Team X

No. 16-9999

In The

Supreme Court of the United States

Washington County School District

Petitioner,

-against-

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

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Brief for the Respondent

Team X
Counsel for the 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 school district is able to restrict speech that is entirely off-campus and not targeted toward the campus under the *Tinker* test?

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Columbia had federal question jurisdiction under 28 U.S.C § 1331 because it raised a first amendment question. S*ee* 28 U.S.C. § 1331. The United States Court of Appeals for the Fourteenth Circuit had jurisdiction to hear the appeal of an a "district judge . . . making in a civil action. . [an] opinion . . .that involves a controlling question of law . . ." to 28 U.S.C. § 1292(a). And this Court has federal question jurisdiction pursuant to the Constitution which vests federal courts with authority to hear cases "arising under the constitution [or] the laws of the United States." U.S. CONST. ART III, § 2.

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. 1.: 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.

STATEMENT OF CASE

a) Factual

This case involves a school principal punishing a pupil for comments made off-campus on a personal and private social media page. It stems from a November 2, 2015, Pleasantville High School Intrasquad Basketball game. Franklin Aff. at ¶¶ 1. The Respondent Kimberly Clark, a fourteen-year-old freshman at the time, was a member of the basketball team and participated in the game. Kimberly Clark Aff. at ¶¶ 3. During the game, Kimberly and an older player, sophomore Taylor Anderson, disagreed over a call by the referee. Kimberly Clark Aff at ¶¶ 4. An argument broke out between the two girls and they were both ejected from the game. *Id*.

That night, Kimberly used the computer at her parents' house to make a Facebook Post expressing her opinion about Taylor, a transgender female, playing on the girls' basketball team:

> "I Can't believe Taylor [Ms. Anderson] 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…" Franklin Aff. Exhibit C.

In accordance with the School District's Non-Discrimination in Athletics Policy, Ms. Anderson was allowed to play on the women's team even though she was born male. Franklin Aff at ¶¶ 4-7. This is because Ms. Anderson self-identifies as a female.

Two days after the post, Taylor, another transgender student, and both students' parents, expressed their concern over the post with Principal Thomas Franklin. *Id.* at ¶9. Taylor and the other transgender student both stayed home from school in response to the Facebook Post. *Id.* at ¶ 9. The next day Kimberly's parents met with the principal. *Id*. at ¶¶14-15. During this meeting

Kimberly acknowledged the post could possibly reach other students, but that the post was only meant for her friends to see. Franklin Aff. at ¶14.

After the meeting, Kimberly was suspended for three days on the grounds that she violated the school's bullying policy. Alan Clark Aff. Exhbit A. Kimberly's parents appealed the decision because it would stay on her permanent high school record. In front of the Washoe County School Board, the school district denied the appeal because it viewed Kimberly's post as a "true threat" and that it materially disrupted the earning environment. *Id*.

b) Procedural

As a result of the suspension and appeal denial, Kimberly, by and through her father, filed suit in the District Court seeking a declaratory judgment that her suspension was unconstitutional and an order requiring the school district to extinguish any record of the suspension. On January 10, 2015 the school district and Kimberly filed cross motions for summary judgment. Pursuant to FRCP 56(a), the district court granted summary judgment in favor of the Defendant Washington School District on April 14, 2016. In doing so the Court held the school district did not violate Kimberly's constitutional rights by disciplining her for off-campus activities because the Facebook post was a true threat and the statement materially disrupted the learning environment under the *Tinker* test.

Kimberly appealed the summary judgment ruling to the United States Court of Appeals for the Fourteenth Circuit. That court reversed the summary judgment determination by holding Kimberly's speech was not a true threat, and that *Tinker* did not authorize the school district to discipline her based on her Facebook. The Court remanded the case to the district Court with instructions to enter summary judgment for Kimberly. The school district appealed to this Court. Petition for Certiorari was granted and the parties were instructed to brief two issues: (1) whether

Kimberly's post constitutes a "true threat" and (2) whether the school district could discipline a student for a Facebook post.

SUMMARY OF THE ARGUMENT

Kimberly asks this Court to affirm the lower court's determination that her speech did not constitute a "true threat" and protect Kimberly's speech that occurred outside of the school house gates. The First Amendment protects speech, even crude and hyperbolic speech, to ensure the free exchange of ideas. Kimberly's Facebook post, an expression of her political and religious ideology, is precisely the type of speech the First Amendment protects. Further, if this court takes the opportunity to clarify the true threat standard, it should recognize that a "true threat" requires subjective intent to convey a threat. Such a requirement strikes the appropriate balance between allowing the government to prevent individuals from fear of violence, while also ensuring individuals can freely and openly exchange ideas.

In addition, this Court should not allow the school to regulate Kimberly's speech in this case. The appellant asks this Court to extend *Tinker* to speech that occurs off-campus without the intent of spilling onto school property. This extension directly conflicts with a parent's fundamental right to raise a child, and creates an environment where students are constantly concerned their off-handed and developing thoughts on social media might render them punished at school. If this Court does determine that schools can regulate off-campus conduct, it should adopt a purposeful direction standard. Under this test, the student must intend for the speech to reach the school. Otherwise, school administration can cherry-pick which speech it will regulate and punish ideas it simply does not like. Such an environment is not conducive to learning, nor is it conducive to progressing towards civically engaged citizens who engage in democratic dialogue.

ARGUMENT

I. This Court should uphold the lower court's determination that Kimberly's Facebook post is protected speech under the First Amendment and not a "true threat."

The First Amendment protects the fundamental right of free speech. It enshrines America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Watts v. United States*, 394 U.S. 705, 708 (1969). These debates on public issues can at times be "vehement, caustic, and unpleasantly sharp" and are likely to include language that "is often vituperative, abusive, and inexact." *Id.* (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). It is the trading of ideas—"even ideas that the overwhelming majority of people might find distasteful or discomforting"—that is "[t]he hallmark of the protection of free speech. . . ." *Virginia v. Black*, 538 U.S. 343, 358 (2003); see also *Texas v. Johnson,* 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") That being said, the First Amendment is not an absolute protection of speech, and some categories of speech are not included within the constitution's broad protections for speakers. *See Black*, 538 U.S. at 358 ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.")

One such category of excluded speech, the only at issue in this case, is true threats. Put simply, speech which seriously and intentionally threatens unlawful violence toward another person is not protected by the First Amendment. *See id.* at 359 ("'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.") By prohibiting

"true threats," this Court aims to serve three purposes related to fear and violence. First, it "protect[s] individuals from the fear of violence." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992). Second, it protects individuals "from the disruption that fear [of violence] engenders." *Id.* And third, it allows the government to take action that lowers "the possibility that the threatened violence will occur." *Id.*

Nonetheless, whenever the government attempts to regulate pure speech, it must do so within the confines of the First Amendment. *Watts*, 394 U.S. at 707. The difficulty in this area of First Amendment jurisprudence is distinguishing between speech that constitutes a "true threat" and speech that is constitutionally protected. *Id.*; *see also* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283 (2001) ("The challenge is to distinguish a true threat from an idle threat, political hyperbole, a jest, misconstrued speech, allowable coercion, or legitimate political advocacy.")

The present case involves speech that the First Amendment protects. Kimberly's Facebook post is not a true threat; rather, the comments were within the context of politically motivated, and traditionally protected, speech. And while her words may have been inartful and hyperbolic, Kimberly was plainly expressing her political and religious beliefs. Further, even if Kimberly's statements could be misconstrued as a threat, a "true threat" requires subjective intent. Not only did Kimberly not intend to threaten Taylor, but the record shows that Kimberly never meant for Taylor to see the post. As a result, this Court should uphold the circuit court's decision that Kimberly's speech is protected under the First Amendment.

A. The political speech in Kimberly's Facebook post is not a "true threat" under this court's analysis in Watts v. United States.

Even if a statement out of context appears threatening, offensive, or crude, courts understand it as hyperbole when it is politically oriented and directed towards a general audience.

For example, in *Watts*, an 18-year-old boy was participating in a rally on the grounds of the Washington Monument. *Id.* at 706. While engaging in a discussion about being drafted to the military, Watts said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* A jury later convicted Watts of making threats against the life of the President, which was forbidden by law. *Id.* Throughout the course of his criminal trial, and on appeal, Watts argued that his statement was protected speech under the First Amendment. He claimed his statement "was made during a political debate, that it was expressly made conditional upon an event—induction into the Armed Forces—which [he] vowed would never occur, and that both [he] and the crowd laughed after the statement was made." *Id.* at 707. This Court overturned Watts' conviction and held that his statements, taken in context, were political hyperbole and protected under the First Amendment. *Id.* at 708. This court reasoned that Watts' statement was simply a crude and offensive method of stating a political position, and was protected speech under the First Amendment. *Id.* at 708.

Here, Kimberly's post was a teenager's inartful and hyperbolic expression of her political ideology. Namely, her belief that a transgender girl should not be able to play on the girls' basketball team. Kimberly's post expressed her opinion that a transgender girl playing on the girls' basketball team is "unfair," "immoral," and "against God's law." While unwise and exaggerated, the remainder of Kimberly's post should not be taken out of the context of this clearly political and religious speech. Like *Watts*, where the speech was made during a political debate, Kimberly's comments that Taylor watch out at school, and that she would get more than just ejected, are within the context of Kimberly expressing her political and religious beliefs about transgender girls on the girls' basketball team. Taken in context, the second paragraph of Kimberly's post is expressing her desire to have Taylor removed from the girls' basketball team.

Further, similar to *Watts*, where the crowd laughed at the speaker's reference to shooting the president, Kimberly insists she was using joking language when she said she would take "'it' out one way or another." And perhaps factually most important, the actual in-person argument between Taylor and Kimberly during the basketball scrimmage earlier that day was entirely verbal, and then Kimberly's later post was directed at a public audience through her social media account.

Kimberly should not, nor does this court's precedent require that she, lose First Amendment protection of her speech simply because her manner of expressing her views was crude, unrefined, and exaggerated. In fact, the First Amendment exists precisely to protect such unpopular language. *See Watts*, 394 U.S. at 707 (recognizing that the First Amendment should be interpreted with the understanding that language in the political arena is often "vituperative, abusive, and inexact"). So taken in isolation, the second paragraph of Kimberly's Facebook post may appear to be a threat to some, but the statements cannot be removed from the context of the rest of Kimberly's post. Kimberly is expressing a political and religious belief, she is a teenager in high school attempting to find her voice, her interaction with Taylor earlier that day was entirely verbal and not physical, and the post was made on a Facebook page to which Taylor and other transgender students did not have access. Rather than a threat of violence, Kimberly's post was an inartful expression of her belief that Taylor should not play on the girls' team and that she will work to ensure Taylor cannot play on the team.

Protected speech can come in the form of offensive, inexact, and even threatening, language; Kimberly's opinion does not lose the protection of the First Amendment simply because she expressed it inartfully. Consider a factual scenario where Kimberly more carefully articulated that she didn't believe Taylor should be allowed to play on the girls' team and that she was going to work to make sure Taylor was removed from the girls' team. Such an expression of Kimberly's

political and religious ideas would clearly be protected under the First Amendment. That Kimberly was unable to express her ideas clearly, or used inexact and exaggerated language, does not remove the expression from the protections of the First Amendment. This court recognized as much in *Watts*. Thus, considering the context of the statements, Kimberly's post is the type of statement that this court's precedent recognizes as protected under the First Amendment. As a result, this court should uphold the circuit court's determination that Kimberly's post was not a true threat on the basis that the statement was political hyperbole and exaggerated speech, which is protected under the First Amendment.

B. If this court decides to go further, and clarify the true threat standard, it should recognize that a "true threat" requires that the speaker intend an expression to be taken as a threat of unlawful violence.

All speech restrictions carry with them the possibility of collaterally prohibiting the expression of ideas. See *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.") So the question becomes, how do we evaluate what speech should be restricted? Under an objective test, speech is unnecessarily chilled. On the other hand, by recognizing that a "true threat" requires subjective intent, this Court can achieve the balance between promoting productive democratic dialogue and also avoiding violence and intimidation.

1. An objective "true threat" standard is overinclusive and chills speech.

An objective standard for determining a true threat needlessly prohibits the expression of ideas. While jurisprudence in this area is murky, most circuit courts are currently using some form of an objective standard to determine whether a statement is a true threat and thus not protected by the First Amendment. These courts look to whether a reasonable person would consider the statement a threat of unlawful violence. *See generally Roy v. United States*, 416 F.2d 874 (9th Cir.

1969) (inspiring the reasonable person test); *see also United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cit. 1997) (determining a true threat by "whether [the speaker] should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made"). While this objective test does a good job of promoting the three purposes of the true threat exception, it does not adequately protect the First Amendment. An objective test goes too far in protecting people from fear of violence and not far enough in protecting individuals' freedom of speech. If a speaker simply misspeaks, even negligent speech can become unprotected.

Under an objective standard for true threats, ambiguous statements that are not intended as threats can be misconstrued as threats. For example, in *United States v. Fulmer*, Fulmer alleged that various members of his family were engaged in fraud. 108 F.3d 1486, 1489 (1st Cir. 1997). Fulmer was very active in the FBI investigation into his accusations, and was intent on having those family members prosecuted for fraud. *See id.* However, after reviewing the evidence, the U.S. attorney determined there was not enough evidence to support the case. *Id.* The FBI agent whom Fulmer had been working with notified Fulmer of the same. *Id.* at 1490. Several months later, Fulmer left the FBI agent a voicemail message accusing the FBI agent of deliberately concealing a felony, and also said that "the silver bullets are coming." *Id.*

The FBI agent took Fulmer's statement as a threat, and found the voicemail "chilling" and "scary." *Id.* However, there was evidence that Fulmer had used the term "silver bullets" to signify evidence of a violation of the law, almost like the term "smoking gun." *Id.* A jury, hearing evidence that the FBI agent took the voicemail as a threat of violence, and given an objective standard for true threat, found Fulmer guilty. *See generally id.* The First Circuit upheld the objective true threat jury instruction, and the admission of evidence regarding how the FBI agent construed the voicemail, but did overturn Fulmer's conviction on other grounds. *See generally id.*

Fulmer is a good illustration of how an objective test places pure speech, with no intent to threaten an audience with violence, outside the First Amendment's protection. In effect, an objective test allows the government to criminalize or penalize pure speech, such as in *Fulmer*, based on the reaction of the listener and not on the intent of the speaker. This is in direct opposition to the principles of the First Amendment and our profound national commitment to the protection of speech.

In addition to penalizing innocent speech, an objective true threat standard chills speech. An objective standard puts the onus on a speaker to carefully craft her words so as to not make ambiguous statements that could be misconstrued by a listener as a threat. *See Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) ("In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners.") As a result of this onus, a speaker who does not intend for a communication to be threatening, but fears that it might be received in such a manner, will forego expressing that communication. This is important because a speaker who does not intend to communicate a threat is probably intending to communicate an idea. Such freedom to communicate ideas is the very reason that freedom of speech was enshrined in the First Amendment; a standard that allows the government to penalize these communications of ideas through pure speech is overinclusive.

In sum, an objective standard is overinclusive and chills speech that intends to communicate ideas. A speaker will be less inclined to exercise her constitutional right of free speech for fear that her words will be misconstrued as a threat. And while this is not a criminal case, if this court adopts an objective test for true threats it will have a broad effect on criminal cases by allowing negligent speech to be punished. Such a standard is not generally accepted in

criminal contexts. *See Rogers*, 422 U.S. at 47 (Marshall, J., concurring) (("[The Supreme Court] ha[s] long been reluctant to infer that a negligence standard was intended in criminal statutes; we should be particularly wary of adopting such a standard for a statute that regulates pure speech.") (internal citations omitted)). It is difficult, if not impossible, to find another context where speech loses its protected value based on the speaker's negligent manner of speaking. This court should follow its precedent in other contexts of requiring intent and not adopt an objective standard for true threats.

2. The First Amendment requires that a "true threat" include a subjective intent by the speaker to convey a threat.

Under the First Amendment, "true threat" requires two things: (1) that the speaker intended to make a threatening statement, and (2) that the statement made by the speaker was in fact threatening. *Rogers*, 422 U.S. at 47 (Marshall, J., concurring). Unlike the objective intent approach, which overprotects from the fear of violence and underprotects speech, a subjective approach strikes a fair balance between free speech and orderly society. Requiring an intent to convey a threatening message allows for the government to penalize a speaker who intends to cause the fear of violence associated with a threat, and the disruptions that come with such a threat, but also gives a speaker the freedom to communicate his or her ideas freely. In fact, in most cases the subjective intent test will likely achieve the same result as the objective test for true threat. It is only in the areas along the margins, where it is not clear whether a statement is an unlawful threat or a dearly protected idea, that requiring subjective intent will make a difference. But it is in precisely those cases that this Court should choose to safeguard speech and ideas, as it is the very purpose of our First Amendment to protect unpopular ideas and sentiments no matter how roughly they are portrayed.

C. Whether this court requires subjective intent or not, Kimberly's Facebook post does not meet the requirements of a "true threat" and is protected under the First Amendment.

1. Kimberly did not intend for her post to threaten violence.

If this court recognizes that a true threat requires subjective intent, then Kimberly's comments are firmly protected under the First Amendment. To constitute a true threat, a speaker must intend to threaten a target, or intend to cause the disruption that comes from reaction to a threat. For example, in *United States v. Bly*, Bly became angry after being dropped from his university graduate program. 510 F.3d 453, 455 (4th Cir. 2007). He began to write angry letters and communications to university officials. *Id.* at 456. One such letter warned "bullets are far cheaper and much more decisive [than legal channels]. A person with my meager means and abilities can stand at a distance of two football fields and end elements of long standing dispute with the twitch of my index finger." *Id.* But he did not stop there, he also attached practice targets with bullet holes to show his proficiency with firearms. *Id.* Bly claimed his letters were political hyperbole, but the court rejected his argument holding that his statements were true threats. *Id.* at 459. Bly's statements were specific, they were privately directed at the university officials, and they intended to provoke a reaction from the threat rather than targeting a general audience in a public forum. *Id.*

The purpose of Kimberly's Facebook post was to express her belief that transgender girls should not play on the girls' basketball team; Kimberly did not intend to threaten Taylor or any other transgender student with violence. Unlike in *Bly*, where there was a clear intent to strike fear in university officials by attaching a target with bullet holes, Kimberly vows she did not mean to threaten Taylor. Further, the post contains ambiguous language, and it is undisputed that the comments were not made directly to Taylor or any other transgender student. In fact, Kimberly

did not mean for anyone but her friends to see the post. Quite simply, there is nothing in the record to support finding that Kimberly intended to threaten Taylor with violence.

2. Even under an objective test, Kimberly's post should not be considered a "true threat."

Even if this court chooses the more restrictive approach to First Amendment speech and adopts an objective standard for true threat, a reasonable person would not have foreseen Kimberly's post as a threat. The Eighth Circuit considers various useful factors to determine whether a statement is reasonably a true threat:

> [1] the reaction of the recipient of the threat and of other listeners, [2] whether the threat was conditional, [3] whether the threat was communicated directly to its victim, [4] whether the maker of the threat had made similar statements to the victim in the past, and [5] whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. (internal citations omitted)

United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996).

In *Dinwiddie*, a woman protested outside of abortion facilities for many years. *Id.* at 917. As part of her protests, she hurled repeated threats at a physician who performed abortions. *Id.* In the course of six to eight months, the woman made about 50 comments to the physician, such as, "Robert, remember Dr. Gunn [a physician who was killed in 1993 by an opponent of abortion]. . . . This could happen to you. . . . He is not in the world anymore. . . . Whoever sheds man's blood, by man his blood shall be shed. . . ."*Id.* She had also used physical force against a staff member at one time, and would say things like "you have not seen violence yet until you see what we do to you" to other staff members at the abortion facility. *Id.* The verbal attacks became more and more violent, and the facility had to hire more counselors to help with upset employees. *Id*. The facility even hired an armed security guard, and the physician began to wear a bulletproof vest. *Id.*

Applying the factors above, the court concluded that the woman's comments were true threats. *Id.* at 926.

Here, the *Dinwiddie* factors suggest that an objectively reasonable person would not consider Kimberly's Facebook post a true threat. First, while Taylor did stay home from school in reaction to Kimberly's post, an objective test cannot rely too heavily on the subjective reaction of the supposed target of a comment. Unlike *Dinwiddle*, where the threats were very serious and very specific, and the targets responded accordingly, here, Kimberly's comments are ambiguous in nature, and Taylor's response was extremely cautious. The terms "eject" and "take out" are direct basketball references; Taylor and Kimberly were both ejected from a basketball game earlier that day, and when a player is removed from a game one might say they were "taken out." Kimberly's use of this language cannot be read in isolation; an objective person would read "take out" and "eject" in the context of the previous paragraph expressing Kimberly's desire to have Taylor taken off the girls' basketball team. When the post is taken as a whole, Kimberly was referring to having Taylor removed from the girls' team, and the decision to keep Taylor home from school was an excessively cautious reaction.

Moreso, the threat was not made directly to Taylor.[1] This is not a case, such as *Dinwiddle*, where a woman hollered terrible threats directly to, and in the presence of, the targets of her violence. While Kimberly recognized that the post could eventually be seen by Taylor, it is undisputed that Taylor was not her intended audience. Kimberly only meant for her own friends to see the post, she posted it on her private social media account, and did not go out of her way to

[1] The second factor, the conditional nature of the comments, is not particularly relevant to this case. Normally, a court might review the immediacy of a conditional threat under this factor. However, because the post is not conditioned on anything, this factor of the *Dinwiddle* test is not very helpful to determining whether the post is a true threat.

communicate it to Taylor. Further, Kimberly had never made threatening statements, publicly or privately, to anyone in the past—and she certainly never made threatening statements to Taylor. Unlike *Dinwiddle*, where there were 50 very specific threats made directly to a target over six months, Taylor made one comment on a Facebook post that she intended to be seen only by her friends.

Finally, there is no reason to believe Kimberly would engage in violence. Kimberly has never been subject to disciplinary action, and has absolutely no history of violent behavior. Further, the earlier disagreement between Taylor and Kimberly at the basketball game also remained entirely verbal. There is no evidence in the record to suggest Kimberly has ever engaged in violence; rather, the record shows she has never been in trouble at school.

Essentially, Kimberly made one ambiguous comment on an internet platform that was never meant to be seen by Taylor. Taylor became aware of the post only through a third party, and then her parents took very serious precautions in response. While Taylor's parents were well within their rights to keep Taylor home from school, that response does not mandate a finding that Kimberly's comments be considered a "true threat" under an objective test. Given the record, an objectively reasonable person would (1) read Kimberly's comments within the context of the entire post and situation, (2) understand the threat was not made in the presence of, nor was it directed to Taylor, and (3) recognize that there is no reason to believe Kimberly would engage in violence. As a result, Kimberly's comments were not, and cannot be construed as, "true threats."

II. The school cannot regulate off-campus conduct under the *Tinker* test.

A. Ms. Clark's Facebook post, while offensive, falls under the protection of the First Amendment and outside of the *Tinker* test.

While schools have latitude in maintaining order, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines*

Independent Community School District, 393 U.S. 503, 507 (1969). Schools should not become "enclaves of totalitarianism" because schoolchildren are still "'persons' under our Constitution." *Id.* at 511. However, due to a school's role in teaching students, the First Amendment rights of students are not "coextensive" to the First Amendment rights of adults. *Bethel School District v. Fraser*, 478 U.S. 675, 682 (1986). Thus, schools may restrict speech, under *Tinker*, if (1) the school authorities can reasonably show that the speech will "materially and substantially disrupt the work and discipline of the school" or if (2) the speech will collide with the rights of others. *Tinker*, 393 U.S. at 513-14.

Before applying *Tinker* to the case at hand, this Court must first determine when to, or if it will, apply *Tinker* to off-campus student speech. All of this Court's exceptions to student speech under the First Amendment have involved student speech on-campus or at school supervised events. *See Tinker,* 393 U.S. at 504 (students wore armbands to high school campus); *Bethel School District*, 478 U.S. at 675 (student delivered speech on high school campus at an assembly); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 262-63 (1988) (school regulated high school newspaper that was published on-campus); *Morse v. Fredrick*, 551 U.S. 393, 393 (2007) (students held up a banner at a "school-sanctioned and school-supervised event" right outside of the high school).

Thus, with the advent of the internet, and without any guidance from this Court, the circuits have split in how the First Amendment applies to schools' regulation of students' off-campus internet speech. A majority of the circuits have held that the *Tinker* test applies to speech that originates off-campus so long as it is "reasonably foreseeable" that speech would reach the school. *See, e.g., Doninger v. Niehoff*, 642 F.3d 334, 347 (2d Cir. 2011); *Kowalski v. Berkely County Schools*, 652 F.3d 565, 574 (4th Cir. 2011); *S.J.W. ex rel. Wilson v. Lee Summit R-7 School*

District, 696 F.3d 771, 777 (8th Cir. 2012). *Cf. Wynar v. Douglas County School District*, 728 F.3d 1062, 1069 (9th Cir. 2013) (holding that Tinker applies to off-campus speech, but not expressly adopting the reasonable foreseeability standard).

Differing from the reasonable foreseeability approach, the 5th circuit has adopted the purposeful direction standard. Under this standard, schools may regulate off-campus speech in line with the *Tinker* test, if the student "intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher." *Bell v. Itawamba County School Bd.*, 799 F.3d 379, 397 (5th Cir. 2015).

While the majority of circuits have applied *Tinker* to off-campus speech, two circuits are hesitant to apply *Tinker* whole cloth to off-campus speech. The 3rd circuit is split on whether *Tinker* should apply to off-campus speech. *See J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 593 F.3d 286, 301 (3d Cir. 2010) (students could be punished for a MySpace account if the speech reasonable threatens to cause substantial disruption). *But see Layshock ex rel. Layshock v. Hermitage School District*, 593 F.3d 249, 261 (3d Cir. 2010) (Student speech on a personal website cannot be punished if a substantial disruption did not actually occur); *J.S. ex rel. Snyder*, 953 F.3d at 943 (Smith, J. concurring). Further, the 14th Circuit below held that *Tinker* does not apply to off-campus speech because it would give school districts authority that is inconsistent with the First Amendment. *Clark v. School District of Washington Count.*, Dkt. No. 17-307, 13-14 (14th Cir. Jan. 5, 2017).

We ask this Court to uphold the 14th circuit's opinion as to the application of *Tinker*, as regulating student off-campus speech violates the First Amendment. Or, in the alternative, we ask the court to adopt an "intentional direction" standard like that of the Fifth Circuit since it is most

compatible with First Amendment jurisprudence, and it is also compatible with the test of the other circuits.

B. Applying *Tinker* to off-campus speech is inconsistent with the First Amendment.

Applying *Tinker* to off-campus speech contradicts *Tinker's* recognitions that the First Amendment applies to children, and that the Constitution is not void just because children are within "the school house gates." *Tinker*, 393 U.S. at 507. If the appellant's legal theory succeeds, schools will be able to regulate speech that occurs entirely off-campus. *Snyder*, 650 F.3d at 941 (Smith, J. concurring). This application of the *Tinker* test to off-campus speech is out of line with this Court's general reasoning on free speech issues. *See Fraser,* 478 U.S. at 688 (Brennan, J. concurring) ("If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate"); *See also Morse,* 551 U.S. at 294 (Alito, J. concurring) ("Student speech celebrating illegal drug *use at a school event*, *in the presence of school administrators* and teachers," is subject to regulation by the school) (emphasis added).

The First Amendment has long been strenuously protected by this Court. *See generally* Richard H. Fallon, *Strict Judicial Scrutiny* 54 UCLA L. REV. 1267 (2007). When *Tinker* was decided, this Court had the general framework of its precedent in mind—that is, that strict scrutiny should apply in a majority of First Amendment cases, with intermediate scrutiny applying to content-neutral regulations that addressed the time, place, or manner of the regulations. *See Pickering v. Board of Educ. of T.P. High School*, 391 U.S. 563, 573 (1968). However, because public schools are government property, the Court views them differently and allows them to be regulated more easily. *Tinker*, 393 U.S. at 507. Because a school's control over the educational environment helps maintain order, and therefore, the essential work of the school, First

Amendment rights can be limited when the school officials can reasonably forecast a disruption. *Id.*

In *Tinker*, students wore black armbands to protest the Vietnam war. *Id.* at 504. In response, the school administrators prohibited students from wearing these armbands because they were worried that disorder would break out. *Id.* at 510. When the plaintiffs decided to continue wearing the armbands, the school suspended them and sent them home. *Id*. at 504. The school's policy was unconstitutional because there were no facts that indicated a disturbance would occur because of the armbands, and no disorder had in fact occurred. *Id.* at 514.

The crux of the Court's reasoning behind the *Tinker* test was based upon this need to keep order in public schools, and not based upon the rights of the students as individuals. *Id.* at 511. However, the Supreme Court has continually held that children have the same First Amendment rights as adults. *Planned Parenthood v. Danforth*, 482 U.S. 52, 74 (1976). And in subsequent student speech cases the Court has evaluated whether a student was on-campus, or at a school sponsored event, when determining whether restrictions on speech should apply. *Bethel School District*, 478 U.S. at 688 n.1 (Brennan, J., concurring) (These statements obviously do not […] refer to the government's authority generally to regulate the language used in public debate outside of the school environment); *Morse* , 551 U.S. at 422 (Alito, J., concurring) ("in-school student speech [may be regulated] in a way that would not be constitutional in other settings").

This Court's indication that *Tinker* does not apply to off-campus speech is good public policy. The contrary approach leads to absurd results; under the majority circuit approach, *any* speech from *any* individual in *any* place at *any* time would be subject to *Tinker*, so long as it was foreseeable that it would reach the campus, and it was reasonably forecast that it would cause a disruption. *Snyder,* 650 F.3d at 940 (Smith, J., concurring) ("A bare foreseeability standard could

be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters"). For example, adults in the 1950s and early 1960s caused a substantial disruption in the South by arguing for integration of Southern schools, this would not be allowed if the *Tinker* test applied to off campus speech today. *See Id.* at 940.

Applying *Tinker* to off campus speech also conflicts with the fundamental right of parents to raise their children and to "prepare [them] for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Allowing schools to reach off-campus into the parents' home expands the schools' authority to new heights. *See Morse*, 551 U.S. at 424 (Alito, J., concurring) (it "is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities"). Thus, giving the school district such power is contrary to this Court's jurisprudence.

Here, we ask this Court to clarify that *Tinker* does not apply to speech that occurs off-campus. Surely students gathered outside of school and gossiped before the internet. Such distractions likely disrupted the school environment in the pre-internet age, much like it does in today's age. The difference is not the distraction that is posed; the difference is the transparency of the information to school officials, and the ability to prove who is spreading the gossip. While the particular content of Kimberly's post may be insensitive, that is not a good reason to allow schools to reach into students' homes and regulate speech; the application of this standard moving forward could just as easily allow a school to restrict someone speaking in favor of transgender rights online, if the school could predict a material disruption and if it was reasonably foreseeable that the speech could reach the school. *See Snyder*, 650 F.3d at 939. As a result, this court should not apply *Tinker* to off-campus speech, and hold that Kimberly should not have been punished for speech that occurred in her own home.

C. In the alternative, if *Tinker* does apply to off-campus speech, we ask the court to adopt the purposeful direction standard.

The purposeful direction standard has two parts: (1) the speech must be about the school in some capacity, and (2) the speech must be intentionally directed at the school. *Bell*, 799 F.3d at 396-97. In order for speech to be about the school, it must be directed at a teacher, student, or school policy in a manner that threatens, harasses, intimidates, or disrupts. *Id.* at 396. For example, in *Snyder* the Third Circuit held that creating an internet profile that mocked a principal was about the school since it was directed at a school administrator and was harassing in nature. *Snyder*, 650 F.3d at 920. Another example of attempting to undermine a school policy is publishing a magazine that describes how to hack around a school's computer system. *Boucher v. School Bd.of School Dist. of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998). In order for *Tinker* to apply to speech about other students, the speech must not only harass and intimidate, but it must also *disrupt*. *Kowalski,* 652 F.3d at 573-74 (persistent online bullying of a fellow student by a large group was enough to be regulated under *Tinker*).

Not only does the speech need to be about the school, but it must also be intentionally directed at the school. This means that the student must direct speech toward the school, or put the speech in the hands of a third party who intends that the speech reaches the school. *See Snyder* 650 F.3d at 940 (since the student did not send her disruptive MySpace page to the school, it was not intentionally directed at it). Even when a student speaks to a third party, and the message reaches the school, the original student speaker must have intended that the message reach the school. *Bell*, 799 F.3d at 396. In *Bell*, the student posted a rap video, which threatened and harassed a school coach, to Facebook and YouTube. *Id.* at 383. The student later said that the coach had sexually harassed a female student at the school, and that he intended to increase awareness of situation in the school community by posting the rap to his social media page that most of the students

followed. *Id.* at 385-86. The court found that this showed that he intended for the speech to reach the school through third parties. *Id.* at 396.

Thus, to meet the purposeful direction standard the speech must (1) be about the school, and (2) the speaker must intentionally direct the speech at the school. This standard is consistent with the reasoning of the circuits that use the reasonable foreseeability standard, without allowing an overly broad application of *Tinker*. *See Doniger*, 642 F.3d at 347 (explaining the reasonable foreseeability standard).

For example, in *Kowalski* the student made a MySpace group for the sole purpose of discussing and bullying a fellow student, who she perceived to be a "slut." *Kowalski*, 652 F.3d at 567. The student then invited 100 fellow students to join the MySpace page, and admitted to doing so to spread awareness among her classmates about the dangers of STDs. *Id.* After the students joined the group, they posted pictures and disparaging comments about the student who was being bullied. *Id.* at 568. The court held that this speech was subject to *Tinker* because it was "reasonably foreseeable" that the speech would reach the school. *Id.* However, *Kowalski* squarely meets the substantial disruption standard, as the student admitted that she intended for her speech to reach the school, and the speech was about the school, because it involved harassing comments about another student.

Similarly, in *Doninger v. Neihoff*, a student, upset by the fact that a school concert was cancelled multiple times, posted disparaging comments about her principal to her blog. 494 F.3d at 340-41. The student then sent the blog post to her friends and sent them an example of a letter that should be written to the principal protesting the cancellation of the concert. *Id.* at 341. The school punished the student for causing a disruption on campus. *Id.* at 342-43. The court held that this speech was subject to *Tinker* because it was reasonably foreseeable that it would reach the

campus. *Id.* at 347. However, the purposeful direction standard would subject this speech to *Tinker* just as easily. First, the student in this case was targeting a school official for harassment, and used derogatory words in her post, thus this speech was about the school. Second, the student intended for her speech to reach the campus as she encouraged her peers to write letters to the administrators and to protest the administrators cancelling the concert.

The reasonable foreseeability test is overbroad in achieving its goals and chills speech. While many of the decisions under this test would have been consistent with the purposeful direction test, the implications of the reasonable foreseeability test are too extreme. One can easily imagine a situation where a student sticks up for his gay friend who is being bullied by classmates outside of school, and declares "Gay people deserve the same rights as straight people." This speech was not intended to reach the school, but it is reasonably foreseeable that it would as the student is defending his gay friend from his classmates. Further, it is likely that this speech will cause a substantial disruption at the school. Thus, the reasonable foreseeability test would be met and the student's speech, for better or for worse could be regulated. The purposeful direction test is more desirable and consistent with the First Amendment, because it protects students from constantly worrying about whether their speech will, or will not, reach the school.

Here, the purposeful direction standard is not met by Kimberly's Facebook post. Under the first prong of the test, Kimberly appears to be talking about the school because Taylor and the girls' basketball team was the subject of her post. However, unlike *Kowalski*, where the student targeted her classmate because she disliked her and wanted to pick on her, Kimberly was expressing her opinion on a school policy. While it is true that Kimberly uses Taylor's name, she does not do so in the same harassing manner as in *Kowalski*, where a bullied student was harassed

by multiple people in multiple posts. Thus, while it at first appears to be a post about the school, it is not sufficient under the legal standard here.

More importantly, Kimberly did not intend for her speech to reach the school; she solely intended for her post to be seen by the few classmates that she was friends with on Facebook. Kimberly did not to make her classmates aware of the issue like in *Doninger*, nor did she intend to have hundreds of her classmates pick on Taylor at school like in *Kowalski*. Rather she intended to make a private comment to her friends. Therefore, the second prong of the purposeful direction test is not met because the school district cannot show that Kimberly intentionally directed the speech toward school. Therefore, under the purposeful direction standard Clark's comments should not be subject to punishment under the *Tinker* test.

D. If the Court applies *Tinker* to Clark's conduct, the school cannot show that they could reasonably forecast a substantial and material disruption.

If *Tinker* applies, then the school district must show that it reasonably forecast that the speech would "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513-14. Courts usually look to several factors to see if the disruption prong of *Tinker* is met: the objective and subjective seriousness of the speech, the nature of the speech, the seriousness of the speech if the speaker actually took action, past incidents arising out of this type of speech, and the actual past disturbances involving the speaker. *Bell*, 799 F.3d at 398. These factors must lead a court to believe not only that disruption had occurred, but that the disruption was substantial.

In *Tinker*, there was some indication of disruption. Classes were distracted by the armbands. *Tinker,* 393 U.S. at 518. One Math teacher had to completely cancel his class. *Id.* at 517. The students were overall distracted from their classwork, and their thoughts were "diverted

to the highly emotional subject of the Vietnam war." *Id.* So there was some disruption in *Tinker*, but it was not substantial.

If the appellant is to succeed before this Court she must prove that the facts compel the Court to overturn the lower court's ruling under the substantial evidence standard. Under the substantial evidence standard, a lower court's decision is upheld if a reasonable fact-finder could support a factual finding. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)

Here, the factors do not point to a substantial disruption under *Tinker.* As the court below stated when evaluating these factors, not only was there no substantial disruption, there was almost no disruption at all. Four parents were upset by the post, but there is no evidence that the school at large had heard anything about the incident. There is no evidence of classrooms being disrupted or cancelled (like in *Tinker*, which was still not enough), or of any type of backlash from the student population at large.

The four parents' concern was that Kimberly would resort to violence against their transgendered children. However, Kimberly had never been disciplined at school, and does not have a violent history; it is highly unlikely that Kimberly would engage in any sort of violent behavior toward any students at her school. Thus, as the court below held, the fact that there was no general outbreak of disruption among the students, and that Kimberly had no disciplinary record in the past, outweigh the concerns about the content of the post. Therefore, Kimberly asks the Court to uphold the lower court's finding of fact because the record does not compel the opposite finding.

CONCLUSION

For the foregoing reasons, Kimberly respectfully requests that this Court affirm the judgment of the Fourteenth Circuit Court of Appeals.