Team Letter: AA

No. 16-9999

SUPREME COURT OF THE UNITED STATES

WASHINGTON COUNTY SCHOOL DISTRICT,

Petitioner,

v.

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

Ms. Clark.

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

BRIEF OF PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

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

2) Whether, consistent with the First Amendment, a public school district permissibly disciplined a high school student for a Facebook post she initiated off-campus on her personal computer where school authorities conclude that the post was materially disruptive and collided with the right of other students to be secure at school.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SECONDARY SOURCES

STATUTES

SUPREME COURT OF THE UNITED STATES

WASHINGTON COUNTY SCHOOL DISTRICT,

Petitioner,

v.

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

Ms. Clark.

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

BRIEF OF PETITIONER

OPINIONS BELOW

The Fourteenth Circuit Court of Appeal's opinion is unreported. The district court's order granting petitioner's motion for summary judgment is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 5, 2017. A timely petition for a writ of certiorari was filed and subsequently granted by this Court. This Court invoked its jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> 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 THE CASE

i. Factual Background

Ejections and emotions during an intrasquad basketball scrimmage at Pleasantville High School in Pleasantville, New Columbia sparked this litigation. R. at 23. Ms. Anderson, born a member of the male sex but later identifying as female, was a player on Pleasantville High School Girls' Basketball Team. R. at 2. Kimberly Clark, born a member of the female sex and identifying as female, was a player on the same school basketball team. *Id.* At the time of the events that gave rise to this litigation, Ms. Clark was a 14-year-old freshman and Ms. Anderson was a 15-year-old sophomore. *Id.* During an intrasquad scrimmage, Ms. Clark and Ms. Anderson engaged in a loud and disruptive verbal argument on the basketball court. *Id.* This heated quarrel prompted the referee to eject both students from the game. *Id.*

Shortly after Ms. Clark's ejection, Ms. Clark used her home computer to write a Facebook post to complain about Ms. Anderson and the basketball scrimmage. R. at 23. Ms. Clark's public Facebook post stated:

> 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 heard of! It's UNFAIR. It's IMMORAL and it's AGAINST GOD'S LAW!!!
>
> Taylor better watch out at school, I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too…

R. at 18.

Ms. Clark's Facebook post referenced the Pleasantville High School policy, "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students." R. at 15. The purpose of this policy was to create a safe, inclusive learning environment for all students and to ensure that all students have equal access to each component of their educational

programs. *Id.* To this end, the policy allowed students to participate in school sports with the gender the students consistently assert at school. R. at 16. Ms. Anderson was able to participate on Pleasantville High School Girls' Basketball Team because of this policy.

Both Ms. Anderson and another transgender student at Pleasantville High School, Josie Cardona, saw the Facebook post. As a result, Ms. Anderson's and Ms. Cardona's parents brought a printout of the Facebook post to a meeting with Pleasantville High School's principal, Thomas Franklin. R. at 13. During this meeting Principal Franklin noticed that both students were visibly distressed. *Id.* Moreover, both Ms. Anderson and Ms. Cardona's parents expressed concerns for their children's safety. R. at 14. They believed that Ms. Clark might resort to violence against their children. *Id.* The parents were uncertain whether their children should continue to participate in school activities and even whether their children should continue going to school. *Id.* Prior to this meeting, Ms. Anderson stayed home for two days, fearful of Ms. Clark. *Id.* Ms. Anderson and Ms. Cardona were not the only students concerned about the public Facebook post. *Id.* Several other students complained to Principal Franklin about the post, many of whom were visibly upset by the post's content. *Id.* It is not clear that this post was ever taken down.

The morning after his meeting with the Andersons and the Cardonas, Principal Franklin met with Ms. Clark and her parents. *Id.* Although Ms. Clark had never been disciplined before, R. at 23, Washington Country School District has a zero-tolerance harassment policy. R. at 17. During this meeting, Ms. Clark stated that even though she was not Facebook friends with any transgender student at Pleasantville High School, she knew that Facebook posts sometimes go beyond one's own friends. R. at 23. Although Ms. Clark stated that her comments about "IT" and other "TGs" "getting it" were intended merely as jokes, R. at 23, she was aware that students at would likely alert Pleasantville High School transgender students to her post's content, R. at 14.

Even so, Ms. Clark felt that it was important to be able to express her thoughts on rules governing high school athletics in Washington County School District. R. at 24. Ms. Clark's father supported his daughter in her desire speak out against the Washington School District policy respecting transgender and gender non-conforming students. R. at 20. Finding Ms. Clark in violation of Washington County School District's Anti-Harassment, Intimidation & Bullying Policy, Principal Franklin suspended Ms. Clark for three days and put a record of such in her student file. R. at 14.

ii. Procedural Background

On November 5, 2015, Kimberly Clark was suspended from Pleasantville High School for three days pursuant to the School District's Anti-Harassment, Intimidation & Bullying Policy. R. at 3.

That same day, Ms. Clark's father filed an appeal with the Washington County School Board, the governing body of the School District, contesting his daughter's suspension. *Id.* The school board upheld Ms. Clark's suspension, noting that Ms. Clark's post was a "true threat" against other students at school. R. at 21–22. Additionally, the Washington County School Board found that Ms. Clark's post was "materially disruptive of the high school" and "clearly collide[d] with the rights of other students to be secure in the school environment." R. at 21.

As a result, Ms. Clark, a minor, by and through her father Alan Clark, brought this claim on December 7, 2015 against Washington County School District. *Id.* In this claim, Ms. Clark contended Washington County School District violated her constitutional right to freedom of speech under the First Amendment. *Id.* Ms. Clark seeks declaratory judgment that her suspension was unconstitutional and an order requiring the school district to extinguish any record of the

suspension. R. at 1. The District Court for the District of New Columbia had subject matter jurisdiction pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(a)(3).

On January 10, 2015, Ms. Clark and Washington County School District filed cross motions for summary judgment. *Id.* The District Court granted Washington County School District's Motion for Summary Judgment and denied Ms. Clark's Motion for Summary Judgment on two grounds. R. at 12. First, the district court found "'that an objectively reasonable person would interpret [Ms. Clark's post] as a serious expression of an intent to cause a present or future harm' on Ms. Anderson and other transgender students." R. at 7. Accordingly, the district court determined that Ms. Clark's Facebook post constituted a "true threat." *Id.* Second, the district court found Ms. Clark's Facebook post to have materially disrupted school activity and collided with the rights of other students to be secure pursuant to the Supreme Court's decision in *Tinker v. Des Moines School District* and thus not subject to First Amendment protection. R. at 9–11. No post-judgment motions were filed with the district court.

A notice of appeal was timely filed in the Fourteenth Circuit Court of Appeals. The Fourteenth Circuit heard arguments on November 15, 2016. R. at 25. The Fourteenth Circuit found that Ms. Clark's Facebook post failed to constitute a "true threat" because "the record reflects a lack of evidence of subjective that she had subjective intent to intimidate either Ms. Anderson or other transgender students." R at 30–31. Additionally, the Fourteenth Circuit held that *Tinker* does not even apply to internet speech originating off campus form a personal computer. R. at 37. Even if *Tinker* did apply, the Fourteenth Circuit held that "there is insufficient evidence in the record of an actual or foreseeable disruption of the school environment." R. at 36. Further, the Fourteenth Circuit found that there was not a direct collision with the rights of other students. *Id.* Subsequent to these findings, the Fourteenth Circuit Court of

Appeals entered a judgment on January 5, 2017 reversing the District Court's judgment and remanding this case with instructions to enter summary judgment in favor of Ms. Clark. R. at 39.

Washington County School District subsequently filed a timely petition for writ of certiorari, which this Court granted. R. at 40. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

SUMMARY OF THE ARGUMENT

"[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem." *Chaplinsky v. N.H.*, 315 U.S. 568, 571–72 (1942). Two of those classes are "true threats" and student speech. In this case, Ms. Clark's speech fell within both of these classes, and Washington County School District was well within its authority to regulate the speech for the safety and well-being of its students.

Ms. Clark's speech was a true threat against Ms. Anderson under either test applied by federal circuit courts. Under the objective test, the textual context of Ms. Clark's speech was deliberate, and a reasonable person understand it as a true expression of an intent to cause physical harm to Ms. Anderson. Indeed, students were visibly upset by it and parents feared for their children's safety at school. Under the subjective test, there is sufficient evidence of Ms. Clark's specific intent to intimidate others, both in the specific targeting of Ms. Anderson and other transgender students in her message, and that she threatened to be the one who would take action against them. Lastly, the Fourteenth Circuit's application of the subjective test would encourage reckless internet behavior. If it is allowed to stand, the only speech and action that will

be chilled is of transgender students whose personal safety can be threatened on Facebook without any relief.

Washington County School District properly disciplined Ms. Clark for her anti-transgender student speech. First, Washington County School District had the authority to regulate Ms. Clark's speech because it was reasonably foreseeable that Ms. Clark's targeted speech would reach the school community. Additionally, the nexus between Ms. Clark's disparaging speech and the school district's pedagogical interest in preventing harassment and violence was sufficient to justify disciplinary action.

Second, Washington County School District properly regulated Ms. Clark's student speech in accordance with the First Amendment requirements under *Tinker*. The school district could reasonably forecast that the threatening nature of Ms. Clark's speech would cause a material and substantial disruption in the school environment. Moreover, Ms. Clark's anti-transgender speech collided with the rights of other students to be secure and let alone.

Accordingly, we respectfully ask that this Court reverse the Fourteenth Circuit.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE COURT OF APPEALS BECAUSE MS. CLARK'S SPEECH WAS A TRUE THREAT UNDER EITHER TEST APPLIED BY THE FEDERAL CIRCUITS.

A reasonable person would understand Ms. Clark's speech as an intent to threaten physical harm to Ms. Anderson and other transgender students at her school. Furthermore, Ms. Clark's message was a *serious* expression of intent as evidenced by her deeply held political beliefs in the preceding paragraphs. Therefore, under either test applied by the federal circuits, including by the Fourteenth Circuit in this case, Ms. Clark's speech was a true threat beyond the protections of the First Amendment.

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. This prevents the government from prohibiting speech or the expression of an idea "simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). However, it does not protect all speech, particularly speech that poses a high danger of physical harm while being of slight social value. *See generally Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words"); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement). One such category of unprotected speech is true threats of physical violence. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). This Court defined a "true threat" as "[a] statement[] 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." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Such speech can cause its recipients harm, often deterring action as well as speech of its victims. *See, e.g., United States v. Cassel*, 408 F.3d 622, 628 (9th Cir. 2005) ("One of the chief evils wrought by a threat is its deleterious and coercive effect on the victim"). At the same time, true threats serve "no essential part of any exposition of ideas" so that, like

other categories of unprotected speech, "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. Therefore, the First Amendment is no defense for those who utter true threats. *Black*, 538 U.S. at 359.

However, lower courts have not followed this Court's definition of "true threats" in uniform; indeed, both state and federal courts are split as to whether, in line with *Virginia v. Black*, the First Amendment exception for true threats requires a showing that a defendant subjectively intended to threaten another person or group, or merely that a reasonable person would understand the speech as a serious expression of an intention to inflict bodily harm. *Compare United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (requiring the speaker to have "subjectively intended the speech as a threat") *with Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (applying an "objectively reasonable person" test for true threats). Absent clearer direction from this Court, the majority of circuits have not replaced their pre-*Black* objective standards for true threats. *See United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013), *vacated and remanded on statutory grounds* by *Martinez v. United States*, 135 S. Ct. 2798; *United States v. Turner*, 720 F.3d 411, 423 (2d Cir. 2013); *United States v. Jeffries*, 692 F.3d 473, 479–80 (6th Cir. 2012), *cert denied*, 134 S. Ct. 59 (2013); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012); *United States v. Mabie*, 663 F.3d 322, 330–32 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 107 (2012); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2008); *Porter*, 393 F.3d at, 616; *United States v. Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997). In this case, the Fourteenth Circuit has joined the Ninth Circuit in applying the subjective test. R. at 30 ("[The] subjective approach . . . is the standard we apply in the case before us.").

Under either test, Ms. Clark's speech on Facebook constituted a true threat: first, a reasonable person would understand Ms. Clark's speech as a serious expression of an intent to cause fear of physical harm; second, Ms. Clark had a specific intent to intimidate transgender students at her school, again, to "place [them] in fear of bodily harm." *Black*, 538 U.S. at 359–60. Accordingly, this Court must reverse the Fourteenth Circuit.

A. A Reasonable Person Would Understand Ms. Clark's Speech as a True Threat of Physical Harm

A reasonable person would understand Ms. Clark's speech as a serious expression of her intent to commit physical harm to Ms. Anderson, first, because of the context of her speech; and second, because of the reactions of Anderson and other students at school.

The objective test preferences the potentiality for harm posed by threatening language over a speaker's intended effect. As Justice O'Connor wrote in *Black*, "[A] prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 359 (internal citations omitted). In light of *Black*, the Fourth Circuit announced the objective test as follows: "[W]hether the statement amounts to a true threat is determined by the understanding of a *reasonable recipient familiar with the context* that the statement is a 'serious expression of an intent to do harm' to the recipient.'" *United States v. White*, 670 F.3d 498, 509 (4th Cir. 2012) (emphasis in original) (citing *Black*, 538 U.S. at 359). The context of speech can be categorized and understood by two focal points: (1) the specific context of the speech; and (2) the reactions of its listeners.

1. The specific context of Ms. Clark's speech was part of a serious expression of her opposition to the school's policy.

The specific context of speech can lead a reasonable person to understand whether or not its seriousness rises to the level of a true threat. *Black*, 538 U.S. at 367. This Court emphasized in *Black* that what was lacking in a constitutionally defective Virginia statute was precisely the ability to look at "all of the contextual factors that are necessary to decide whether [the speech] is intended to intimidate." *Id.* (finding unconstitutional a provision that said a burning cross alone could establish an intent to threaten). Circuit courts have followed this Court's emphasis such as in *United States v. Turner*, where a man made a blog post saying three judges deserved to die. 720 F.3d at 421. The court said that the textual context of remarks, combining a strong disagreement on public policy with threats of physical harm, reveals "a gravity readily distinguishable from mere hyperbole or common public discourse." *Id.* at 421. This was sufficient for the man to be liable for uttering true threats. *Id.*

In this case, a reasonable person cannot be expected to distinguish between the level of sincerity in Ms. Clark's statements in opposition to school policy and the threatening remarks made about transgender students. Similar to the speech in *Turner*, Ms. Clark's speech mixed sincerely held policy beliefs with ominous warnings to her recipients. 720 F.3d at 421. This textual context suggests that Ms. Clark was not merely joking, R. at 23, but was as serious about making good on her threats as she was about her policy beliefs in the previous sentences. A reasonable person—especially one scrolling through the wall of Facebook—would believe that the author of, "TRANSGENDER is just another word for FREAK OF NATURE!!!" would be no less deliberate in saying "I'll take IT out one way or another" four sentences later.

2. The reaction of several listeners to Ms. Clark's speech was fear of physical harm.

The reaction of listeners can also indicate how a reasonable person would understand threatening speech. *Watts*, 394 U.S. 705, 708. In *Watts v. United States*, a Vietnam War protester told a crowd, "If they ever make me carry a rifle the first man I want to get in my sights is [President] L.B.J." *Id.* at 706. The crowd responded with laughter. *Id.* By contrast, in *United States v. Martinez*, a man emailed his local radio station saying, "[I]'m planning something big around a government building here in Broward County, maybe a post office, maybe even a school, I'm going to walk in and teach all the government hacks working there what the 2nd amendment is all about." 736 F.3d at 983. The response was to shut down all the schools in the county. *Id.* The reaction of the listeners shed light on the context that distinguishes the "obviously flippant statement[s]" like those in *Watts* from statements like those in *Martinez* that realistically threaten harm. *Id.* at 421 n 5.

Because of the speech in this case, two transgender students stayed home from school out of fear of physical harm. R. at 13–14. The reaction of listeners should not be used to bootstrap an argument about what a reasonable person might thin. However, the speech named Ms. Anderson and "other TGs (transgender students) crawling out of the woodwork" as those who had better "watch out," or else "get more than just ejected." R. at 2. Unlike the listeners' laughter in *Watts*, Taylor and another transgender student were "visibly upset" by Ms. Clark's speech, two days after the event. 394 U.S. at 708; R. at 14. And, even though there was not a school lockdown as in *Martinez*, the speech was alarming enough that other students alarmed the principal to the speech, while "visibly distressed" parents of transgender students pleaded with the principal out of fear for their children's safety. R. at 14. In short, protecting speech like Ms. Clark's does

nothing to further free expression; if anything it only stifles the speech and action of listeners like Kimberly Clark and Josie Cardona who fear for their physical safety.

Because of the serious context of the speech and the alarmed reaction of students and parents, a reasonable person would understand Ms. Clark's speech as a serious expression of an intent to harm Ms. Anderson and other transgender students at school. Therefore, this Court need not even consider the merits of the test applied by the Fourteenth Circuit, and should reverse on that basis alone. However, even if this Court adopts the subjective test, Ms. Clark had the specific intent to threaten transgender students, as well.

B. Even Under the Subjective Test, Ms. Clark's Speech was a True Threat

Ms. Clark's speech constituted a true threat under the subjective test, or specific intent standard, applied by the Ninth Circuit because she threatened to personally harm Ms. Anderson and other transgender students at school. Furthermore, the Fourteenth Circuit wrongly applied the subjective test so that a person who knew or should have known her speech would reach its intended victim is not liable for the harm they cause.

To be liable for a true threat in the Ninth Circuit it must be shown that the speaker subjectively intended the speech as a threat. *Cassel*, 408 F.3d at 633. Similar to the objective test outlined above, the subjective analysis does not require proof that the defendant intend to actually carry out the threat. *Id.* at 627. Instead, the test requires that the "the communication itself be intentional," and that "the speaker intend for his language to *threaten* the victim." *Id.* at 631 (emphasis in original). Only a handful of state supreme courts have followed the Ninth Circuit approach. *See generally O'Brien v. Borowski*, 961 N.E.2d 547, 557 (Mass. 2012); *State v. Greyhurst*, 852 A.2d 491, 515 (R.I. 2004); *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011). However, because proving one's intent is only possible through circumstantial evidence, many of the

deciding factors are the same that would be analyzed under the objective test. Indeed, some courts have even questioned whether there is a difference in effect between the subjective and objective analysis. *See Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 623 (8th Cir. 2002) ("The debate over the approaches appears to us to be largely academic because in the vast majority of cases the outcome will be the same under both tests.").

1. Ms. Clark threatened personally harming Ms. Anderson in her message.

Subjective intent can be evidenced by a statement that the speaker herself intends to carry out a threat, as opposed to a mere wish that others would heed the call. *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011). In *Bagdasarian*, a man posted comments on a Yahoo! Finance online message board saying President Obama "will have a 50 cal in the head soon" and that someone should "shoot the nig." *Id.* at 1119. Because he spoke only about what others would do, not what he himself might do, the court found that he did not subjectively intend to threaten President Obama. *Id.* at 1123–24.

In this case, Ms. Clark's statement that "I'll make sure IT gets more than just ejected" and "I'll take IT out one way or another" conveys her personal intention to carry out a threat against Ms. Anderson. R. at 2. Unlike the speaker in *Bagdasarian*, who spoke passively of what might happen to the President, Ms. Clark claimed what she herself would do—what she would be *sure* to do, and in any event. 652 F.3d at 1119. Again, this does not require proof that Ms. Clark was *actually going to carry out* her threat, only that she herself would be the agent of harm to Ms. Anderson. *Cassel*, 408 F.3d at 631.

2. The Court of Appeals applied the subjective test in such a way as would immunize threat-makers who post on the internet knowing that their speech will reach its intended victim.

If the Fourteenth Circuit's reasoning is upheld it will encourage more harmful internet speech by those who know or should know the threats will reach their targets. One does not need to threaten a subject directly if she knows the communication is likely to reach the subject and cause fear. *Black*, 538 U.S. at 359–60. As the Court held in *Black*, "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker *directs a threat to a person or group of persons* with the intent of placing the victim in fear of bodily harm or death." *Id.* One need only direct a threat to a person or group of persons with knowing that it will reach the victims and cause fear. That is precisely what Ms. Clark did.

In this case, Ms. Clark posted the language with knowledge the public would be made aware of her views. R. at 23 ("Although I was aware that Facebook posts sometimes go beyond one's friends, I meant only for my own friends to see my Facebook post."). Indeed, she testified that she wanted to express her views about the school policy and that she was entitled to do so publicly. *Id.* Ms. Clark cannot then argue that she intended her public statements to be private from the very transgender students she targets in her foreboding message. All that was needed, according to this Court in *Black*, was that Ms. Clark "*direct[ed]* a threat to *a person or group of persons*" and that she did so "with the intent of placing the victim"—i.e., Ms. Anderson and other transgender students in high school—"in fear." *Black*, 538 U.S. at 360.

The subjective test is supposed to protect against the chilling of speech—that only with the requisite intent to cause fear can a person be liable for true threats. The Fourteenth Circuit's emphasis that Ms. Clark did not "knowingly communicate the post directly to Ms. Anderson,"

however, would allow for a student to threaten another student knowing that the intermediary of the Facebook wall will shield them from liablility.

II. THIS COURT SHOULD REVERSE THE COURT OF APPEALS DECISION BECAUSE WASHINGTON COUNTY SCHOOL DISTRICT DID NOT VIOLATE MS. CLARK'S FIRST AMENDMENT RIGHTS UNDER *TINKER* BY PUNISHING MS. CLARK FOR HER ANTI-TRANSGENDER FACEBOOK POST

Courts have consistently construed "the First Amendment as applied to public schools in a manner that attempts to strike a balance between the free speech rights of students and the special need to maintain a safe, secure and effective learning environment." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1175 (9th Cir. 2006). While "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cnty. Sch. Dis.*, 393 U.S. 503, 505 (1969), it is equally true that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986). As a result, the "'educational mission' of the school may at times conflict with the speech rights of its students." *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1148 (9th Cir. 2016).

To determine whether a school properly struck this balance between a student's First Amendment rights and the special characteristics of the school environment when disciplining a student for off-campus speech, a court must answer two questions. First, a court must answer a "threshold question of whether the school could permissibly regulate the student's off-campus speech *at all*." *Id.* at 1147. Second, the court must determine whether the school's regulation of the student's speech complied with the First Amendment requirements outlined in *Tinker*. *Id.*

In this case, Washington County School District could permissibly regulate Ms. Clark's Facebook post because there was a sufficient nexus between Ms. Clark's anti-transgender speech

and the school's anti-bullying interests and because it was reasonably foreseeable that Ms. Clark's Facebook post would reach Pleasantville High School. Additionally, Washington County School District appropriately disciplined Ms. Clark under First Amendment requirements outlined in *Tinker* because it was reasonably foreseeable that Ms. Clark's speech would cause a material and substantial disruption to the school environment and Ms. Clark's speech invaded the rights of transgender students to feel secure and let alone.

A. Washington County School District had the Authority to Regulate Ms. Clark's Facebook Post.

This issue of when and how a school may regulate off-campus student speech is a matter of first impression for this Court. Lower courts are mostly in agreement that while "the location of the speech can make a difference…[not] all off-campus speech is beyond the reach of school officials." *Wynar v. Douglas Cnty Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013). However, "there is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.'" *Id.* (quoting *Morse v. Frederick*, 551 U.S. 393, 401 (2007)). Complicating matters, "[t]he pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction." *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 395-96 (5th Cir. 2015).

In an effort to delineate a school's outer boundary of authority, lower courts have employed two different threshold tests to determine whether off-campus speech falls within the ambit of *Tinker*: (1) the reasonably foreseeable test; and (2) the nexus test. *C.R.*, 835 F.3d at 1148. Under either test, Washington County School District had the authority to discipline Ms. Clark for her off-campus speech. Not only was it reasonably foreseeable that Ms. Clark's speech would reach the school community, but there was also a sufficient nexus between Ms. Clark's speech and the school thereby justifying the school district's disciplinary actions.

1. It was reasonably foreseeable that Ms. Clark's Facebook post would reach the school community.

Under the reasonably foreseeability test, a school may properly discipline off-campus student speech "where it is reasonably foreseeable that the speech will reach the school community…" *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012) (citing *D.J.M. v. Hannibal Public School District #60*, 647 F.3d 754,766 (8th Cir. 2011)).

The reasonable foreseeability test is satisfied when speech is "directed" or "targeted" at a school environment. *S.J.W.* 696 F.3d at 778. In *S.J.W.*, two high school students created a blog and posted racist and sexually explicit comments about fellow classmates. *Id.* at 773. The parties disputed the extent to which the blog creators used school computers to create, maintain, and access the blog. *Id.* Nonetheless, the court found it dispositive that the posts named the school and specific classmates and thus the blog was directed at the high school. *Id.* Consequently, the court concluded the school could permissibly regulate the students' speech. *Id.* at 778.

Additionally, the reasonable foreseeability test may be satisfied when ongoing harassment causes a student to worry about the harassment throughout the school day and when such harassment is likely to be discussed at school. *C.R.*, 835 F.3d at 1151. In *C.R.*, a group of middle-schoolers surrounded and sexually harassed two 6th graders in a field on their way home from school. *Id.* at 1145. Applying the reasonably foreseeable test, the court concluded that "administrators could reasonably expect the harassment's effects to spill over into the school environment." *Id.* at 1151. For example, "simply seeing their harassers in the hallway" could be disruptive because the affected students' ability to focus "could be impaired by intrusive worries" of the harassment. *Id.* Further, the court found it reasonable to expect the victims to discuss the bullying with their friends in the lunch room and to expect the harassers to confront

the victims in the hallway or schoolyard. *Id.* Thus, the court found the school had the authority to discipline the students because it was reasonably foreseeable that the speech would reach the school campus. *Id.*

In this case, it is reasonably foreseeable that Ms. Clark's Facebook post would reach the school community. Similar to the targeted blog in *S.J.W.*, Ms. Clark directed her Facebook post at Pleasantville High School. Ms. Clark threatened a fellow student by name: "… Taylor better watch out at school." R. at 18. In addition, Ms. Clark explicitly called out a school policy stating "[t]his new school policy is the dumbest thing I've heard of!" *Id.* Analogous to the sexual harassment in *C.R.*, it is reasonably foreseeable that Taylor and other transgender students would discuss the Facebook post with their peers, and see Ms. Clark in the hallways and at basketball practice. R. at 23. Moreover Ms. Clark's comments about taking "IT out one way or another" would likely affect Taylor and other transgender students' ability to focus because of the same intrusive worries about harassment as in *C.R.* R. at 18.

2. The nexus between Ms. Clark's Facebook post and Washington County School District's pedagogical interests was sufficient to justify discipline.

Under the nexus test, *Tinker* applies to off campus student speech when "a student's off-campus speech [is] tied closely enough to the school to permit its regulation." *C.R.*, 835 F.3d at 1148 (citing *Kowalski v. Berkeley Cnty Sch.*, 652 F.3d 565 (4th Cir. 2011)). A student's speech is "tied closely" enough to the school to permit its regulation when the "nexus of [the student's] speech to [the school's] pedagogical interests [is] sufficiently strong to justify the action taken by school officials in carrying out their role as trustees of the student body's well-being." *Kowalski*, 652 F.3d at 565.

The nexus test is satisfied if dialogue regarding the off-campus speech and any potential fallout resulting from such speech would likely take place in the school environment. *Kowalski*, 652 F.3d at 565. In *Kowalski*, a high school student created a webpage titled "S.A.S.H." which stood for "Students Against Sluts Herpes." *Id.* at 567. Students posted photos and sexually harassing comments on this page targeting a fellow student. *Id.* In holding that the school could regulate such speech, the court emphasized that the creator "knew the dialogue [about the webpage] would and did take place among" fellow high school students. *Id.* at 573. In addition, the court noted that any fallout from the student speech would be felt within the school itself. *Id.*

The Ninth Circuit in *C.R.* outlined some additional factors to determine whether the nexus test is satisfied: (1) whether all individuals involved are students; (2) whether the speech was temporally close to the school day; (3) whether the speech took place physically close to school grounds; and (4) whether the school should be concerned in *loco parentis*. *C.R.*, 835 F.3d at 1151; See also *Wynar*, 728 F.3d at 1069. [1] In *C.R.*, all of the individuals involved in the speech were students. *Id.* Second, the harassing speech occurred shortly after school had been let out. *Id.* Third, the speech took place in close proximity to the school. *Id.* Fourth, the school was reasonable as *loco parentis* to be concerned with the students' well-being as they began their homeward journey at the end of the day. *Id.* Thus, this Court concluded that the School District had the authority to discipline *C.R.* for his off-campus speech. *Id.*

[1] In *Wynar*, a high school student sent "a string of increasingly violent and threatening instant messages" to his friends bragging about his weapons and threatening to shoot fellow students. The court held that "[g]iven the subject and addressees of Landon's messages, it is hard to imagine how their nexus to the school could have been more direct." *Wynar*, 728 F.3d at 1069.

In this case, there is a sufficient nexus between Ms. Clark's Facebook post and Washington County School District's pedagogical interests, justifying the school's disciplinary action. Primarily, all of the individuals involved in the present case are students. Similar to the sparked dialogue about S.A.S.H. in *Kowalski*, Ms. Clark knew that her Facebook post would be viewed by others at school. R. at 23. Ms. Clark also knew that transgender students would likely be alerted to her post. R. at 23. It follows, as in *Kowalski*, that Ms. Clark was aware that any fallout from the speech would take place at school. Unlike the off-campus, in person, verbal bullying in *C.R.*, Ms. Clark's speech did not take place near school property. However, that fact in and of itself is not dispositive. Ms. Clark's speech took place following a school sponsored basketball scrimmage. R. at 2. Because Ms. Clark threatened to harm Ms. Anderson on school property, the school acting in *loco parentis*, would reasonably want to protect students from the emotional and physical harm of harassment based on gender identity.

Consequently, Washington County School District had the authority to discipline Ms. Clark under both the reasonable foreseeability test and the nexus test.

B. Washington County School District Properly Disciplined Ms. Clark Under *Tinker*.

Under *Tinker*, a school may regulate student speech that materially and substantially interferes with the requirements of appropriate discipline in the operation of the school or that collides with the rights of others. *Tinker*, 393 U.S. at 513. In this case, Ms. Clark's speech both could be reasonably forecast to cause a material and substantial disruption, and collided with the rights of other students to be secure and let alone. Thus, the school district's discipline did not violate Ms. Clark's First Amendment rights.

1. Ms. Clark's speech created a material and substantial disruption.

"Under *Tinker*, schools may restrict speech that 'might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities.'" *Wynar*, 728 F.3d at 1070. However, "*Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption." *LaVine*, 257 F.3d at 989.

A school district may reasonably forecast a material and substantial disruption when the speech in question is violent, threatening, harassing, or otherwise intimidating. Tragically, "we live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis." *LaVine*, 257 F.3d at 989. Given this "backdrop of actual school shootings," speech filled with threats of school violence are sufficient for school authorities to reasonably forecast a material and substantial disruption. *Id.* at 990.[2] Even if speech does not intimate schoolwide violence, otherwise threatening, harassing, or intimidating speech still gives rise to a material and substantial disruption under *Tinker*. *See Bell*, 799 F.3d at 379. In *Bell*, a high school student recorded a rap song and posted it on social networking sites, including his Facebook page. The rap song threatened, harassed, and intimidated two school coaches. *Id.* at 384. The court emphasized that the speech directly related to events at school, named two specific coaches, and was understood by both the targets and neutral third parties as threatening. *Id.* at 399. Ultimately, the court concluded that "the school board reasonably could have forecast

[2] In *LaVine*, a student wrote a poem entitled "Last Words." *LaVine*, 257 F.3d at 983. In pertinent part, the student's poem describes the author committing a school shooting. *Id*. Similarly, in *Wynar*, a high school student exchanged "increasingly violent and threatening" instant messages with his classmates through the social networking website Myspace. *Wynar*, 728 F.3d at 1064. In both cases, the court determined that it was reasonable to interpret the messages as a real risk and to forecast a substantial disruption.

a substantial disruption at school, based on the threatening, intimidating, and harassing language in Bell's rap recording." *Id.* at 400.

In this case, Washington County School Board could forecast a material and substantial disruption because Ms. Clark's speech threatened violence towards, harassed, and intimidated Ms. Anderson and other transgender students. Ms. Clark threatened Ms. Anderson by stating: "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." R. at 18. Ms. Clark expanded her threat to other transgender students "crawling out of the woodwork lately too." *Id.* Similar to the rap video in *Bell*, this post was publicly posted on a student's Facebook page. Such speech and circumstances could not more clearly represent, violent, harassing, and intimidating speech subject to discipline under *Tinker*.

2. Even if this Court does not find Ms. Clark's speech caused a material and substantial disruption, Ms. Clark's speech invaded the rights of students to feel secure and to be let alone and thus could properly be disciplined under Tinker.

While, "the precise scope of *Tinker's* 'interference with the rights of others' language is unclear," *Saxe v. State College Area School Dist.*, 240 F.3d 200, 217 (3rd Cir. 2001) this Court has determined that a safe, secure, and effective learning environment, "involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society." *Harper*, 445 F.3d at 1178. Accordingly, "students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school." *Id.* (quoting *Sypniewski v. Warren Hills Reg'l Bd. Of Educ.*, 307 F.3d 243, 264 (3rd Cir. 2002)).

Courts have found that student speech invaded the rights of other students in three circumstances: (1) when the speech threatens of physical violence; (2) when the speech is of a directed and sexual nature; and (3) when the speech involves a core identifying characteristic

such as race, religion or sexual orientation. *Wynar,* 728 F.3d at 1072 (Finding a "quintessential harm to the rights of other students to be secure" where a student's instant messages "threatened the student body as a whole and targeted specific students by name"); *C.R.*, 835F.3d 1142 at 1153 ("Sexually harassing speech, by definition, interferes with the victims' ability to feel safe and secure at school); *See Harper,* 445 F.3d at 1178 (Attacks on a core identifying characteristic collide with a student's right to be secure and let alone).

Most relevant to this case, students have a right to be free from attacks on the basis of a core identifying characteristic such as race, religion, or sexual orientation. *See Harper*, 445 F.3d at 1178. The underlying rationale of this right is that "high school students who are members of minority groups that have been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn." *Id.* Bullying and harassment of LGBT students severely impacts their psychological welfare and their educational success.[3] Allison S. Bohm et. al., *Challenges Facing LGBT Youth,* 17 GEO. J. GENDER & L. 125, 151-56 (2016). LGBT youth experience more bullying, harassment, and violence than non-LGBT youth. *Id.* With this in mind, the Court in *Harper* addressed the question of whether a school could order students not to wear T-shirt's to school reading: "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" and handwrote "HOMESEXUALITY IS SHAMEFUL" on the back.

[3] According to a 2013 study, 55% of middle and high school LGBT students reported verbal harassment based on their gender expression in the previous year. Of those surveyed students, 11% reported being physically assaulted for their gender expression. This harassment negatively impacted the students' education and well-being. Nearly 1/3 of the students surveyed missed at least one day of school in the month preceding the survey because they feared for their safety or felt uncomfortable at school. The harassed students averaged lower GPAs, and were twice as likely to report they did not intend to attend college. Moreover, nearly half of transgender youth have seriously contemplated suicide. In its position as *loco parentis*, it is imperative that schools support LGBT youth and provide a safe and secure learning environment for them.

Harper, 445 F.3d at 1170. Emphasizing "it is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students' health and welfare… [but also] to their educational performance and their ultimate potential for success in life," the Court found that the shirt collided with the rights of other students. *Id.* at 1178-79.

In this case, Ms. Clark's anti-transgender and threatening Facebook post fundamentally collided with the rights of Ms. Anderson and other transgender students to feel safe and secure in the school environment. Pleasantville High School passed a school policy to directly address transgender and gender nonconforming students to create a safe and inclusive learning environment for all students. R. at 15. In opposition to this policy, Ms. Clark stated "TRANSGENDER is just another word for FREAK OF NATURE!!!" and further disparaged and harassed transgender students. Moreover, Ms. Clark threatened to physically assault transgender students as Pleasantville High School. R. at 18. Similar to the anti-homosexuality shirt in *Harper*, Ms. Clark's attack on a core identifying characteristic collides with the rights of other students to be safe and secure.

Washington County School District had the authority to regulate Ms. Clark's anti-transgender, public Facebook post because it was reasonably foreseeable that her speech would reach the school and there was a sufficient nexus between the speech and the school's pedagogical interests. Moreover, Washington County School District properly disciplined Ms. Clark's speech according to *Tinker*. First, Ms. Clark's speech could be reasonably forecasted to cause a material and substantial disruption and second, Ms. Clark's speech collided with the rights of other students to feel secure and let alone.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

CERTIFICATE OF COMPLIANCE

1. The work product contained in all copies of this team's brief is in fact the work product of its team members.

2. This team has complied fully with its school's governing honor code.

3. This is an acknowledgment that this team has complied with all Rules of the Competition.

Attorneys for: Petitioner

Date: January 31, 2017