Team:U

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 Petitioner

Team U

Counsel for Petitioner

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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The opinion of the Court of Appeals held for the respondent, Clark. The District Court held for the petitioner, School District of Washington County.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 2017. The petition for a writ of certiorari was granted. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

APPENDIX OF RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority…" U.S. CONST. art. III, § 2, cl. 1.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech…" U.S. CONST. amend. I.

STATEMENT OF THE CASE

On November 2, 2015, two Pleasantville High School students who identify themselves as female— Kimberly Clark who was born female and Taylor Anderson who was born male— were ejected from an intrasquad basketball game after engaging in a loud verbal argument initiated over a referee call. R. 13, 23.

As a transgender student, Ms. Anderson had only recently been allowed to join the team after Washington County School District in New Columbia had instituted a new nondiscrimination policy at her school. R. 15-16. This policy, instituted on August 1, 2015, had forbidden schools from banning students from teams based on their biological sex. *Id*.

The night after she fought with Ms. Anderson, while at home and using her personal computer, Kimberly Clark wrote and uploaded the following Facebook post:

> 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. 18.

Ms. Clark was not friends with any transgender students on Facebook, and stated that she meant only for her friends to see the post. R. 14. However she also admitted that not only did she know that her friends may pass the post on to other people, but she knew that they were "likely to alert" Taylor Anderson and other transgender students. *Id*.

As Ms. Clark had suspected, some transgender students in the school soon became aware of the post. On November 4, 2015, Taylor Anderson and another transgender student, Josie Cardona, along with their parents, came to see the principle of Pleasantville High School, Thomas James Franklin. R. 13. Mr. Franklin reported that the students were "visibly distressed" and their parents expressed that because of the Facebook post they were afraid Ms. Clark would hurt their daughters. R. 13-14. The students expressed that because of Ms. Clark's Facebook threat they were afraid to play basketball and even to attend school at all. R. 14. Ms. Anderson had not attended school since the day the post was uploaded. *Id*. Later the same day other upset students also complained about the post to Principal Franklin. *Id*.

Mr. Franklin then invited Ms. Clark and her parents to a meeting on November 5, 2015. R. 14. At that meeting, Ms. Clark took ownership of her post. *Id*. She also admitted that she intended for her friends to see her post "because it stated her views on an important school

policy." R. 19. Ms. Clark stated her view that transgender students are "against God's law." R. 23. She also claimed that she intended her Facebook remarks as jokes. *Id*.

As Principle of Pleasantville, Mr. Franklin was responsible for implementing the school's Anti-harassment, Intimidation, & Bullying Policy, which prohibits threatening communications (including "electronic" communications and "messages") which "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. 13, 17. After speaking with Ms. Clark and her parents, Mr. Franklin concluded that Ms. Clark's post had been "materially disruptive" and had prevented other students from feeling safe at school. R. 14. Mr. Franklin then gave Ms. Clark a three-day suspension. *Id*.

Worried about the effect this would have on her permanent record, Ms. Clark's father Alan Clark appealed her suspension to The Washington County School Board. R. 20. The School Board rejected her appeal and upheld her suspension. R. 20. The Chair of The District Disciplinary Review Board explained this decision, writing in a letter to Mr. Clark that "the advent of cyber bullying has led to a dramatic shift in the interactions of students and can have a devastating effect on students in the classroom and at home" and that "administrators need the ability to address any bullying concerns brought before them involving the school or school events, even if their origin is off-campus." R. 21. He concluded that Ms. Clark's post was disruptive and a strong example of unallowable school-related cyber bullying. R. 21-22.

After her appeal failed, Ms. Clark initiated this action. The facts of the case were never in dispute and both parties filed summary judgments. Ms. Clark alleged that her first amendment rights to free speech had been violated. R. 24. The Washington County School District argued that Ms. Clark's post was not protected under the first amendment because it was a true threat

and because it was both materially disruptive to other students and collided with their rights to be secure. The United States District Court for the District of New Columbia found for the school district. On appeal, the United States Court of Appeals for the Fourteenth Circuit then reversed for Ms. Clark. This Court then granted certiorari.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals should be reversed because Clark's Facebook post was not protected by the first amendment, both under true threat analysis and the *Tinker* framework. There are a number of tests used to determine whether a statement is a true threat. Statements found to be political in nature are generally not held to be true threats. Additionally, a true threat will generally not be found when the speaker is far removed from his victim. However, statements meant to intimidate and which put their victims in fear of bodily harm can be seen as true threats. A true threat will also be found if (1) the threat has a reasonably deleterious effect on its victim, or (2) the statement is intended to be a threat. In this case, Clark's Facebook post is a true threat because of the proximity of herself to her victim as well as the non political nature of the statement. Additionally, Clark's post is a true threat because of its deleterious effect on Anderson and the fact that Clark intended it to be a threat.

Generally, a statement will trigger *Tinker* framework scrutiny when it interferes with the administration of school related activities, even when the statement is made away from the school. A statement will be protected by the First Amendment unless it (1) materially disrupts the school environment and (2) intrudes upon the rights of other students. In this case, Clark's Facebook post materially disrupted the school environment by causing Anderson's parent to keep her from school out of fear, intruding upon her right to an education. Thus, Clark's post fails *Tinker* framework scrutiny and is not protected by the first amendment.

For the foregoing reasons and those more fully articulated below, this Court should reverse the ruling of the Court of Appeals.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE MS. CLARK'S FACEBOOK POST WAS A TRUE THREAT AND THUS WAS NOT PROTECTED BY THE FIRST AMENDMENT

The Supreme Court has laid out exacting standards for what does and does not qualify as speech protected by the First Amendment. For example, it clarified its assertion that the government cannot forbid an idea "simply because society finds the idea itself offensive or disagreeable" by making an explicit exception for threatening speech. *Texas v. Johnson,* 491 U.S. 397, 414 (1989); *Virginia v. Black*, 538 U.S. 343 (2003). This speech, called "true threats" is not protected because it has "low value" and could "inflict such serious harm." *United States v. Cassel*, 408 F.3d 622, 627 (9th Cir. 2005).

Unfortunately, beyond the near-universal agreement that true threats are threatening, harmful, and not protected by the first amendment, there is still a fair bit of controversy over what particularly constitutes a true threat. Circuit courts look to two seminal "true threat" cases for answers, yet still differ, particularly on whether a threat should focus on its reasonable effects (the majority) or the subjective intent of the perpetrator (the minority).

A. Ms. Clark's Facebook Post Was A True Threat Because It Fits Into The Supreme Court's Framework Of A True Threat.

The first classic true threat case decided by the Supreme Court, *Watts v. United States*, found that in the political sphere where the parties are removed from each other, there is no true threat. In that case the defendant made a threat against the life of the President of the United States while protesting police brutality. 394 U.S. 705 (1969). However the Supreme Court found that this did not rise to the level of a true threat, because "the language of the political arena […]

is often vituperative, abusive, and inexact" and may result in verbal attacks on "government and public officials." *See also Texas v. Johnson,* 491 U.S. 397 (where the defendant's act of flag burning was political with no direct victim). Additionally in *Watts*, the defendant and victim were separated from each other. The defendant had no relationship with the President and would likely never meet the president.

Though in Watts the defendant and victim were removed from each other and the threat was politically motivated, in Ms. Clark's case there was neither politics nor removal. Ms. Clark's post was not political. Ms. Anderson is not a public or governmental official nor even the leader of a political committee. She was a private citizen at the time of the threat and remains a private citizen. In addition, though the first portion of the message expresses Ms. Clark's (crudely-stated) viewpoint on an issue, the second half of her message is simply discriminatory threats with no political message whatsoever. Finally, Ms. Clark had a terse but real relationship with the threatened victim, unlike the removed parties involved in *Watts*. Ms. Clark was on Ms. Anderson's volleyball team, and was sure to spend every day with Ms. Anderson and the other transgender students at school. As a result, Ms. Clark's case, unlike *Watts*, is a true threat.

The second Supreme Court true threat case, *Virginia v. Black*, expressly labeled intimidation as a true threat. 538 U.S. 343, 363 (2003). The case held that Virginia was allowed under the First Amendment to ban KKK cross burning as a "particularly virulent form of intimidation." *Id*. *Black* has sparked controversy within the circuits with its somewhat ambiguous definition of true threats:

> "True threats" encompass those 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 […] The speaker need not actually intend to carry out the threat. Rather a prohibition on true threats "protects individuals from the fear of violence" and "from the disruption that fear engenders."

Black, 538 U.S. at 359-60. Despite the circuits' interpretations of this statute, the Supreme Court used it to find that a true threat existed and could be punished when it was "likely to inspire fear of bodily harm." *Id.* at 363. *Black*'s definition naturally finds a true threat within Ms. Clark's case, where Ms. Clark's victims were described as "visibly distressed," were missing school, and felt terrified to face the girl who had threatened them. R. 13. Ms. Clark attempted to dehumanize, humiliate, and indeed intimidate Ms. Anderson and others through her post. This behavior is discouraged in *Black.*

B. Ms. Clark's Facebook Post Was A True Threat Because It Had A Reasonably Deleterious Effect On Her Victims

Whether a statement is a true threat should depend on whether a reasonable victim would be harshly injured by its contents. *United States v. Cassel* noted that "one of the chief evils wrought by a threat is its deleterious and coercive effect on the victim […] and that effect is not diminished merely because the defendant is bluffing." 408 F.3d at 628. Because the true harm occurs to the victim, the proper standard for determining a true threat should be the reasonable reaction of the victims to the threat. Therefore circuits have held that a true threat is present when "a reasonable and objective recipient would regard the letter as a true threat." *Porter v. Ascension Parish School Board*, 393 F.3d 608, 617 (5th Cir. 2004) (explaining *Doe*, 306 F.3d 624 (8th Cir. 2002)). The First Circuit characterized a true threat as a situation where an informed jury could find that a reasonable recipient would feel threatened by the message. *US v. Nichnianidze*, 342 F.3d 6, (1st Cir. 2003).

In this case, the victims were afraid to come back to school, were "visibly distressed" and greatly feared for their own safety. R. 13. A reasonable jury would certainly be able to find that a threat to "take [the victims] out one way or another" by an angry party could cause this response.

R. 18. Thus because this Facebook post both subjectively and objectively produced a severely negative effect on its intended victims, the post should be classified as a true threat.

C. Ms. Clark's Facebook Post Was A True Threat Because It Was Intended As Such.

Some circuits have alternatively stated that the intent of the defendant is more important than the effect on the victim. But it is debated whether this means the defendant must be shown to intend to *communicate* the threat, or whether she must intend the *threat* itself. The former is the more logical choice, but either way, Ms. Clark's actions show that she intended both the communication and the threat.

1. Ms. Clark intended to communicate her threat to Ms. Anderson.

Many true threat cases agree that intent to communicate a threat to a victim is a necessary element of a true threat. *Porter v. Ascension Parish School Board* clarifies that this simply means a defendant must "intentionally or knowingly" tell anyone else about his message. 393 F.3d 608 (5th Cir. 2004); *see also Doe,* 306 F.3d 624 (the speaker must tell "someone"); In *Doe*, the Third Circuit held that there was intent to communicate, and therefore a true threat, when a man showed a mutual friend threatening letters he wrote to his girlfriend. 306 F.3d 624. Conversely, there was no intent to communicate in *Porter*, because the creator of a threatening message had hidden it away in his closet for years and it had only been revealed to the target school accidentally and unknowingly through the actions of his brother. 393 F.3d 608 (5th Cir. 2004).

There was no accidental reveal in Ms. Clark's case. She satisfied the *Porter* standard and told all of her Facebook friends. These friends were likely mutual friends of Ms. Anderson, just as in *Doe*. Even more damaging to Ms. Clark is that she admitted herself that she knew that her message would "likely" get to Ms. Anderson and the other transgender students. R. 14. Even if invidious gossip didn't have a special way of finding its victim, these girls went to the same

school, knew the same people, and (in the case of Ms. Anderson) were even on the same basketball team. Objectively and logically, Ms. Clark must have understood that her threatening message would get to the subjects of her message; her admission confirms this.

2. Ms. Clark intended to threaten Ms. Anderson.

Conversely some jurisdictions have interpreted the "intent" element to mean that a proper true threat must include a *mens rea* element: however this is a controversial and relatively impossibly-implemented standard and should be rejected. The Supreme Court specifically glossed over this element in 1969, mentioning, "we have grave doubts about [requiring intent to threaten]." *Watts v. United States*, 394 US 705, 707 (1969). The Court again glossed over this element in 2015, showing their continuing reluctance to make this an element of true threats. *Elonis v. US*, 135 S. Ct. 2001 (2015). *See* Allison J. Best, Elonis v. United States*: The Need To Uphold Individual Rights To Free Speech While Protecting Victims Of Online True Threats*, 75 MD. L. REV. 1127 (2016) (discussing *Elonis* as the Supreme Court's missed opportunity to answer this polarizing question).

However the Ninth Circuit then did what the Supreme Court refused to do and implemented the "intent to threaten" standard, concluding that threshold for a true threat requires "proof that the speaker subjectively intended the speech as a threat." *Cassel* 408 F.3d at 633 *(interpreting Virginia v. Black*, 538 U.S. 343 (2003)*; cf. United States v. Orozco-Santillan*, 903 F.2d at 1266 n.3 (9th 1990) (finding, in a Ninth Circuit case prior to *Black,* that "the only intent requirement" is communication, not intent to threaten). The Ninth Circuit clarifies this holding explaining that "no one now contends that the Constitution requires proof that the defendant intends to carry out the threat—that is to inflict the harm that he has threatened" but "rather the disputed question is whether the government must prove that the defendant intended his words or

conduct to be understood by the victim as a threat." *Cassel* 408 F.3d at 627-28; *United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014) ("we read *Black* as establishing" defendant must intend to place victim in fear).

This standard seems almost insurmountably steep: If a defendant claims that he did not intend for his threat to harm the victim, what proof could possibly overcome his word? While those that favor this system claim that an intent element prevents tone-deaf defendants from making ill-received jokes, a reasonable jury should be able to exonerate these rare defendants through their determination of whether a reasonable person would see this as a communicated threat. *Cf.* Paul T. Crane, *"True Threats" And The Issue of Intent*, 92 VA. L. REV. 1225, 1273 (2006). In this vein, the majority of circuits have found that this is not a test intended by the Supreme Court. See *Porter,* 393 F.3d at 616. *(*"The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat"). The Fourth Circuit, for example, refused to overturn their precedent "as well as the jurisprudence of most other circuits" and has asserted directly that *Cassel* was incorrect in introducing an "intent to threaten" requirement. *United States v. White,* 670 F.3d 498, 508 (4th Cir. 2012) (interpreting *Virginia v. Black*, 538 U.S. 343 (2003)). The Third Circuit (in a case focusing on a threat to the President) found that the intent to threaten test would both make it harder to prosecute and would stop the preventions of disruptions arising out of threats. *United States v. Kosma*, 951 F.2d 549 (3rd Cir. 1991).

Nevertheless, even if the court were to follow the Ninth Circuit rather than the Fifth Circuit, Ms. Clark's message still hints at her malicious intentions. Ms. Clark admitted that she specifically wrote that Ms. Anderson and the other transgender students "better watch out at

school," were "freak[s]," and that Ms. Clark would take them out. R. 18. This choice of words is implicitly threatening on its face.

Because Ms. Clark's cruel message fits any possible definition of a true threat against Ms. Anderson and the other transgender students in her school, it is not protected by the First Amendment and this court should reverse the ruling of the Court of Appeals.

II. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE MS. CLARK'S FACEBOOK POST IS NOT PROTECTED BY THE FIRST AMENDMENT UNDER *TINKER*

Generally speaking, public school students are protected by the First Amendment and do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969). The First Amendment rights of public school students, however, "are not automatically coextensive with the rights of adults in other settings and must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker,* 393 U.S. at 506). The courts have construed the first amendment, as applied to public schools, in a manner that attempts to strike a balance between the free speech rights of students and the special need to maintain a safe, secure and effective learning environment. *Harper v. Poway Unified Sch. Dist.,* 445 F.3d 1166, 1176 (9th Cir. 2006).

The Supreme Court has limited the First Amendment rights of students in a number of circumstances: (1) vulgar, lewd, obscene, and plainly offensive speech has been limited by *Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675 (1986), (2) school-sponsored speech is limited by *Hazelwood*, (3) speech promoting illegal drug use is limited by *Morse v. Frederick*, 551 U.S. 393 (2007), (4) all other speech is governed by *Tinker*. In *Tinker*, the Court stated that a student may express his opinions, even on controversial subjects if he does so without "materially and

substantially interfering with the requirements of appropriate discipline in the operation of the school" and "without colliding with the rights of others." 393 U.S. at 513. If the student conduct, either in class or out of it, however, "materially disrupts class work or involves substantial disorder or invasion of the rights of others" it is not immunized by the constitutional guarantee of freedom of speech. *Id.*

Six circuits have considered the applicability of the *Tinker* standard to off campus speech. Five of those six circuits have determined that *Tinker* is applicable to speech originating off-campus, however, their tests for *Tinker*'s applicability have differed. The Second and Eighth Circuits have held that the *Tinker* framework can be applied to off-campus activity, provided a threshold test of "reasonable foreseeability" is met. In order for *Tinker* to apply the off-campus speech must "create a foreseeable risk of substantial disruption within a school", at least when it was similarly foreseeable that the off-campus expression might also reach campus." *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist*., 494 F.3d 34, 36 (2d Cir. 2007); *see also Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008). In *Wisniewski*, a student designed an icon to be displayed to his AOL Instant Message "buddy list." 494 F.3d at 36. The icon displayed was a small drawing of the student's English teacher being shot in the head. *Id.* This icon was available to the student's buddy list, some of who were fellow students at his middle school. *Id.* It was later brought to the attention of the teacher and school officials, and the student was suspended. *Id.* The court found that the "potentially threatening content" of the icon, its distribution to 15 recipients some of whom were classmates, and the fact that is was made known to teachers and school "would foreseeably create a risk of substantial disruption within the school environment." *Id.* at 39.

In *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.,* two brothers created a website using a Dutch domain, and posted a variety of racist, offensive, and sexually explicit comments about classmates. 696 F.3d 771, 773 (8th Cir. 2012). The brothers initially only told a few school friends about the website but it quickly became widespread. *Id.* at 773-774. The Eighth Circuit panel determined that *Tinker* applied because it was reasonably foreseeable that the post would reach the school because the posts were "targeted at" the school, by the mention of specific students on the website. *Id.* at 778. *See also D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011) (The Eighth Circuit held that *Tinker* applied to an off campus instant message because it was "reasonably foreseeable" that D.J.M's speech "would be brought to the attention of the school authorities and create a risk of substantial disruption within the school environment."); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (The Second Circuit upheld school disciplinary action for an off-campus blog post because the post "would foreseeably create a risk of substantial disruption within the school enforcement." The court found that it was reasonably foreseeable that the speech would reach campus because it directly pertained to events at the school).

Thus, the Second Circuit and Eighth Circuits have established a threshold inquiry as to whether the off-campus student speech presents a "reasonably foreseeable risk" of reaching the campus and causing a substantial disruption within the educational environment. If this threshold is met the Tinker framework applies.

The Fourth Circuit has held that even if speech originates off-campus "where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem." *Kowalski v. Berkeley County Sch*., 652 F.3d 565, 577 (4th Cir. W. Va. 2011). The speech in question involved a student who, from

her home computer, created a MySpace social media page that was largely dedicated to ridiculing a fellow student. The Fourth Circuit stated that "to be sure, it was foreseeable in this case that Kowalski's conduct would reach the school via computers, smartphones and other electronic devices." *Id* at 574. The court also noted that in this case the MySpace page was accessed via the school a number of times. *Id.* The court found that there was a "sufficient nexus" between the MySpace page and the school because many of the members of the group, and the target of the group's harassment were students at the school, therefore the speech was subject to the *Tinker* framework. *Id.*

The Ninth Circuit did not adopt the "reasonable foreseeability" or "sufficient nexus" threshold tests developed in the other circuits. Instead the Ninth Circuit held that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*." *Wynar v. Douglas Cty. Sch. Dist.,* 728 F.3d 1062, 1069 (9th Cir. 2013). Landon Wynar, a high school sophomore, sent instant messages to classmates via MySpace, where he frequently wrote about his guns and his interest in shooting. *Id.* at 1065-66. The content of Wynar's messages became increasingly violent, eventually including statements that centered around a school shooting to take place on a specific date in the near future. *Id*. Wynar was later suspended by school officials. *Id.* He then sued the school district for violating his constitutional rights. *Id.* at 1066. The court upheld the discipline stating that *Tinker* applies to off-campus speech after the "identifiable threat of violence" threshold is met. *Id*. at 1069.

The Fifth Circuit addressed the *Tinker* framework of off-campus speech most recently. In *Bell v. Itawamba Cty. Sch. Bd*., a high school senior, posted a rap recording on his Facebook page and on YouTube, which contained explicit language, including a description of violent acts

to be carried out against two high school teachers and coaches. 799 F.3d 379, 384 (5th Cir. 2015), *cert. denied sub nom. Bell v. Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166 (2016). School officials interpreted the language as threatening and harassing, and took disciplinary action against Bell. *Id.* at 385. The Fifth Circuit decided that intent is relevant in determining whether off-campus speech is subject to *Tinker*. *Id.* at 393. The Fifth Circuit decided that Tinker governs when "a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate … even when such speech originated and was disseminated, off-campus without the use of school resources." *Id.* The threshold inquiry, therefore, is whether the student intended for the speech to reach the school community. The court found that Bell did intend his rap to reach the school community because he posted the rap to Facebook stating, "students all have Facebook." *Id* at 396.

The *Tinker* framework can reach Ms. Clark's Facebook post under any of the threshold tests set forth by the circuit courts. It was reasonably foreseeable that Ms. Clark's Facebook post would reach the campus because similar to the blog post in *Doninger* the post, "directly pertained" to events at school. Ms. Clark's Facebook post written in response to a verbal argument with Anderson occurring during basketball practice at school and it referenced a school policy that Ms. Clark was unhappy with. R. 18. The post also referenced violent acts to occur at school when she wrote "Taylor better watch out at school." R. 18. Ms. Clark also specifically mentions Anderson in her Facebook post, therefore "targeting" the speech at the school, like the students in *S.J.W.*

Ms. Clark knew that her speech might reach the school because she posted her speech to Facebook and "she knew that at least some of her friends might pass her post onto others." R. 23. She also conceded that she knew that some of those who viewed her message were likely to

alert Taylor Anderson or other transgender students to her post." R. 14. Ms. Clark was clearly aware "that Facebook posts sometimes go beyond one's own friends." R. 23. Ms. Clark knew or should have known that her Facebook post would reach the school.

It was also reasonably foreseeable that once the speech in the Facebook post reached the school it would "cause a substantial disruption" in the school environment. Due to the "potentially threatening content" of the Facebook post, Ms. Clark should have known that the post would be brought to the attention of school officials and those she targeted and cause a substantial disruption in the school environment. It is reasonably foreseeable that language such as "take IT out" is sufficiently threatening to alert school officials and cause them to respond to the Facebook post.

There is also a "substantial nexus" between the Facebook post and the school. Just as the court found a "substantial nexus" in *Kowalski*, there was a substantial nexus here because the target of the Facebook post's harassment was a fellow student at the school. R. 18. To further bolster the nexus to the school, Ms. Clark's Facebook page makes specific reference to a school policy, and references violence to occur at school. R-18. The post therefore has a "substantial nexus" to the school.

Ms. Clark's Facebook post would also meet the "identifiable threat of violence" test of the Ninth Circuit. Ms. Clark's Facebook post warns a fellow student to "watch out at school" and that Ms. Clark will "take IT out one way or another." R. 18. Although, unlike *Wynar*, this Facebook post does not specifically mention the type or the date of violence threatened, this is an "identifiable" threat nonetheless. Ms. Clark threatens a specific student, and notes that the violence will be carried out "at school." Due to this specific threat of violence school officials were justified in acting to prevent this violence.

Ms. Clark's post would also pass the most stringent threshold test set out by the Fifth Circuit, requiring that in order for the *Tinker* framework to apply to Ms. Clark's Facebook she needed to "intentionally direct" her speech at the school community to "threaten, harass or intimidate." This intended direction at the school community is clearly displayed in the Facebook post. The words "Taylor better watch out" is a threat intentionally directed at a specific student in the school community. R. 18. Ms. Clark's father admits that his daughter "intended her friends to see it because it stated her views on an important school policy." R. 19. Although Ms. Clark claims she only, for her friends to see her post, Ms. Clark readily admitted that she was aware that Facebook posts sometimes go beyond one's own friends. R. 23. As the student in *Bell* stated, "students all have Facebook" and since Ms. Clark chose to express her views of the school policy on Facebook, and intended at least some of the school community to see it, it is evident that Ms. Clark's post was intentionally directed at the school community.

Ms. Clark's Facebook post is not protected by the First Amendment because the *Tinker* framework is applicable under any of the threshold tests set forth by the circuit courts. Regardless of what test this Court might adopt, and even if this Court decides not to use any of the above threshold tests, Ms. Clark's speech is not protected because it did in fact cause a substantial disruption at the school, and under the *Tinker* framework, speech which actually causes a substantial disruption to the educational environment is not protected by the first amendment.

A. Ms. Clark's Facebook Post Is Not Protected by the First Amendment Because It Materially Disrupted the School Environment

The school did not violate Ms. Clark's First Amendment rights because the Facebook post caused a material disruption to the work and discipline of the school. Under *Tinker*, if the student's behavior "materially disrupts" classwork it is not immunized by the constitutional

guarantee of freedom of speech. 393 U.S. at 513. (1969). *Tinker,* however, does not require that school officials wait until disruption actually occurs before they may act, "in fact they have a duty the prevent the occurrence of disturbance." *Wynar,* 728 F.3d at 1070. The *Tinker* test is satisfied when an actual disruption occurs; or the records contains facts "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker,* 393 U.S. at 514.

Courts have considered a number of factors in determining the substantiality of an actual disruption. The court in *Kowalski* found both an actual and nascent substantial disruption because the speaker identified a student by name. *Kowalski,* 652 F.3d at 573. The "targeted defamatory nature" of the speech created a material disruption because the creation of the MySpace group caused a student to miss school in order to avoid further abuse. *Id.* at 574. The court also found that if the school had not intervened, the potential for continuing harassment was real. *Id.* The court in *D.J.M.* considered the occurrence of other school disturbances, including administrative disturbances. *D.J.M. ex rel. D.M.,* 647 F.3d at 766. In *D.J.M.*, the court found a substantial disruption within the school environment because parents and students notified the school about instant messages where a student talked about shooting students at school, and asked what measures the school was taking to protect the students. *Id.* School officials had to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place. *Id.*

When determining the objective reasonableness of the forecast of substantial disruption courts looked to the relationship of the speech to the school and the use of threatening, intimidating, and harassing language used by the speaker. In *Doninger,* the speech pertained directly to events occurring at school and identified two teachers by name, based on those factors

the court found that the school board could have reasonably forecast substantial disruption in the school environment. 527 F.3d at 45. In *Bell,* a rap recording posted to Facebook contained, threatening, intimidating and harassing language, and the court said that this type of language must be taken seriously by schools and could be forecast by them to cause a substantial disputation. 799 F.3d at 393.

Ms. Clark's Facebook post caused an actual material disruption at the school because it caused Anderson to miss school and the school officials had to spend considerable time dealing with the concerns of parents. Ms. Clark posted to Facebook on November 2, 2015. R. 19. Two days later two transgender students and their parents came to the principal's office to express their concern that Ms. Clark might resort to violence against their children. R. 13. Anderson had been kept home for two days between the post and the visit to the principal's office. R. 14. Causing Anderson to be kept home is alone enough to find a material disruption under *Kowalski*, however school officials had to spend a considerable amount of time dealing with the concerns of parents, and speaking with Ms. Clark's parents, so there was enough to find a substantial disruption under *D.J.M.* as well. When only one of these events occurred, circuit courts have found a substantial disruption, however here the combination of a student missing school and the administration disturbance is surely enough to find a material disruption.

Even if there were no actual material disruption, the school's disciplinary action can still be upheld, because the First Amendment would not protect Ms. Clark's Facebook post because the school could reasonably have believed that the post would forecast material disruption of school activities. There was a strong relationship of the speech to the school. As stated above, Ms. Clark wrote the post in reference to an event that happened at the school, she made specific reference to a school policy, and she specifically targeted her Facebook post at a fellow student

at the school, and also stated that the targeted student "better watch out at school." R. 18. This strong relationship between the post and the school means that the school was reasonable in forecasting that there would be a material disruption in the school.

Further Ms. Clark's Facebook post contained threatening, intimidating and harassing language that must be taken seriously by school officials. Although Ms. Clark did not mention a specific act of violence she did threaten Anderson to "watch out at school," and that she would "take IT out one way or another." R. 18. Ms. Clark continued to threaten all other "TGs crawling out of the woodwork lately too." R. 18. It is clear that this language is threatening and intimidating because Anderson was kept home for two days following the post because her parents were worried about her safety. R. 14. For those reasons the school was justified in their decision to discipline Ms. Clark and the First Amendment does not protect her speech because the Facebook post could be forecast to cause a substantial disruption at school.

B. Ms. Clark's Facebook Post Is Not Protected by the First Amendment Because It Intruded Upon the Rights of Other Students

Ms. Clark's Facebook post is not protected by the First Amendment because it intruded upon the rights of all transgender students at the school to learn, and collided with Anderson's right to be secure. In *Tinker*, the Supreme Court held that public schools may restrict student speech which "intrudes upon … the rights of other students" or "collides with the rights of other students to be secure and to be let alone." 393 U.S. at 508. In *Harper v. Poway Unified Sch. Dist.*, the Ninth Circuit held that a school did not violate a student's First Amendment right to free speech when the school punished him for wearing a shirt that said, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMED. HOMOSEXUALITY IS SHAMEFUL." 445 F.3d 1166, 1171 (9th Cir. 2006). The court ruled this was not a First

Amendment violation because the student's "wearing of his T-shirt 'collid[ed] with the rights of other students' in the most fundamental way. *Id* at 1178 (citing *Tinker*, 393 U.S. at 508.)

The court stated that 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 those attacks while on school campuses. *Harper*, 445 F.3d at 1178. Such speech that attacks high school students who are members of minority groups serves to injure and intimidate them, as well as damage their sense of security and interfere with their opportunity to learn. *Id.* at 1778. Public education institutions need not tolerate assaults that may destroy the self-esteem of the must vulnerable students and interfere with their educational development. *Id.* at 1179. Therefore, the court found that the school was justified in punishing this student because his t-shirt was injurious to gay and lesbian students and interfered with their right to learn. *Id.* at 1180.

The Ninth Circuit again upheld the constitutionality of a punishment of a student on the "invasion of the rights of others" prong of *Tinker* in *Wynar*. 728 F.3d 1062. The court did not define the right to "be secure and let alone," however the court said that "without a doubt the threat of a school shooting impinges on those rights." *Id*. at 1072. The MySpace messages in question threatened the student body as a whole and targeted specific students by name, for those reasons they represented "quintessential harm to the rights of other students to be secure." *Id.*

Ms. Clark's Facebook message can not be protected under the First Amendment because it not only intrudes upon the rights of Anderson to feel secure specifically, but it also intrudes upon the rights of all transgender individuals. As stated in *Harper,* public schools do not need to tolerate speech that served to injure and intimidate minority groups. Ms. Clarks Facebook post is very similar to the T-shirt in *Harper*. The student in *Harper* said that "homosexuality is shameful." Ms. Clark's post references the school's transgender policy calling it "IMMORAL

and it's AGAINST GOD'S LAW!!!" R. 18. Transgender students are surely included among the vulnerable students that the court in *Harper* sought to protect. The court in *Harper* makes it clear that public schools do not need tolerate verbal assaults that may interfere with the educational development of vulnerable students. Although the Facebook post originated off-campus, it was easily accessible by phones and computers on the school campus. Arguably using Facebook as a medium for communication makes the speech more easily disseminated than if the information was displayed on a T-shirt. Therefore, Ms. Clark's Facebook post collided with the rights of every transgender student at the school "in the most fundamental way." Transgender students have a right to be free from such attacks.

Ms. Clark's Facebook post also violated Anderson's right to feel secure and let alone. Ms. Clark's post specifically targeted violence at Anderson, specifically Ms. Clark threatened to "take IT out one way or another." R. 18. Even though Ms. Clark did not mention they specific type of violence she would use against Anderson, this type of targeted threat is a "quintessential harm to the rights of other students to be secure." Ms. Clark's Facebook post can not be protected by the First Amendment because it intruded on the rights of all transgender students at the school, and collided with Anderson's right to feel secure and let alone.

CONCLUSION

Petitioners respectfully request that the judgment of the Court of Appeals be reversed.

CERTIFICATIONS

1. This brief is the work product of the team members and only the team members.
2. This team has fully complied with our school's governing honor code.
3. This team has complied fully with all the rules of the Competition.