anderson, Ms. Cardona, and any other Pleasantville High

student to provide a first hand account of the level, if any, of emotional or psychological distress caused by Ms. Clark's Facebook post. Students were merely observed by a third party to be "visibly distressed" and "upset." R. at 13, 14. This failure to evidence the honest reactions of students is fundamental to whether the Facebook post was either a true threat or caused a material disruption to the student body or a collision with its right to be secure.

II. Ms. Clark's Facebook Post Was Not a True Threat.

First Amendment jurisprudence is rooted in its continual commitment to protect all American speakers. *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 740 (1996). To fall outside of this shield and be designated a "true threat," a statement must rise to the level where "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual." *Virginia v. Black*, 538 U.S. 343, 359 (2003). But, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Thus, it is not merely just to draw this distinction, it is imperative to discern truly threatening communications from inevitable offensive language stemming from high school athletic competition.

a. This Court Should Adopt a Reasonable Speaker Standard When Determining the Existence of a True Threat.

Federal courts consistently grapple with how to measure a "true threat." *See Watts v. United States*, 394 U.S. 705, 707–08 (1969) (establishing the true threat standard); *Black*, 538 at 359 (refining true threat analysis to include the intent to intimidate). Despite establishing factors for consideration, confusion remains among the federal circuits regarding the precise nature of intent needed to satisfy a true threat, such that the statement is precluded from First Amendment

protection. *See* Paul T. Crane, *True Threats and the Issue of Intent*, 92 VA L. Rev. 1225, 1226 (2006) ("[I]n providing a definition, the [*Black*] Court created more confusion than elucidation."). Therefore, this is a distinct opportunity for this Court to better define the standard and definition by which a true threat is determined.

Federal circuits are split on whether the level of intent should be analyzed from the speaker's point of view or the recipient's, and the amount of weight contextual clues should hold.[1] This Court should adopt a reasonable speaker standard because the "reasonable recipient test is less conducive to the robust and wide-open public debate envisioned by the First Amendment because a speaker may find it necessary to tone down his or her speech in fear of triggering a recipient's unknown sensitivity." *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 623 (8th Cir. 2002). Further, despite the divide in federal circuits on a speaker or recipient standard, every single circuit relies, to varying degrees, on contextual clues. *United States v. Lee*, 6 F.3d 1297, 1306 (8th Cir. 1993) ("Threats must be analyzed in the light of their entire factual context."). The reasonable speaker standard allows for greater insight into the context of a

[1] *See, e.g., United States v. Nishniandize*, 342 F.3d 6, 14–15 (1st Cir. 2003) (finding that a true threat is one that a reasonable recipient familiar with the communication would find threatening); *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997) (using context and the specific recipient to determine a true threat); *United States v. Malik*, 16 F.3d 45, 48 (2d Cir. 1994) (using a reasonable recipient familiar with the context standard); *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) (creating an objective true threat test that considers whether a reasonable recipient familiar with the context would interpret the statement as a threat); *Porter v. Ascension Sch. Dist.*, 393 F.3d 608, 617–18 (5th Cir. 2004) (conducting the true threat analysis from the recipient's perspective, but ultimately not concluding on the accurateness of a recipient or speaker based test); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992) ("[T]he standard . . . is an objective standard, i.e., would a reasonable person consider the statement to be a threat."); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990) (reasonable recipient standard); *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 622–23 (8th Cir. 2002) (using the reasonable recipient standard); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 2005) (analyzing a true threat from the speaker's perspective); *United States v. Welch*, 745 F.2d 614, 619 (10th Cir. 1984) (using a reasonable speaker standard regarding statements to the President of the United States).

statement at issue—and, as stated, context is the one commonality asserted by all circuits. Further, the speaker is in the best position to shed light on features of her intentions and mindset.

Online communications, like a Facebook post, are inherently susceptible to misinterpretation of the writer's true intentions and emotions. Only black letters appear and the reader is deprived of facial expressions, voice intonations, and body language, among others, that could aid in communication interpretation. A "sarcasm font" does not exist, yet Ms. Clark utilized society's closest version of it: capital letters. Ms. Clark stated that she intended for her use of "IT" to be humorous. R. at 23. It is commonplace in text language to indicate sarcasm by placing words in all capital letters—and, notably, Ms. Clark typed "IT" in capital letters with every use of the term. R. at 2. Moreover, Ms. Clark reduced her audience to her Facebook community, absent Ms. Anderson or any other transgender individual, which likely included only people that would understand her perspective as intentionally humorous. R. at 23.

As this Court fiercely upholds, the First Amendment recognizes that "a function of free speech under our system of government is to invite dispute," and "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce [them] into action." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). Ms. Clark's Facebook post may have embarrassed Ms. Anderson or provoked an argument, but when examining the issue through the lens of a fourteen-year-old girl, her statement is devoid of true threat factors. She was passionate about her feelings, and it must be remembered that "[w]hat is offensive to some is passionate to others," and this passion is protected by the First Amendment. *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996).

i. The Reasonable Speaker Standard is Satisfied by the *Watts* Factors.

The distinction between a reasonable speaker and reasonable recipient was borne of federal court interpretations of *Watts v. United States* and *Virginia v. Black*. *Watts*, 394 U.S. at 707–08; *Black*, 538 U.S. at 359. The *Watts* court developed a three part test, holding that a statement is not a true threat if the following are all true: (1) the statement is political; (2) the statement is conditional in nature; and (3) the full context of the speech indicates that it is not a serious threat. *Watts*, 394 U.S. at 708. The *Black* court refined this test by holding that a true threat hinges not just on a consideration of the aforementioned factors, but also on whether an "intent to intimidate" is present. *Black*, 538 U.S. at 347. Although these seminal cases are criminal, there has yet to be a civil Supreme Court case directly addressing this issue of intent. Absent direction on the issue, federal courts apply this criminal "true threat analysis" to civil matters. *See, e.g., Porter v. Ascension Sch. Dist.*, 393 F.3d 608, 617–18 (5th Cir. 2004) (civil case using criminal law); *United States v. Cassel*, 408 F.3d 622, 630–31 (9th Cir. 2005) (same).

In keeping with this theme, this Court reliably holds that a "wrongdoing must be conscious to be criminal," and there is no need to stray from that now. *Morissette v. United States*, 342 U.S. 246, 252 (1952). Thus, a level of scienter is necessary to prove a conviction or civil wrongdoing. *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (holding that proof of intent was necessary to criminalize an online threat). The reasonable speaker standard requires inquiry into Ms. Clark's mindset at the time she wrote the post, and her affidavit shows that she was not conscious of any severe wrongdoing such that her statement equates to a true threat. R. at 23 ("[I]ntended merely as jokes."); *see also Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373 (9th Cir. 1996) (holding that the most accurate test is whether a reasonable person would foresee that the statement would be interpreted as a serious threat).

1. Ms. Clark's Facebook Post Was Political.

Using the *Watts* factors, Ms. Clark's statement was political in nature. R. at 2. She directly cites to the school policy and provides her feelings regarding the same. R. at 2. As stated in the Fourteenth Circuit, her post is a form of protest against the Washington District's Policy of allowing transfemale students—regardless of the status of the student's transition—to participate on a girls' basketball team. *Clark ex rel. Clark v. Washington Cty. Sch. Dist.*, No. 17-307, slip op. at 4 (14th Cir. Jan. 5, 2017). Even though her Facebook post is two separate paragraphs, it is all contained in the same post and echoes her overall contention that the Policy is unfair in terms of school guidelines and immoral with regard to her religious beliefs. R. at 2, 23–24. It is Ms. Clark's First Amendment right to disseminate her political opinion, even where it is offensive, and she should not be deprived of this. *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that a church's protest with messages "Thank God for Dead Soldiers" was protected due to it being a matter of public concern at a public place).

2. Ms. Clark's Facebook Post Was Conditional in Nature.

Ms. Clark's post is also conditional in nature. As a direct response to Ms. Clark and Ms. Anderson being ejected from the basketball game, Ms. Clark went home that night and wrote the Facebook post from her personal computer in her bedroom. R. at 23. Not only would this post not have occurred but for the new school policy, but Ms. Clark did not state enough specifications that would show when or where any sort of altercation would occur. R. at 2; *compare United States v. Callahan*, 702 F.2d 964, 965–66 (11th Cir. 1983) (holding that a letter containing the time, date, and place of a statement was a true threat). Additionally, both the Second and Tenth Federal Circuits mandate that the statement at issue contain an element of immediacy, such that a statement is not a true threat if the speaker does not convey an "imminent

prospect of execution." *United States v. Dillard*, 795 F.3d 1191, 1200 (10th Cir. 2015) (quoting *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 196 (2d Cir. 2001)). This sense of immediacy is lacking where Ms. Clark wrote the Facebook post from her own bedroom, in her own house, and removed from the physical locations of Ms. Anderson and the school.

3. The Full Context of Ms. Clark's Facebook Post Illustrates That It Was Not A True Threat.

Last, it is imperative that the full context of Ms. Clark's post be considered. She was a fourteen-year-old high school freshman girl, playing on her high school girls' basketball team for the first time. R. at 2, 23. It is unclear whether Ms. Anderson had undergone a male to female transition. R. at 2. Assuming she had not, Ms. Anderson had higher levels of androgen hormones, which gives males a higher maximum oxygen uptake—a quality highly important to aerobic activity performance, like that of basketball. Jill Pilgrim et. al., *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 Fordham Intell. Prop. Media & Ent. L.J. 495, 529 (2003). At a basic scientific level, the difference between males and females at this age is vastly different. *Id.* Moreover, elements of safety, fairness, and social stigma are central in a young high school environment. Teenage girls already may have a difficult time congealing on a same-sex sports team. And biological differences aside, the evolving dynamic of integrating transfemales into athletic competition inevitably poses intimidation, confusion, and frustration to younger girls who may no longer feel as safe or as athletically competent as other members of their team. It is indisputable that this is a new era for high school athletics, but Pleasantville High quashing its own student's valid verbal reactions to a new policy is not the way to foster a "safe, inclusive learning environment for *all* students." R. at 14 (emphasis added).

ii. The Reasonable Speaker Standard Solves the *Black* "Intent to Intimidate" Issue.

It is well known that the *Black* court did not clearly define the nature of intent needed to satisfy the true threat standard. *See* Steven Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 Notre Dame L. Rev. 1287, 1288 (2005) (discussing the difficulty in understanding following the *Black* opinion). But, when an "intent to intimidate" is viewed from the speaker's perspective, the focus is back on the mental element. Ms. Clark did not *intend* to intimidate Ms. Anderson such that her Facebook post is a true threat.

In *Black*, the issue surrounded the criminalization of two incidents of cross burning by Ku Klux Klan members. *Black*, 538 U.S. at 347. The Court held that defendants could be convicted if there was evidence that the cross burning—typically protected First Amendment "speech"—was done with an intent to intimidate. *Id.* at 363–64. But, it remains unclear whether that intent pertains to the speaker's intent to communicate something that could be reasonably understood as a threat by the recipient—i.e., whether courts need to look from a speaker's or a recipient's point of view. The answer is found within Ninth Circuit jurisprudence. *See Cassel*, 408 F.3d at 633 (discussing how the *Black* majority clearly intended for a requirement that the speaker *subjectively intended* to intimidate) (emphasis added). In essence, there is no viable alternative interpretation of *Black*: an "intent to intimidate" must be analyzed from the reasonable speaker's point of view, and that is mandated here.

Further, a contextual-intensive analysis developed by the Eighth Circuit bolsters the Ninth Circuit's interpretation of *Black*, that intent must be examined with the speaker prominently in mind. *See Dinwiddie*, 76 F.3d at 925 (looking to communication means and a speaker's history to determine whether a protestor's statements against abortion were true threats outside of First Amendment protections). This analysis contains similar *Watts* factors, but also

looks to whether the threat was communicated directly to the victim, whether the speaker had made similar statements to the victim before, and whether the victim had reason to believe the speaker had a propensity for violence. *Id.* This test examines factors beyond a reasonable recipient, and directs a factfinder to look at prominent characteristics of the speaker.

Ms. Clark's Facebook post was not communicated directly to Ms. Anderson or any other transgender student—rather, it was posted on her private Facebook profile, of which neither Ms. Anderson, Ms. Cardona, nor any other transgender person was a member. R. at 23. Ms. Clark has never been academically disciplined before, as attested to in her affidavit, and it can be reasonably inferred from the record that she had never had any notable interactions with Ms. Anderson prior to the event at issue. R. at 19; 23 (stating that Ms. Clark was a freshman and thus brand new to Pleasantville High that year). Last, Ms. Clark has no history of any violent behavior. R. at 23. Weighing these factors, Ms. Clark satisfies all of the elements that keep her statement within First Amendment protection, consistent with both *Watts* and the comprehensive Ninth and Eight Circuit analysis.

Moreover, aside from statements by Principal Franklin that some students were distressed, the record is absent of affidavits from Ms. Anderson, her parents, or any other Pleasantville student to correctly discern their reactions. R. at 13. Ms. Anderson was kept home by her parents for two days, but returned after this point and remains there currently. R. at 14. Thus, when drawing reasonable inferences in a light most favorable to Ms. Clark, the nonmoving party, it can be inferred that any tension between the students dissipated and the status quo—a normal high school environment—returned.

If the reasonable speaker standard is upheld in this case, this Court is given the opportunity to truly analyze the Facebook post from a young girl's perspective. This Court can

consider her adolescent age, the social pressure she is under to perform well and stand out in high school, and the legitimate normalcy of a teenager using social media to vent frustration. This case is no more than a young girl posting an offensive message on her personal Facebook page—she does not spell out a time or place for an interaction with Ms. Anderson, she uses capital letters that imply sarcasm, and she uses immature words such as "freak of nature" and "IT." R. at 2. The reasonable speaker, in this case, was a fourteen-year-old girl who merely posted a childish response to an event at school, devoid of any suggestions of a legal true threat.

b. Public Policy Supports Allowing Minors To Communicate Policy Views As Much As Possible.

Society has undergone a seismic shift in the forum choices of political discourse. Gone are the days when individuals would swap political views in a face-to-face setting. Social media is now the dominant channel through which people express their deeply held political views and religious beliefs. Minors, specifically youths like Ms. Clark, already experience difficulty expressing their sentiments and frustrations in person. Social media platforms like Facebook are valuable resources and channels for minors to reflect on their closely held political and religious beliefs. In the spirit of the First Amendment, it is the duty of the justice system to uphold the opinions of minors as valid and integral to the democratic process. After all, the Constitution proscribes the abridgment of free speech, and qualifying Ms. Clark's Facebook post as a true threat not only curtails her speech, it silences her right to expression. U.S. Const. am. 1.

III. The *Tinker* Test Does Not Apply to Ms. Clark's Private-Audience Facebook Post that Expressed her Protected Political and Religious Views, and, Even If The *Tinker* Test is Applied, Ms. Clark's Off-Campus Communication Fails the Test.

This Court in 1969 formulated the surviving test for when a school can restrict on-campus student speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 514 (1969).

This test, hereinafter the *Tinker* Test, accounts for the degree of disruption at a school and the rights of fellow students to feel secure when evaluating whether a school is legally empowered to regulate student speech. *Id.* at 513–14. In *Tinker*, high school students expressed their opposition to the Vietnam War by wearing black armbands to school. *Id.* at 514. This use of armbands "to make their views known, and . . . influence others" was deemed political, albeit controversial speech. *Id.* Because the students caused nothing but relevant discussion outside of school, this Court held that this politically charged student expression should not be disciplined. *Id.*

This Court finds Pleasantville High School amidst a similar academic environment rife with social conflict, stemming from the religiously, politically, and scientifically contested movement to accept teenage transgender students in the classroom, in the locker room, and in athletics. To absolve the tension between free expression and a school's duty to maintain an orderly educational environment, this Court noted "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682 (1986) (restricting student speech under *Tinker*).

As aforementioned, the *Tinker* Test is grounded in first determining whether a student expression occurred in school or school activity context. 393 U.S. at 513. To warrant school intervention, the student expression must result in one of three circumstances: (1) a material disruption to school activities occurred; (2) the record contains facts which might reasonably have led school authorities to forecast material disruption with school activities; or (3) the speech invaded the rights of members of the school to feel secure.[2] *Id.* at 513–14. Here, Ms. Clark's

[2] This Court carved out one exception to *Tinker*, in *Bethel Sch. Dist. No. 403 v. Fraser*, which permits schools to restrict blatant vulgar or lewd student speech. 478 U.S. 675, 685 (1986). This exception is acknowledged, but will not be addressed, because Ms. Clark's Facebook post, on its face, does not contain any explicit sexual references or vulgarities.

speech was not made in the context of a school activity, and, even if it was, it did not cause a material disruption or collide with any student's right to feel secure.

a. *Tinker* Cannot Apply Because Ms. Clark's Post Is Not School Speech.

The *Tinker* Test is only applicable where there is a nexus between a student's expression and school boundaries or its activities. *Tinker's* progeny authorized the restriction of student speech in a student newspaper, at a school assembly, and at an off campus school-sponsored function. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (school district acted within its authority in imposing sanctions upon a student after his offensively lewd and sexual innuendo-riddled on-campus speech at a student assembly); *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (holding no First Amendment violation occurred when a school exercised editorial control over its high school newspaper publishing viewpoints on student pregnancies and sexual history); *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007) (holding a principal did not violate a student's right to free speech by confiscating his banner that hung across the street from school that read "BONG HiTS 4 JESUS"). This case—an attempt to apply *Tinker* to speech shared privately on the Internet, far removed from plain sight or earshot of the campus—is one of first impression for this Court. This Court should affirm the Fourteenth Circuit's holding that the Washington District cannot restrict Ms. Clark's off-campus online speech, and remand this case to the District Court with instructions to enter summary judgment in favor of Ms. Clark.

i. Ms. Clark's Speech Originated From Her Home.

This Court cannot apply the *Tinker* Test because Ms. Clark's Facebook post is not "school" speech subject to administrative restriction. 393 U.S. at 513. Unlike this Court's prior cases involving proper restriction of student speech, Ms. Clark's social media post was not made at school or at a school-sponsored activity, and it therefore fundamentally cannot fall within the

Tinker framework. *Fraser*, 478 U.S. at 683 (restricting speech made at a student assembly); *Hazelwood*, 484 U.S. at 262 (censoring student speech made in the student newspaper); *Morse*, 551 U.S. at 393 (restricting student speech made across the street from school, in plain view of students at a parade that the school sanctioned and supervised). Rather, Ms. Clark's expression was made to a select group on her Facebook—an array of family members and friends that do not attend Pleasantville High. R. at 23. And, her speech originated from her personal computer while she was in her bedroom—she was physically far removed from school grounds. R. at 23.

ii. The *Tinker* Test, Even If Applicable to a Student's Social Media Speech, Cannot Be Extended to Posts Made to a Private Audience.

Since the *Tinker* decision in 1969, technological developments and the rampant use of social media have empowered students with potent mass communication abilities. Modern students have the power to disseminate and direct a digital message to the entire student body with undeniable ease. While there is merit to extending *Tinker* to social media generated by students off campus, *Tinker* should still not stretch to restrict off-campus private messages, much less commentary on political and religious values.

If this Court opts to analyze online student speech using the *Tinker* Test, this Court should draw a line based on the expression's intended audience. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (holding *Tinker* governs First Amendment analysis when a student intentionally directs speech at the school community). The *Bell* court applied the *Tinker* Test to uphold a school district's suspension of a student who caused a substantial disruption to school activities when he publicly uploaded a crude YouTube video—making the video available to anyone on the Internet. *Id.* at 383, 396. The student admitted that the rap video was published for the consumption of the whole student body, and he did so to raise awareness of alleged lewd conduct of school employees. *Id.* at 396. This mass broadcasting of a digital message targeting

the entire student body in *Bell* is akin to the public assembly speech in *Fraser* or the banner strung across the street from the school in *Morse*—these public messages fall within the scope of student speech that schools can sanction under *Tinker*. *Fraser*, 478 U.S. at 683 (vulgar class assembly speech); *Morse*, 551 U.S. at 396 (banner hung by school promoting illegal drug use).

Contrary to *Bell*, here, Ms. Clark's speech was posted on her private Facebook account and was available only to her Facebook "friends." R. at 23. These "friends" to whom the message was shared did not include Ms. Anderson, Ms. Cardona, or any other transgender individual. R. at 23. Ms. Clark clarified her intended audience in her affidavit, stating, "I meant only for my own friends to see my Facebook post." R. at 23. Ms. Clark retained the option to make her Facebook profile "public" and viewable to all, but maintained a "private" profile for instances such as this. Therefore, any reliance by this Court on *Bell*, which hinged on the intentional mass publication of a student expression directed to the student body at large, is misplaced.

Here, this Court is presented with a situation akin to Ms. Clark expressing her views orally to her Facebook friends and family in person. To apply *Tinker* to this equivalent situation would permit a school policy to assert censorial authority over expressive conversations between friends in their bedrooms—a sacred boundary this Court should refuse to trespass.

b. Even If This Court Applies The *Tinker* Test, Ms. Clark's Post Does Not Satisfy Any Elements Of The Test.

Tinker cautioned schools against censoring student speech just because of an "undifferentiated fear or apprehension of disturbance," or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 508–09. Ms. Clark's stance on the Policy may be unpopular and an uncomfortable reality for some students at Pleasantville High, but her expression is still political and religious in nature and,

therefore, is entitled to a heightened level of First Amendment protection. *Fraser*, 478 U.S. at 683 ("Unlike the sanctions imposed on the students wearing armbands in *Tinker,* the penalties imposed in this case were unrelated to any political viewpoint.").

i. No Material Disruption Occurred at Pleasantville High.

Because this is an event of cross motions for summary judgment, this Court must construe the facts and inferences drawn in favor of the party against whom the motion was made. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986). The evidence, when read in a light most favorable to Ms. Clark, indicates the disruption at Pleasantville High is equal to or less than the minimal disturbance found in *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist*., 650 F.3d 915, 928 (3d Cir. 2011) (holding student gossiping and canceled counselor meetings did not constitute a substantial disruption). This *de minimus* level does not satisfy the *Tinker* Test's requirement of an actual, material disruption.

1. Student and Parent Complaints are Not a Material Disruption.

Sparse complaints made by students and parents, alone, are likely not a material disruption. *Tinker*, 393 U.S. at 514 (holding that heated student discussion outside the classroom was not a material disruption). In *Snyder*, the school district suspended a student for creating a public MySpace "mock" profile of her school principal. *Snyder*, 650 F.3d at 920. The profile, which utilized the principal's actual photo, made explicit vulgar and sexual representations. *Id.* at 921. Following the creation of the profile, general "rumblings" among the student body, incessant student gossiping during class, and conversations that provoked a professor to raise his voice still were not enough constitute a *Tinker* material disruption. *Id.* at 923–24.

The undetailed nature and undetermined amount of complaints Principal Franklin fielded from students very likely does not meet the material disruption standard envisioned by this Court

in *Tinker*. *Tinker*, 393 U.S. at 508 (finding that hostile remarks to the students wearing armbands was not a material disruption). Further, although Ms. Anderson was kept home from school for two days following the post, Ms. Anderson's parents made this decision—not her. R. at 3. Since Ms. Anderson's return to Pleasantville High, she, Ms. Clark, and every transgender individual have shared the same hallways at Pleasantville High without issue.

2. The Students' Ambiguous Emotional Discomfort is Not a Material Disruption.

The Record is barren of any direct evidence or testimony that identifies the specific level of discomfort Ms. Clark's post caused any student. Principal Franklin observed that the affected students appeared "visibly distressed" and "upset." R. at 13, 14. There is an expansive range of emotions—from slightly offended to severely mentally disturbed—that can all physically manifest equally as "visibly distressed" or "upset." Neither of the allegedly affected individuals nor their parents have put forth any evidence to explain why Ms. Anderson and Ms. Cardona were distressed in the meeting or to what degree they were upset. To find that this ambiguous level of independently observed emotional reaction constitutes a disruption to a school community or invasion of student security is conclusory. This reliance on an undetermined material fact indicates this case is not ripe for the summary judgment for which Petitioner prays.

ii. A Disruption Was Not Reasonably Foreseeable.

To determine what constitutes a foreseeable disruption, an analysis of the conditions surrounding the speech must be considered. *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008) (examining factors such as: the speaker's stature in the school, use of vulgarities, the principal's receipt a deluge of calls and emails over the issue, and "riled up" students over a cancelled school-sponsored event). In *Burge ex rel. Burge v. Colton Sch. Dist. 53*, a fourteen-year-old

student made a series of posts on his private Facebook page about one of his teachers, including posting that "she needs to be shot." 100 F. Supp. 3d 1057, 1060 (D. Or. 2015). The teacher was reportedly nervous and upset, and she protested the student's return to her classroom. *Id.* at 1061.

The *Burge* court noted, though, that the student had never been disciplined before. *Id.* at 1066. Despite the teacher's negative reaction, there was no evidence that the school took additional action or precautions that proved it foresaw a disruption. *Id.* at 1061; *see also Tinker*, 393 U.S. at 509 ("[A]n official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption."). Accordingly, the *Burge* court held that the student's comments did not "present[] a material and substantial interference with school discipline." 100 F. Supp. 3d at 1064.

As in *Burge* and *Tinker*, here, there is no record that Principal Franklin did anything else to address the safety concerns expressed by the Andersons and Cardonas, other than meet with Ms. Clark and her parents. R. at 37. No investigative or preventative measures—probing into Ms. Clark's personal life or reasoning behind the post—were taken to prevent any forecasted disruption to school activities. Like the student in *Burge*, Ms. Clark has no known propensity to violence and has no disciplinary history. R. at 14, 23. Unlike *Burge*, which featured a reference to shooting a specific teacher, Ms. Clark made no specific violent remarks about Ms. Anderson in her Facebook. Ms. Clark merely intended her references to "IT" and "other TGs"—made-up words, typed in all capital letters—to be read in jest. R. at 23.

iii. Ms. Clark's Post Did Not Collide With The Pleasantville Students' Right to be Secure.

This Court has not yet identified what constitutes a statement's collision with the rights to feel secure at school. The Ninth Circuit provides this guidance and illustrates that Pleasantville High students felt protected at all relevant times. *Harper v. Poway United Sch. Dist.*, 445 F.3d

1166, 1171-72 (9th Cir. 2006) (student wearing shirt reading "Homosexuality is Shameful" to school on day to promote sexual orientation acceptance collided with students right to feel secure); *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1071 (9th Cir. 2013) (student with violent history threatening mass shooting at school collided with students right to feel secure).

The following examples describe where this right to security has been threatened. In *Wynar v. Douglas County School District*, via another social networking website, a student bragged about his weapons, threatened to shoot specific classmates, and intimated that he would "take out" other people at school on a specific date, and invoked the image of the Virginia Tech massacre. 728 F.3d at 1065. The *Wynar* court held that a school shooting patently impinges on other students' rights. *Id.* at 1072. In *Harper*, a student wore a shirt to school that read "Homosexuality is Shameful" on the same day the school held a Day of Silence in an effort to "teach tolerance of others, particularly those of a different sexual orientation." 445 F.3d at 1171–72. The Ninth Circuit concluded that the shirt's message "collide[d] with the rights of other students in the most fundamental way," because being 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." *Id.* at 1178. This Court should adopt the Ninth Circuit's reasoning because it clearly sets forth an intelligible standard that values freedom of expression and it shows that a Facebook post not directly viewable to someone else does not equate to a psychological attack.

Thus, this case does not rise to the level of the student insecurity found in Ninth Circuit case law. Ms. Clark's post did not invoke images of the mass school shootings that school children and administration should rightfully fear. Ms. Clark's private Facebook post was purely a young girl's expression of political and religious frustration. If any student felt insecure, it was

Ms. Clark. She voiced her concern about her safety on the basketball court while playing against transfemales. R. at 24. The palatable frustration in the post stemmed from a verbal disagreement on the basketball court—an event common in the sport—and no physical altercation or implied threats of harm were communicated on the court or after the disagreement. R. at 23. Ms. Clark did not bring her controversial views directly into the hallways of Pleasantville High to cause insecurity *a la Harper*. She expressed her message in the comfort and security of her home to her select, pre-approved group of Facebook friends.

While unquestionably a heated topic and post, this Court should look to: (1) Ms. Clark's track record of being a peaceful student and no suggestions of a departure from that norm; (2) an absence of additional action taken by the Washington District and Principal Franklin in response to her post; and (3) the channel and location of Ms. Clark's speech, in determining that Pleasantville High students did not have their right to feel secure infringed upon. Therefore, this Court should affirm the Fourteenth Circuit's holding and remand this case to the District Court with instructions to enter summary judgment in favor of Ms. Clark.

CONCLUSION

For the foregoing reasons, Ms. Clark respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Fourteenth Circuit, and remand the case to the United States District Court for the District of New Columbia with instructions to enter summary judgment in favor of Respondent, Ms. Clark.

CERTIFICATE

Team P hereby certifies that the following statements are true:

(1) The work product contained in all copies of Team P's brief is in fact the work product of the members of Team P;

(2) Team P has complied fully with its school's governing honor code; and

(3) Team P has complied with all Rules of the Competition.

Team P

Counsel for Respondent

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment states the following:

> 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. am 1.