Team Z

Brief on the Merits

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 RESPONDENTS

QUESTIONS PRESENTED

1. **Whether Ms. Clark's Facebook post constituted a "true threat" beyond the protection of the First Amendment?**

2. **Whether Washington County School District violated Ms. Clark's First Amendment rights for punishing her under the School District's Bullying Policy for a Facebook post that was generated off campus on her personal computer?**

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BASIS OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on January 5, 2017. *Clark v. Washington Cnty. Sch. Dist. (Clark II)*, No. 17-307, slip op. at 1 (14th Cir. Jan. 5, 2017). Petitioner timely filed a petition for writ of certiorari, which this Court granted. This court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Alan Clark, on behalf of Respondent Kimberly Clark, filed an action against the Washington County School District in the United States District Court for the District of New Columbia. *Clark v. Washington Cnty. Sch. Dist. (Clark 1)*, No. 16-9999, slip op. at 1 (D. New Columbia Apr. 14, 2016). The parties filed cross motions for summary judgment. *Id.* Neither party disputed the material facts. Ms. Clark contended that the punishment for her Facebook posted violated her First Amendment right to freedom of speech. *Id.* The School District argued that Ms. Clark's suspension was proper because: (1) the post constituted a "true threat" and (2) the post was materially disruptive to the school environment and collided with the rights of other students. *Id*. The district court sided with the School District and upheld Ms. Clark's suspension. *Id.* at 2.

Ms. Clark appealed the district court judgment to the United States Court of Appeals for the Fourteenth Circuit. The Fourteenth Circuit reversed the district court's decision, holding that: (1) Ms. Clark's Facebook post did not constitute a "true threat" and (2) the School District impermissibly punished Ms. Clark for her speech because it occurred off campus while on her personal computer. *Clark II,* at 1.

STATEMENT OF THE FACTS

I. The Nondiscrimination in Athletics Policy.

On August 1 2015, the Washington County School District adopted a policy titled "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" ("Nondiscrimination Policy"). The Nondiscrimination Policy allows transgender and gender nonconforming students to become members of sports teams for the gender with which they identify. (R p 15-16). Prior to the passage of the Nondiscrimination Policy, transgender students who identified as a female, but were born as a male, were not allowed to participate on female sports teams.

II. The events of November 2 2015.

Appellant Kimberly Clark ("Ms. Clark") is a freshman at Pleasantville High School. (R p 13). Ms. Clark is a female by birth, and identifies herself as a female. *Id.* Taylor Anderson ("Ms. Anderson") is a sophomore at Pleasantville High School. *Id.* Ms. Anderson was born a male, but now identifies herself as a female. *Id.* As a result of the Nondiscrimination Policy, Ms. Anderson was allowed to join Pleasantville High School's women's basketball team. (R p 15).

On November 2 2015, Appellant Kimberly Clark ("Ms. Clark"), a fourteen-year-old freshman at Pleasantville High School, was playing in a basketball scrimmage with other members of Pleasantville's Girls' Basketball Team. (R p 23). During the course of the scrimmage, Ms. Clark and Taylor Anderson ("Ms. Anderson"), a sophomore on the basketball team, disagreed with a call made by the referee. *Id.* The two entered into a verbal altercation, prompting the referee to eject them from the scrimmage. *Id.*

After Ms. Clark was ejected from the basketball scrimmage, she returned home to express her frustration with the scrimmage and her altercation on her personal Facebook page. *Id.* Ms. Clark's post stated the following:

> 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 wood work lately...

(R p 18).

At the time of the post, Ms. Clark was not Facebook "friends" with Ms. Anderson or any other transgender student at school. (R p 23). Therefore, her post would not be communicated directly to Ms. Anderson or any transgender student at her school. Rather, Ms. Clark intended the post as a joke for only her friends to see. *Id.* However, Ms. Clark acknowledged that "Facebook posts sometimes go beyond one's own friends." *Id.*

III. The aftermath and punishment of Ms. Clark's Facebook post

On November 4, Ms. Anderson and Josie Cardona, another transgender student at Pleasantville High School, visited Principal Thomas Franklin ("Franklin") along with their parents. (R p 14). This meeting was initiated by the transgender student's parents. *Id.* During the meeting with Franklin, they discussed the incident and showed him a copy of Ms. Clark's Facebook post. *Id.* The parents expressed fear for their students and other transgender students in light of Ms. Clark's Facebook post. *Id.* After the meeting, Franklin contacted Ms. Clark's parents and requested that they meet with him regarding the incident. *Id.* The Clarks then met with Franklin the next morning, November 5. *Id.* During the meeting, Ms. Clark acknowledged

that she was aware that her post could reach Ms. Anderson, Cardona, and other transgender students at her school. *Id.* Further, Ms. Clark opined that allowing transgender students to participate on the sports teams of the gender with which they identify is unfair, dangerous, and immoral. (R p 19).

Upon meeting with the Clarks, Franklin suspended Ms. Clark for three days because he concluded that her Facebook post was materially disruptive to the high school learning environment and collided with the rights of the transgender students to feel safe at school. (R p 14). Because such a suspension would remain on Ms. Clark's public record, *Id.*, the Clarks appealed her suspension to the Washington County School Board ("School Board"). (R p 20). The Washington County School Board is the School District's governing body, and has the authority to review suspensions. (R p 21).

After reviewing the facts, the School Board upheld Ms. Clark's three-day suspension. *Id.* First, the School Board stated that her post was offensive and threatening, especially since Ms. Clark knew that it was likely that other individuals would pass the message along to the transgender students. *Id.* Thus, the School Board considered the second portion of her post—"Taylor better watch out. 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…"—a true threat. *Id.* Second, the School Board agreed that the prescribed suspension was appropriate because Ms. Clark's post prompted a material disruption in the school environment and the second portion of the post collided with the rights of other students to be secure in the school environment. *Id.* The School Board pointed out that many students saw the post and the students were not able to attend school following the incident by their parent's choice. *Id.*

SUMMARY OF THE ARGUMENT

Ms. Clark's Facebook post did not rise to a "true threat" under this Court's holdings in *Watts v. United States* and *Virginia v. Black*. Ms. Clark's statement was part of a political debate, conditional, and, when given context, confirms that Ms. Clark did not intend to issue a threat.

Here, Ms. Clark did not have an objective intent to communicate a threat under *Black*. Her lack of direct communication to Ms. Anderson, the lack of response by Ms. Anderson in return to the post, the lack of prior similar statements by Ms. Clark, and the lack of Ms. Anderson's reasonable belief as to Ms. Clark's propensity to violence lead to the conclusion that a reasonable person would not understand Ms. Clark's post as a "true threat." Further, applying a subjective standard for intent, Ms. Clark did not intend to communicate a threat because she was joking.

In *Tinker v. Des Moines Independent Community School District* and its progeny, this Court authorized schools to limit the otherwise constitutional speech of students. This Court emphasized that this doctrine is to apply in the school environment, where important interests in preserving the safety of students are present. These safety concerns are not present when students are off campus, and there is no need for schools to protect students in such a forum. Therefore, schools cannot constitutionally use *Tinker* to punish off-campus internet speech because *Tinker*'s original authorization was grounded in the special characteristics of the school environment.

Because *Tinker* does not apply to Ms. Clark's off-campus internet speech, this Court must apply general First Amendment principles. Ms. Clark's Facebook post is constitutionally protected speech, and the School Board policy under which she was punished is a content-based restriction. Therefore, review of the School Board policy is reviewed under strict scrutiny. The policy fails to meet strict scrutiny because restricting otherwise constitutional speech is not the least restrictive way that the School Board can address the problem of bullying. Thus, Ms. Clark's punishment under the School Board policy violates her First Amendment rights.

I. Ms. Clark's off-campus Facebook post did not constitute a "true threat" beyond the scope and protection of the First Amendment's right to free speech.

The First Amendment rights to freedom of speech are central to our democracy. *See 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." *Id.* However, his Court has held that certain forms of speech are unprotected by the First Amendment, including defamatory speech, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 331–332 (1974), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), obscenity, *Miller v. California*, 413 U.S. 15, 24 (1973), child pornography, *United States v. Williams*, 553 U.S. 285, 288 (2008), and speech inciting criminal activity, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). When speech constitutes a "true threat," it is also unprotected by the First Amendment. *Watts v. United States*, 394 U.S. 705, 708 (1969). Standardizing what constitutes a "true threat" remains a topic of uncertainty.

A. *Watts* provides exceptions to speech not protected under the First Amendment.

The "true threat" analysis began in this Court with *Watts*. There, a young man protesting the draft occurring amidst the Vietnam War stated, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," making clear reference to the current president at the time. *Watts*, 394 U.S. at 706. Noting that the speech "must be interpreted with the commands of the First Amendment clearly in mind," this Court decided this speech fell within the protections of the First Amendment relying on three primary factors: (1) the statement made was part of a political debate; (2) the statement was conditional in nature; and (3) the full context of the speech indicated it was not a serious threat. *Id.* at 708.

This Court further refined the "true threat" analysis in *Virginia v. Black*, 538 U.S. 343, 343-45 (2003). There, two Ku Klux Klan members were arrested for their participation in cross

burnings, violating a Virginia statute. The Klan members contested their convictions, claiming that the statutory punishment violated their First Amendment rights. The Court struck down the statutory provision establishing cross burning as prima facie evidence of intent to intimidate, but the Court also ruled that the State could constitutionally ban cross burnings with an intent to intimidate by writing "[i]ntimidation in the constitutionally proscribable sense of the word, is a type of true threat." *Id.* at 359. The *Black* Court explained that "'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." *Id.* Regardless of whether the speaker intends to carry out their threat, *Black* provides that speech constitutes a "true threat" when the speaker intends to communicate such threat. *Id.* at 359–60. In sum, for speech to constitute a true threat such that it is unprotected by the First Amendment, it must fall outside the factors provided in *Watts* and be communicated with an intent to intimidate.

Applying the *Watts* factors, Ms. Clark's Facebook post does not fall outside the protection of the First Amendment as it does not constitute a "true threat." First, Ms. Clark's statement is one of a political nature, as it expressly challenges school policy. Despite the that Ms. Clark's post could be divided into two separate statements, such a separation would take her post out of context. Such bifurcation would jeopardize future application of the factors because it would allow challengers of speech to narrow their application such that any speech could be considered a "true threat." This result would be contrary to the freedoms guaranteed by the First Amendment. Further, just as debating the Vietnam War was commonplace in the time of *Watts*, many regularly debate political and cultural issues on Facebook—just as Ms. Clark was doing here.

Second, Ms. Clark's statement was conditional on several situational developments. In

Watts, there was a likelihood Watts would be drafted to serve in the military. He expressly made a statement about attacking the Commander in Chief and stated the method and the tools that he would use to accomplish his goals. There, it was entirely possible that his meeting with L.B.J. could occur, and that he would have the opportunity to carry out his plan. Here, Ms. Clark and Ms. Anderson attended the same public school. However, they were in different grade levels at the school, and likely took different classes. Therefore, the opportunity for the two of them to encounter each other is limited. Further, despite the fact Ms. Clark attended the same school as the targeted individuals, Ms. Clark's statement would rely crafting a plan to "get" them. The threat would be conditional as to the development of plan, to which the record is silent. Then, she would have to carry out such plan. Here, the instant case is missing conditions that were present in *Watts*, where this Court still protected the defendant's speech.

Third, the context of Ms. Clark's speech is important in determining whether it constituted a threat. Preceding the Facebook post, Ms. Clark had no record of violent behavior or other disciplinary infractions. (R p 2). Further, the fact that Ms. Clark restrained from violence during her heated discussion with Ms. Anderson indicates her propensity for non-violence. In sum, applying the *Watts* factors indicate that Ms. Clark's Facebook post was not a "true threat."

B. Federal Circuits are split on whether to apply subjective or objective intent.

Assuming arguendo that the *Watts* exceptions are inapplicable to Ms. Clark's Facebook post, the School District must prove Ms. Clark had an intent to intimidate. The Federal Circuits are split as to whether *Black* requires the speaker to possess an objective or subjective intent.

1. Eighth Circuit in Dinwiddie: Objective Intent

In *Dinwiddie*, an anti-abortionist protested outside of a Planned Parenthood facility. *United States v. Dinwiddie*, 76 F.3d 913, 917 (1996). She obstructed the entry to the facility and threatened to use physical force against the facility's patients and staff members. *Id.* The

government contended that Dinwiddie's conduct violated the Freedom of Access to Clinic Entrances Act ("FACE"). *Id.* at 919. Dinwiddie argued that FACE was unconstitutional in violation the Free Speech Clause of the First Amendment. *Id.* at 919. The Eighth Circuit held that "[a]lthough the government may outlaw threatening speech, the First Amendment does not permit the government to punish speech merely because the speech is forceful or aggressive [because] what is offensive to some is passionate to others." *Id.* at 925 (internal citation omitted). Further, in analyzing alleged threats, the speech is viewed "in light of [its] *entire* factual context." *Id.* (internal citations omitted).

There, the court used a set of factors to consider when deciding whether statements have constituted a threat of force: the reaction of the recipient of the threat and of other listeners; whether the threat was conditional; whether the threat was communicated directly to the victim; whether the maker of the threat made similar statements to the victim in the past; and whether the victim had reason to believe the maker of the threat had a propensity to engage in violence. *Id.* (internal citations omitted). Furthermore, the court clearly made note the list was not exhaustive, nor did "the presence or absence of any one of its elements need [] be dispositive." *Id.*

Since then, additional factors have been considered in light of developing technology. Particularly, the medium on which the statement was made has become more pertinent, particularly when such statements are available on public accessible internet forums. *See United States v. Turner*, 720 F.3d 411, 413 (2d Cir. 2013) ("Turner published a blog post declaring that three Seventh Circuit judges deserved to die for their recent decision…."); *United States v. Jeffries*, 692 F.3d 473, 475–77 (6th Cir. 2012) (describing a music video that Jeffries posted on YouTube containing threats to kill the judge if he doesn't "do the right thing" at an upcoming

custody hearing). The relevance of the medium has become increasingly more important as political speech, and element considered under *Watts*, can contain metaphors, satire, sarcasm, and even violent calls to action. For "true threats," a hyper-individualized reading lacks the benefit of what a communal response could be. *Watts*, 394 U.S. at 707 (noting the comical reaction of the crowd around Watts). Some commentators to the protection of online speech have argued "true threats" with political overtones require a test for imminence to help distinguish political hyperboles and true threats, which has been the question the Court has faced since *Watts*. *See* Scott Hammack, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification on the Courts' Approach to True Threats and Incitement*, 36 Colum. J.L. & Soc. Probs. 65, 82 (2002).

The imminence of an alleged threat has been considered by the Court before through an incitement doctrine, which relates to "true threats" by punishing speech that advocates for "imminent lawless action." *Brandenburg*, 395 U.S. at 447. As consistent to the *Watts* contextual consideration, medium and imminence must be analyzed as relevant to the culture and communicative methods of the time.

2. Eighth Circuit in Pulaski

In *Doe v. Pulaski*, a student wrote a letter containing language about sexually harassing and murdering a specific classmate. *Doe v. Pulaski*, 306 F.3d 616, 619–20 (8th Cir. 2002). The fact that the author of the letter made the potential victim aware of the letter was dispositive. *Id.* at 624. Consistently, the Eighth Circuit considered the direct communication factor as dispositive in *Dinwiddie*. *Dinwiddie*, 76 F.3d at 925; *Pulaski*, 306 F.3d at 624-26. "Additionally, the court discussed that the government similarly has no valid interest in the contents of a writing that a person… might prepare in the confines of his own bedroom," further emphasizing the need

for direct communication. *Id.* at 624. In *Pulaski*, the principal of the school was made aware of the threatening letter, proceeded with an internal investigation, and ultimately expelled the student. *Pulaski*, 306 F.3d at 620. In determining whether the school violated the First Amendment in expelling the student for the speech, the Eighth Circuit examined whether the student sent the letter with an objective intent to intimidate. *Id.* at 624. Because, *inter alia*, the student made the potential victim aware of the threatening letter, the court reasoned that "the nature of the alleged threat from the viewpoint of a reasonable recipient" barred First Amendment protections under the "true threat" doctrine. *Id.* at 622.

3. Fifth Circuit in Porter

In *Porter v. Ascension School Parish Board*, the Fifth Circuit focused on whether the speaker knowingly communicated their statement in a way that a recipient reasonably could find threatening. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004). There, the student was expelled for bringing a sketch that depicted a violent attack on the school building. The student's older brother sketched the picture two years before the incident, and the student inadvertently brought the picture into the school. *Id.* at 612–13. At school, a friend of the student saw the old sketch and reported it to his school bus driver, who reported it to school authorities,= Ultimately, the student who had brought the sketch to school was punished. *Id.* at 612.

The Fifth Circuit applied an objective standard for intent, providing that "[s]peech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'" *Id.* at 616. (citing *Pulaski*, 306 F.3d at 622). The Fifth Circuit noted the shortcomings of the district court's failure to apply an objective standard, noting that they did "not decide whether [the] drawing

would constitute a true threat in the eyes of a reasonable and objective person because [the student] did not intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the First Amendment." *Id.* at 617.

4. Ninth Circuit in Cassel: Subjective Intent

In *Cassel*, the Ninth Circuit applied a subjective standard for intent. *United States v. Cassel*, 408 F.3d 622. 632–33 (2005). There, the defendant was charged with interfering with the sale of federal lands. *Id.* at 624–25. The defendant was a nearby resident and did not want neighbors. On separate occasions, the defendant greeted prospective buyers with his "aggressive dogs," informed them that the land was poor, and cautioned them from purchasing the land. *Id.* One prospective buyer stated the defendant had said "he would see to" it that anything erected on the lot would be burned down. *Id.* at 625. In interpreting *Black*'s intent requirement, the court provided that "[a] natural reading of [*Black*'s] language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." *Id.* at 631 (emphasis added). However, this interpretation arose due to the defendant's violation of a criminal statue, noting that the *mens rea* requirement is foundational component of American criminal jurisprudence. *Id.* at 634 (internal citations omitted). The Ninth Circuit ultimately held that the defendant expressed a subjective intent to communicate a threat to the purchasers, as indicated by his express language to the potential purchasers. *Id.* at 634–35.

5. This Court in Elonis

This Court recently addressed whether an objective or subjective standard is required to communicate a threat in *Elonis v. United States*. *Elonis v. United States*, 135 S. Ct. 2001, 2004–05 (2015). In *Elonis*, the defendant was prosecuted for posting threatening messages on his

Facebook page that included references to rape, bestiality, guns, knives, high-caliber bullets, school shootings, mortar attacks, and other illegal and violent imagery. *Id.* There, this Court applied a subjective standard for intent in determining whether the defendant met the *mens rea* element in a criminal prosecution, consistent with *Cassel*. *Id.* at 2008. The *Elonis* Court rejected application of the objective, reasonable person standard on which Elonis's conviction was premised, because it would be inconsistent with the conventional requirement for criminal conduct—awareness. *Id.* The application of the subjective intent requirement rested on the principle that the "wrongdoing must be conscious to be criminal." *Id.* at 2009 (internal citations omitted). The Court noted, though, that the level of intent required extended to both the communication and the wrongful conduct. *Id.* at 2011.

C. Ms. Clark's did not possess the intent required to communicate a true threat.

The Fourteenth Circuit agreed with the Ninth Circuit in *Cassel* by applying a subjective standard of intent to Ms. Clark's Facebook post when determining if it constituted a "true threat." *Black II* at 7. Regardless of whether an objective or subjective standard of intent are applied, the facts indicate that Ms. Clark did not possess the requisite intent to communicate a "true threat."

In applying the objective standard using the *Dinwiddie* factors to the contested speech, Ms. Clark did not communicate an objective intent to intimidate. First, the reaction of the recipient was minimal. Ms. Anderson's parents were the ones who brought the post to the attention of the school principal. Further, it was the transgender students' parents who decided to keep them home from school. The record makes no indication of the students seeking refuge from the school environment or Ms. Clark. Secondly, the alleged threat was conditional. The *Watts* analysis considered this factor, and for the reasons previously discussed, the threat relied on certain conditions being met. Thirdly, Ms. Clark did not directly communicate the alleged

threat to Ms. Anderson or any other transgender student. She was not friends with any transgender student on Facebook and she made no efforts to transport the message into the school. Her post was made directly on her Facebook personal page and shared only with her Facebook friends. Fourthly, there is no evidence to indicate that Ms. Clark has made any statement similar to the one contested. Finally, Ms. Anderson had no reason to believe to that Ms. Clark had a propensity to engage in violence given their previous interactions have been isolated to verbal exchanges on the basketball court. (R p 2).

Additionally, the medium in which Ms. Clark communicated her speech is important, especially in considering the context of her speech. She was a fourteen-year-old girl using a social platform to express an idea. (R p 2). Just as it was common to protest the Vietnam War in *Watts*, social media is a common medium for expressing personal thoughts. Further, the implication of the imminence factor suggests that no "true threat" existed. Not only is the record silent on Ms. Clark, or any other student, acting out towards Ms. Anderson or other transgender students, but it was three days before Ms. Clark even met with the principal to discuss the Facebook post. The temporal proximity, or lack thereof, suggests that Ms. Clark's post was not like previous cases that advocated for "imminent lawless action."

There was no direct communication between Ms. Clark and the targeted individuals, a factor noted in the Eighth Circuit opinion in *Pulaski*. *Pulaski*, 306 F.3d at 624–625. In the case of Ms. Clark, the record indicates her message was made at her home, on her personal Facebook account, which she did not link with Ms. Anderson, any other transgender students, or any parent of theirs. This indicates that she did not direct her message towards the transgender students. (R p 2). Moreover, Ms. Clark made no other effort to communicate the message to Ms. Anderson evidenced by the stipulated facts in the record. Therefore, Ms. Clark fails to meet the direct

communication factor for determining whether there was an objective intent to intimidate.

Under the objective intent standard, Ms. Clark's post does not give rise to a "true threat" as the factors weigh in favor of Ms. Clark. Although the reactions of the parents of transgender students are considered, that is insufficient to counter the other factors presented.

If the Court were to decide to apply the subjective intent standard used in the Ninth Circuit and in *Elonis*, Ms. Clark still would retain the protections of the First Amendment. An important distinction to note is that defendants in *Elonis* and *Cassel* were convicted of federal crimes. When life and liberty are at stake, the Constitution and public policy would support the utmost protections in place. In comparison of the facts to the instant case, the defendant in *Cassel* used specific, threatening language referring to burning down structures. *Cassel*, 408 F.3d at 625. Here, Ms. Clark made only an ambiguous statement that no evidence supports was meant to purport violence. Ms. Clark's statements could be read to imply social ostracism, particularly given the context that a fourteen-year-old, high school freshman girl made the Facebook post.

Applying a subjective standard of intent to the instant case would not be inconsistent with *Black*, noting that the intent to communicate a "true threat" is a First Amendment question, not merely one of criminality. *Cf. Cassel*, 408 F.3d at 634. However, doing so would further distance Ms. Clark's post from constituting a "true threat." During the meeting with her principal, which took place three days after the post was made, Ms. Clark expressly stated that she was "joking", eliciting her lack of intent to threaten the targeted individuals. (R p 3).

While Ms. Anderson may have found the incident upsetting, offensive, or mean-spirited, that alone render Ms. Clark's statement a "true threat." Because Ms. Clark's speech was not communicated with the requisite intent, her speech was not a "true threat."

D. Mere offensiveness or disagreeableness does not forfeit First Amendment protections.

As previously discussed, the "bedrock principle underlying the First Amendment" prohibits the government from suppressing expression of an idea only because it may be offensive or disagreeable. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (internal citations omitted). Both *Johnson*, a case protecting the freedom of speech through expression via flag burning, and *Snyder*, a case protecting members of Westboro Baptist Church who picketed a fallen soldier's funeral with offensive signs bearing messages such as "Thank God for Dead Soldiers," *Id.*, display that the First Amendment entitles citizens to express their opinions, no matter how reprehensible the speech may be to others.

The speech in question is Ms. Clark's Facebook post, which stated that: "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"; and "[t]hat goes for the other TGs crawling out of the woodwork lately too…". (R p 2). While reprehensible, it is unclear that Ms. Clark intended to suggest violence. Regardless, her speech does not compare to the level of specific threats of harm found in several other "true threat" cases. *See e.g.*, *Watts*, 394 U.S. at 706; *Cassel*, 408 F.3d at 625; *Lovell By & Through Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 369 (9th Cir. 1996) ("If you don't give me this schedule change, I'm going to shoot you!"). Further, Ms. Clark's statements could be read to imply social ostracism, particularly given the context that a fourteen-year-old girl made the Facebook post in regards to high school grievances. Ms. Clark has no known propensity to violence, so even if a reasonably objective person came to the conclusions that the statements might portend violence, there is an absence of evidence that Ms. Clark subjectively intended to issue a threat of any kind. Without evidence to suggest more than disagreeableness, the Constitution protects Ms. Clark's ability to make her opinions known.

"'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an unlawful act of violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. Here, Ms. Clark's post does not rise to the level of a true threat. Ms. Clark's post is excepted under *Watts* by its political, conditional, and contextual nature. Assuming arguendo that *Watts* did not except her speech, Ms. Clark's speech does not possess the requisite level of intent in order to constitute a "true threat" under *Black*.

II. The School violated Ms. Clark's First Amendment rights to freedom of speech by punishing her for her off-campus internet speech.

A. This Court has recognized the limited scope of *Tinker* in addressing student speech.

In *Tinker*, this Court authorized school administrators to punish the otherwise constitutional speech of students in order to maintain discipline in the school environment. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07 (1969). However, because "students don't shed their constitutional rights at the schoolhouse gate," the *Tinker* Court was careful to limit its holding. *Id.* at 506. The Court noted that, in order to punish a student's speech, the school must "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. As a result, *Tinker* authorized only the regulation of student speech that "materially disrupts" the school environment or "involves substantial disorder or invasion of the rights of others." *Id.* at 513.

In the cases following *Tinker*, this Court provided several exceptions to the *Tinker* doctrine. However, the Court continued to emphasize the limited scope of the authority for public schools to punish otherwise constitutional speech. *See Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986) (authorizing schools to punish speech that is "offensively lewd and indecent" because it is disruptive to the values of public education); *Hazelwood Sch. Dist. v.*

Kuhlmeier, 484 U.S. 260, 273 (1988) (authorizing schools to regulate student speech that is school-sponsored); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (authorizing schools to punish student speech that promotes illegal drug use). In his concurring opinion in *Fraser*, Justice Brennan emphasized that given the Court's precedent, the government "obviously" could not regulate language used by students in the public debate outside of the school environment. *Fraser*, 478 U.S. at 688 n.1 (Brennan, J. concurring). Further, the *Hazelwood* Court characterized *Tinker* as granting educators the "ability to silence a student's personal expression *that happens* to occur on the school premises." *Hazelwood*, 484 U.S. at 271 (emphasis added). Finally, in his concurring opinion in *Morse*, Justice Alito noted that *Tinker* authorizes the regulation of the in-school speech of students that would not be constitutional in other settings. *Morse*, 551 U.S. at 422 (Alito, J. concurring). Collectively, this Court's line of school speech cases illustrates that *Tinker* authorizes schools to regulate the in-school speech of students—not their off-campus speech.

Tinker's authorization of school administrators to punish the otherwise constitutional speech of students rests primarily upon "the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. The *Tinker* Court required the application of the student's constitutional rights in light of these "special characteristics," namely, the importance of school administrators "to prescribe and control conduct *in the schools*." *Tinker*, 393 U.S. at 507 (internal citations omitted) (emphasis added). Further, in his concurring opinion in *Morse*, Justice Alito provided that any alteration of free speech in public schools must be based on the differences of the school environment from the general community. *Morse*, 551 U.S. at 424 (Alito, J. concurring). Justice Alito noted that the public school environment can present unique dangers to students, and that school administrators have an important interest in keeping students safe. *Id.* As a result, school

administrators can punish student speech in select instances in order to ensure the safety of the school environment. *Id.* In sum, *Tinker* and Justice Alito's concurring opinion in *Morse* indicate that schools have the ability to censor the otherwise constitutional speech of students when it occurs on-campus, where special characteristics of the school environment are present.

B. Several Federal Circuit decisions have refused to extend *Tinker* to off-campus speech.

The Federal Circuits are split on how to apply *Tinker* to off-campus speech. Several Federal Circuit Courts have refused to extend *Tinker* to off-campus communications by students. *See, e.g.*, *Thomas v. Bd. of Educ., Granville Central Sch. Dist.*, 607 F.2d 1043, 1050, 1053 n.18. (2d Cir. 1979); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 620, 625 (5th Cir. 2004). More recently, Federal Circuits have addressed the issue of whether *Tinker* extends to internet speech on websites such as Myspace and YouTube. *See Bell v. Itawamaba Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011).

1. Second Circuit in Thomas

In *Thomas*, public high school students were suspended for publishing an underground newspaper with sexually explicit content. *Thomas*, 607 F.2d at 1046. The Second Circuit refused to extend *Tinker* to the student's speech. *Id.* at 1045, 1050. The court determined that the newspaper constituted off-campus speech since it was "deliberately designed to take place beyond the schoolhouse gate." *Id.* at 1050. As a result, "because school officials . . . ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith," the student's speech should be evaluated pursuant to general First Amendment standards rather than *Tinker*. *Id.* Further, the court noted that *Tinker*'s willingness to defer to school authority in disciplining students stems from the fact that their authority was confined to

the school environment. *Id.* at 1052. Therefore, the standard in *Thomas* allows schools to punish otherwise constitutional student speech only when that speech is generated in the school environment.

2. Fifth Circuit in Porter

More recently in *Porter*, a high school student was suspended for bringing a picture to school that depicted a violent attack on the school building. *Porter*, 393 F.3d at 615. The student's older brother drew the picture two years prior to the incident at home, but the student found the picture in his brother's closet and inadvertently brought it school. *Id.* The court determined that the picture did not constitute on-campus speech because the student did not intend for the speech to reach the school environment and the student took no action to increase the likelihood that the drawing would reach the school environment. *Id.* Because the court determined that the case involved off-campus speech, the school refused to apply *Tinker* and instead applied general First Amendment principles. *Id.*

3. Fifth Circuit in Bell

In *Bell*, the en banc Fifth Circuit reluctantly applied *Tinker* to off-campus internet speech, though only after acknowledging that there was no specific rule as to speech that originates outside school grounds. *Bell*, 799 F.3d at 394. The student in *Bell* was disciplined for uploading a video to the internet that alleged misconduct to coaches at school towards female students, as well as making violent threats to the coaches. *Id.* at 383–84. The video in the case spread quickly around the community, as one of the coach's wives heard about the video from a friend. *Id.* at 385. The court in *Bell* held that the student could be punished because the speech was intentionally directed at the school community, and "reasonably understood by school officials to threaten, harass, and intimidate a teacher." *Id.* at 396. In his dissenting opinion, Judge Dennis

disagreed with the majority's application of *Tinker* to off-campus speech. *Id.* at 422 (Dennis, J. dissenting). Judge Dennis emphasized that "the majority opinion ignores that *Tinker*'s holding and its *sui generis* 'substantial-disruption' framework are expressly grounded in 'the special characteristics of the school environment.'" *Id.* Ultimately, Judge Dennis contends that *Tinker* is inapplicable to off-campus internet speech because it lacks grounding in the "special characteristics of the school environment" which allow school administrators to limit the constitutional speech of students.

4. Third Circuit in Blue Mountain

The en banc Third Circuit similarly struggled with the issue of whether *Tinker* extends to off-campus internet speech in *Blue Mountain*. *Blue Mountain*, 650 F.3d at 931, 933. In *Blue Mountain*, a student was disciplined for creating a Myspace page to parody a school administrator. *Id.* at 921. The page was created on the student's personal computer, and the public could not access the page unless they had the specific URL address. *Id.* Further, the page did not rapidly spread, and the administrators happened to become aware to the page through a comment made in passing by a student. *Id.* The court applied *Tinker* to the speech, but ruled in favor of the student because the student's speech did not create a "material and substantial disruption." *Id.* at 924 (internal citation omitted). Concurring in judgment, Judge Smith disagreed with the majority in regard to their application of *Tinker* to the off-campus internet speech. *Id.* at 938. Judge Smith also emphasized that *Tinker*'s holding is "expressly grounded in the 'special characteristics of the school environment.'" *Id.* at 937 (internal citations omitted). In support of his proposition, Judge Smith acknowledged Justice Alito's concurrence in *Morse*, which provided that *Tinker* authorized schools to regulate "in-school student speech . . . in a way that would not be constitutional in other settings." *Id.* at 938 (quoting *Morse*, 551 U.S. at 422.).

C. *Tinker* does not apply to Ms. Clark's off-campus internet speech.

In the instant case, the Fourteenth Circuit followed Judge Smith's concurring opinion in *Blue Mountain* and Judge Dennis's dissent in *Bell* in refusing to extend *Tinker*'s to off-campus internet speech. (R pp 37–38). Instead, the court applied a test focusing on where the speech was generated, consistent with *Thomas* and *Porter*. The court refused to apply *Tinker* to off-campus internet speech under the belief that "the United States Supreme Court designed the *Tinker* standard to censor children for speech uttered outside school grounds." (R pp 38–39). Further, the court felt that extending *Tinker* to off-campus speech would vest school authorities with a far reaching power inconsistent with the First Amendment's guarantee of freedom of speech. (R p 38). The court emphasized that the power for regulate off-campus speech would risk a chilling of otherwise constitutional speech—a potentially ominous implication. (R p 39).

The approaches for which Judge Bell and Judge Dennis advocate, as well as the standard that the Fourteenth Circuit established, allows schools to only to regulate the speech of students that occurs on-campus and during school-sponsored event. These standards are consistent with this Court's school speech precedents, which have all authorized schools to regulate student speech only in the school environment or at school-sponsored events. Internet speech is fundamentally different from speech generated in the school environment, and the standards for which Judge Bell, Judge Dennis, and the Fourteenth Circuit advocate apply *Tinker* in light of these differences.

Most parents who send their children to a public school generally have no other choice of schooling options. *See Morse*, 551 U.S. at 424 (Alito, J. concurring). These parents and students have little ability to shape the experiences to which their students are exposed in the public school environment. As a result, the school environment can expose students to safety threats that they otherwise would not encounter, and force the students to spend time with other persons

with whom they otherwise would choose not to associate. When faced with such dangers during school hours, parents cannot provide protection and guidance to their students. Further, the student's lack of freedom to choose the individuals with whom they associate at school may cause the student to spend time close by other students who may harm them. *See id.* Thus, in schools, students can be exposed to great danger. Without an ability to rely on their parents for guidance and protection in the school environment, nor the ability to escape harmful situations, students rely on school administrators for protection in the school environment. Therefore, under *Tinker* and its progeny, school administrators are given discretion to sometimes limit student speech to protect students from the "special characteristics" of the school environment. *Id.*

In contrast, when students are not in school or participating in school-sponsored events, the students and their parents have the opportunity to make choices. When students are off campus, parents can protect them by monitoring and controlling the experiences to which they are exposed, as well as the persons with whom they interact. Additionally, while off campus, students can choose the persons with whom they spend their time, and generally won't be forced to spend their time with individuals that threaten them or cause them to feel uncomfortable. There is no need for the school to protect students when they are off campus because the "special characteristics" of the school environment preventing students and parents from making choices in regards to safety are generally absent. *See id.*

Further, limiting *Tinker*'s reach to the school campus and school-sponsored activities serves as a bright-line rule that would prevent the chilling of otherwise constitutionally protected speech. Limiting *Tinker*'s reach is important check on school authority because it ensures that

> [T]he student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and

> educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption.

Thomas, 607 F.2d at 1052. A rule that gives schools the power to punish off-campus student speech under certain circumstances would have the effect of chilling otherwise constitutional speech because it would leave the student constantly wondering whether his school could punish him. *See, e.g.*, *Wisniewski ex. rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007) (allowing schools to discipline off-campus speech if it is reasonably foreseeable that the speech would cause a disruption at school); *Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 573 (4th Circ. 2011) (allowing schools to discipline off-campus speech if there is a sufficient nexus between the speech and the school community). Further, standards based on foreseeability or a sufficient nexus are vague, and leave an impermissible amount of discretion to school administrators to punish the student for speech generated off campus.

Here, Ms. Clark generated the Facebook post off campus while using her personal computer. Because the speech occurred off campus, Ms. Anderson and Cardona were not compelled to look at Ms. Clark's Facebook post—they either chose to log into Facebook, or were alerted to view the post after speaking with their friends. Further, their parents could have protected them from potentially harmful speech by not allowing them to use Facebook or protecting them from other forms of harmful internet speech. Regardless, the speech did not occur where the "special characteristics" of the school environment necessitate school administrators to censor the speech in order to ensure safety. In sum, assuming arguendo that the post created a material disruption at school or collided with the rights of another student, *Tinker* still should not apply because Ms. Clark's speech occurred off campus.

Today's students communicate through an online medium that did not exist at the time of *Tinker*'s decision in 1969. However, this internet speech is not so fundamentally different from

the off-campus speech that occurred before students regularly communicated online; Ms. Clark could have communicated this speech to her peers at the mall, soda parlor, or any other off-campus environment rather than Facebook. When students did not use technology to communicate in off-campus environments, this Court never extended *Tinker* to off-campus speech. Despite the ease with which modern student speech can communicated and accessed through online mediums, this communication warrants no different treatment under the First Amendment. *See Reno v. ACLU*, 521 U.S. 844, 885 (1997) (rejecting the contention that the ease of publishing speech on the internet makes it different from other forms of speech under the First Amendment).

No matter how odious Ms. Clark's speech may have been, applying *Tinker* to her off-campus internet speech creates a dangerous precedent. Such a precedent would open the doors for schools to punish the speech of students in the general community, a location lacking the "special characteristics" of the school environment that allowed this Court to censor the otherwise constitutional student speech in the first place. Freedom of expression is at zenith when it is generated in the general community, *See Thomas*, 607 F.2d at 1046, and "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414 (1989). Therefore, the School District impermissibly analyzed Ms. Clark's speech under *Tinker* rather than general First Amendment principles.

D. The School District violated Ms. Clark's First Amendment rights.

In applying general First Amendment principles to Ms. Clark's speech, Ms. Clark's Facebook post is constitutionally protected. Her post does not constitute an unprotected "true threat", as discussed in Part I *supra.* Further, the language in Ms. Clark's Facebook post were not "fighting words" because her post could not have led to an immediate breach of the peace. She

generated her post in the privacy of her home without the presence of Ms. Anderson or any other transgender person. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Because the other forms of constitutionally unprotected speech—speech inciting criminal activity, obscene speech, child pornography, and defamatory speech—are inapposite to the instant case, Ms. Clark's Facebook post is constitutionally protected under the First Amendment.

The School District can still punish Ms. Clark's speech if it passes review under the appropriate level of scrutiny. The Bullying Policy under which Ms. Clark was punished forbids all forms of bullying, harassment, intimidation and threats. (R p 17). The Bullying Policy is a content-based regulation because it requires the school to review the contents of a student's speech to determine if it violates of the policy. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). Therefore, in order to pass constitutional muster, the Bullying Policy "must be narrowly tailored to serve a compelling government interest." *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

"It is rare that a regulation restricting speech because of its content will ever be permissible." *United Stated v. Playboy Ent. Group*, 529 U.S. 808, 818 (2000). Here, keeping students safe from bullying in the school environment is concededly a compelling government interest. *See, e.g.*, *State v. Bishop*, 368 N.C. 869, 877 (2016). Regardless, the School District must demonstrate that the Bullying Policy represents "the least restrictive means among available, effective alternatives" to address bullying. *See Ashcroft v. ACLU*, 542 U.S. 656. 666 (2004). Several alternatives to punishing students for constitutionally protected speech are available to the School District to address bullying. For example, the schools can sponsor programming with students and parents to provide anti-bullying strategies and foster the importance of students treating each other with respect. Addressing the issue of bullying in

schools through this manner would be much less restrictive because it would not involve punishing students for speech that is protected by the First Amendment. Therefore, because the Bullying Policy is not the least restrictive means by which the School District can address bullying, Ms. Clark's punishment under the policy violated her First Amendment rights to freedom of speech.

III. Conclusion

For the reasons above stated, we respectfully ask that this court hold that Ms. Clark's speech did not amount to a "true threat" under the standards provided under *Watts* and *Black*. Further, we ask that this Court affirm the Fourteenth Circuit's holding that *Tinker* does not extend to Ms. Clark's off-campus internet speech and that the School District's Bullying Policy fails to meet strict scrutiny and is thus unconstitutional.