Team C

No. 16-9999

In the SUPREME COURT OF THE UNITED STATES

SCHOOL DISTRICT OF WASHINGTON COUNTY, NEW COLUMBIA

PETITIONER

v.

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

RESPONDENT

On Writ of Certiorari to the UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a public high school student's Facebook post warning a transgender student to "watch out at school" and promising to take that student out "one way or another" constitutes a true threat under *United States v. Watts* and therefore not entitled to First Amendment protection.

II. Whether a public school district violated the First Amendment when it concluded that a student's Facebook post addressing a transgender student was materially disruptive and collided with the rights of other students to be secure at school, and then disciplined that student for the post.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on January 5, 2017. *Clark v. Sch. Dist. of Washington County, New Columbia* (*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) (2012).

STATEMENT OF THE CASE

On December 7, 2015, Alan Clark, on behalf of his minor daughter Kimberly Clark (collectively, "Respondent"), brought this action against the School District of Washington County, New Columbia ("Petitioner") after the Pleasantville High School Principal, Thomas Franklin ("Principal"), suspended Respondent for authoring derogatory statements about a transgender student on Respondent's Facebook page (the "Post"). *Clark v. Washington County School District* (*Clark I*), C.A. No. 16-9999, slip op. at 3 (D.N.C. Apr. 14, 2016); *Clark* II, slip op. at 3. The parties submitted cross motions for summary judgment and the United States District Court for the District of New Columbia granted Petitioner's motion on April 14, 2016. *Clark* II, slip op. at 3. The district court held that the First Amendment did not protect a portion of the Post because it constituted a "true threat." *Id.* Furthermore, the district court stated that even if the Post was not a true threat, Petitioner could discipline Respondent because the Post was "materially disruptive and collided with the rights of other students." *Id.*

Respondent filed a timely appeal to the United States Court of Appeals for the Fourteenth Circuit seeking a reversal of the district court's grant of Petitioner's motion for summary judgment. On January 5, 2017, the Fourteenth Circuit reversed the district court finding that the Post did not constitute a true threat and that Petitioner did not have authority to discipline Respondent for activities conducted off-campus and not at a school-sponsored event. *Id.* at 15. The Fourteenth Circuit remanded the case and instructed the district court to enter summary judgment for Respondent. *Id.* Petitioner timely filed a petition for writ of certiorari that this Court granted.

STATEMENT OF THE FACTS

On November 2, 2015, Respondent and a transgender student, Taylor Anderson, were ejected from a Pleasantville Girls' Basketball Team scrimmage after engaging in a disruptive argument over a referee call. *Clark II*, slip op. at 2. Respondent subsequently authored the Post on her home computer stating 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 woodwork lately too…

Id. Although Respondent and Ms. Anderson were not Facebook "friends," Ms. Anderson did see the Post resulting in Ms. Anderson's parents keeping her out of school for two days. *Clark I*, slip op. at 2-3. Ms. Anderson, her parents, Josie Cardona, and her parents later handed Principal a hard copy screenshot of the Post. *Clark II*, slip op. at 2. Both parents expressed concern over their children's safety and the safety of other transgender students at the school. *Id.*

On November 5, Principal met with Respondent and Respondent admitted to authoring the Post. *Id.* Respondent acknowledged that she intended her Facebook friends to see the Post and that she knew the Post would likely "go beyond one's own friends." Further, Respondent knew the Post would likely reach Ms. Anderson and other transgender students through a third party. *Id.* After the meeting, Principal suspended Respondent for violating Petitioner's Anti-Harassment, Intimidation & Bullying Policy. *Id.* at 3. On appeal, Petitioner School Board affirmed Respondent's suspension stating the Post constituted a true threat and that is was materially disruptive, colliding with other student's rights. *Id.* Respondent then filed this action against Petitioner alleging a First Amendment violation. *Id.*

SUMMARY OF THE ARGUMENT

This Court should reverse the appellate court's grant of Respondent's motion for summary judgment regarding whether the Post constituted a true threat beyond First Amendment protection. The appellate court erred in finding that Petitioner had violated Respondent's First Amendment rights because the appellate court's true threat analysis incorrectly applied a subjective intent standard where an objective listener standard properly protects listeners from the fear of violence and adheres to both *United States v. Watts* and the First Amendment's underlying principles. This Court should adopt the objective listener standard for true threat cases because the objective listener standard appropriately denies First Amendment protections to speech that communicates a serious expression of an intent to commit an act of unlawful violence. Applying the subjective intent standard inappropriately provides First Amendment protections to speech that, regardless of the speaker's intent, instills a fear of violence in the listener.

Under the objective listener standard, the Post constitutes a true threat because Respondent intentionally and knowingly communicated the threat and Ms. Anderson reasonably interpreted the Post to contain a threat. Though Respondent did not communicate the threat to Ms. Anderson directly, Respondent intentionally and knowingly communicated the threat to third parties. Furthermore, Ms. Anderson reasonably interpreted the Post to contain a threat because the context surrounding the Post shows a reasonable person would understand the Post to be transmitting a true threat of violence, the Post conveyed unconditional threats, and the audience who heard about and read the Post treated the post as a threat and not as a joke.

This Court should also reverse the appellate court's grant of Respondent's motion for summary judgment regarding whether Petitioner violated the First Amendment when it disciplined Respondent for the Post. The appellate court erred in finding that Petitioner violated the First

Amendment because Petitioner correctly concluded that Respondent's Post, addressing a transgender student, was materially disruptive and collided with the rights of other students to be secure. In analyzing this issue, this Court should adopt the student speech doctrine in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* as the appropriate framework to review Respondent's Post, which constitutes student speech because it addressed a fellow student engaged in a school activity.

Under the student speech doctrine, Respondent's Post materially disrupted school activities when targeted students could not safely participate in school activities, meeting the first category of unprotected student speech under *Tinker*. Specifically, the Post materially disrupted the school environment when it created an unsafe environment for targeted students, regardless of Respondent's location when she authored the Post. Respondent's Post further materially disrupted the school environment because it was inconsistent with Petitioner's basic educational mission. Finally, Respondent's Post collided with the rights of her fellow students because her verbal assaults inflicted intimidation and harassment, meeting the second category of unprotected student speech under *Tinker*.

ARGUMENT

I. THE APPELLATE COURT ERRED IN FINDING THAT RESPONDENT'S POST DID NOT CONSTITUTE A TRUE THREAT BECAUSE THE APPELLATE COURT INCORRECTLY APPLIED A SUBJECTIVE INTENT STANDARD WHERE AN OBJECTIVE LISTENER STANDARD PROPERLY PROTECTS LISTENERS FROM THE FEAR OF VIOLENCE AND ADHERES TO BOTH *UNITED STATES V. WATTS* AND THE FIRST AMENDMENT'S UNDERLYING PRINCIPLES.

The objective listener standard protects individuals from the fear of violence and denies First Amendment protections to speech that communicates a serious expression of an intent to commit an act of unlawful violence. By its own language, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment is designed to "allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting)). However, this protection is not absolute and permits restrictions on speech that is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

As this Court has previously acknowledged, the First Amendment does not protect "true threats," speech defined as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individuals or group of individuals." *Black*, 538 U.S. at 359-60 (2003) (citing *United States v. Watts*, 394 U.S. 705, 708 (1969)); *see R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992). The purpose of prohibiting true threats is to "protect [the listener] 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." *Black*, 538 U.S. at 360 (citations omitted). When analyzing speech that could constitute a

true threat, the *Watts* court used objective criteria to determine whether the speech at issue was political hyperbole or a true threat. 394 U.S. at 708 (holding speech not a true threat after considering context of the statement, whether it was conditional in nature, and reaction of listeners). Furthermore, even the *Black* court focused on the effect of the speech on the listener and devalued the importance of the speaker's intent. 538 U.S. at 360. ("The speaker need not actually intend to carry out the threat."). Not only has this Court never suggested courts analyze true threats under a subjective intent standard, the majority of circuits routinely employ the objective listener standard. *See, e.g.*, *United States v. Clemens*, 738 F.3d 1, 8 (1st Cir. 2013); *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 762 (8th Cir. 2011). Even in the Ninth Circuit, the only circuit to firmly adopt the subjective intent standard, the application of the subjective intent standard after *Black* is far from consistent. *See Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008) ("[Since *Black*, the Ninth Circuit has] . . . analyzed speech under both an objective and a subjective standard.").

A. The objective listener standard appropriately denies First Amendment protections to speech that communicates a serious expression of an intent to commit an act of unlawful violence.

Applying the objective listener standard upholds First Amendment principles because it protects individuals from the fear of violence implicit in true threats. The definition of true threats outlined in *Watts* focuses on threats that are "so unambiguous and have such immediacy that they convincingly express an intention of being carried out." *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976). Speech that unambiguously expresses this intention to commit violent acts falls outside First Amendment protection because it instills the fear of violence in the listener, creating disruptions stemming from that fear as well as the possibility that the threatened violence will occur. *R.A.V.*, 505 U.S. at 388. Hearing this type of speech does not convey a political message

but rather puts fear into a reasonable listener, regardless of the intent of the speaker. *Black*, 538 U.S. at 359-60. This consideration is especially critical in light of the increasing rate of violence against transgender individuals in this country. *See generally Addressing Anti-Transgender Violence: Exploring Realities, Challenges, and Solutions for Policymakers*, Human Rights Campaign & Trans People of Color Coalition, 28 (Jan. 20, 2015), http://www.hrc.org/resources/addressing-anti-transgender-violence-exploring-realities-challenges-and-sol (finding transgender women face 4.3 times the risk of becoming homicide victims than the general population of all women); Katie Steinmetz, *Why Transgender People are Being Murdered at a Historic Rate*, TIME (Aug. 17, 2015), http://time.com/3999348/transgender-murders-2015/ (reporting that even where statistics are likely underestimating violence against transgender individuals, there was a historically high rate of transgender murders in 2015).

An objective listener standard undertakes a contextual, fact-intensive inquiry to determine whether the recipient of the alleged threat could reasonably conclude that the alleged threat expresses "a determination or intent to injure presently or in the future." *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (quoting *United States v Dinwiddie*, 76 F.3d 913, 925 (8th Cir.1996)) (internal quotation marks omitted). Analyzing the overall context of the speech at issue reflects a common sense judgment that a reasonable listener can distinguish genuine threats of violence that would justify a fearful response from purely cathartic or therapeutic speech that should not inspire fear. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) ("Some people may experience a therapeutic or cathartic benefit only if they know that their words will cause harm or only if they actually plan to carry out the threat, but surely the First Amendment does not protect them."). Therefore, the objective listener standard is the appropriate standard to apply to determine whether speech constitutes a true threat.

B. The subjective intent standard inappropriately provides First Amendment protections to speech that, regardless of the speaker's intent, instills a fear of violence in the listener.

The subjective intent standard for true threats fails to protect listeners from the fear of violence. This Court has previously held that speech instilling the fear of violence in a listener is not entitled to First Amendment protections. *See, e.g.*, *Black*, 538 U.S. at 359-60 (upholding ban on cross burning as speech with intent to intimidate); *see also Watts*, 394 U.S. at 708 (banning speech where speaker means to communicate serious expression of intent to commit act of unlawful violence against an individual). However, the appellate court erroneously applied the subjective intent standard as articulated in *United States v. Cassel*, interpreting *Black* to require a showing of a subjective "intent to intimidate." *Clark II*, slip op. at 6; *Cassel*, 408 F.3d 622, 632 (9th Cir. 2005). Even though *Black* explicitly held that speech can lose First Amendment protections regardless of whether the speaker "need not actually intend to carry out the threat" and makes no mention of a requirement to consider a speaker's subjective intent, the Ninth Circuit inexplicably analyzed whether the speaker subjectively intended the speech as a threat. *Black*, 538 U.S. at 359; *Cassel*, 408 F.3d at 633. The *Cassel* court even acknowledged that their decision was "in tension" with previous holdings requiring an objective analysis. 408 F.3d at 633 (collecting previous Ninth Circuit cases that applied an objective listener standard).

As articulated in *Cassel*, the subjective intent standard requires courts to analyze whether the speaker subjectively intended for the speech to intimidate or put a fear of violence in the listener. *Id.* at 631-33. However, focusing on the speaker's subjective intent would be "dangerously underinclusive" with regard to "protect[ing] individuals from the fear of violence and 'from the disruption that fear engenders.'" *N.Y. ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457, 479 (S.D.N.Y. 2006). Even if the speech instills the fear of violence in the listener, if the speaker does not subjectively intend for the speech to instill a fear of violence, then the speech is entitled to

constitutional protections. *R.A.V.*, 505 U.S. at 388. This is the exact outcome this Court has expressly rejected. *See, e.g.*, *Black,* 538 U.S. at 360 (finding no constitutional protections 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"). Therefore, the subjective intent standard would be the inappropriate standard to apply to determine whether speech constitutes a true threat.

C. Under the objective listener standard, the Post constitutes a true threat because Respondent (1) intentionally and knowingly communicated the threat and (2) Ms. Anderson reasonably interpreted the Post to contain a threat.

1. Despite not communicating the threat directly to Ms. Anderson, Respondent intentionally and knowingly communicated the threat to third parties.

The objective listener standard inquires first whether the speaker intended to communicate the speech and, second, whether a reasonable listener would interpret the speech as a threat. *See, e.g.*, *Porter*, 393 F.3d at 617 (analyzing whether the speaker intended to communicate the speech); *Doe*, 306 F.3d at 625 (finding that where the speaker intended to communicate the speech, the court must analyze whether a reasonable listener would find the speech constituted a threat). Furthermore, individuals such as tech-savvy high school students know that it is reasonably foreseeable that statements about a victim transmitted to third parties online will be communicated to the victims, either online or in the real world. *See, e.g.*, *D.J.M.*, 647 F.3d at 762 ("Since [the third party] was a classmate of the targeted students, [the speaker] knew or at least should have known that the classmates he referenced [in electronic communications] could be told about his statements."); *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008) (finding a true threat "doesn't need to be communicated directly to its victim or specify when it will be carried out"); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, No. 5;02CV1403, 2006 WL 1741023, at *5 (N.D.N.Y. June 20, 2006), *aff'd*, 494 F.3d 34 (2d Cir. 2007) ("Provided that the speaker intentionally communicated the alleged threat to someone [via electronic communications], it is

not determinative that he did not communicate it directly to its object."). Though Respondent may have intended to communicate the post to her immediate Facebook friends, which did not include Ms. Anderson or any other transgender individual, Respondent conceded that the Post could "go beyond one's friends." Affidavit of Kimberly Logan Clark (hereinafter "Clark Aff.") at ¶ 6; *Id*. Respondent also conceded that third parties would alert Ms. Anderson to the Post's existence. Affidavit of Thomas James Franklin (hereinafter "Franklin Aff.") at ¶ 14. Furthermore, the fact that the Andersons and the Cardonas' gave Principal a print-out of Respondent's Post shows that Ms. Anderson was actually alerted to the existence of the post. Franklin Aff. at ¶¶ 7-8. Therefore, Respondent intended to communicate the speech.

2. Ms. Anderson reasonably interpreted the speech contained within the Post as a violent threat.

The objective listener standard seeks to determine whether the listener reasonably interpreted the speech as a threat. To determine whether an objective listener would interpret the speech as a threat, *Watts* requires courts to analyze the context of the speech, whether the threat was conditional, and the reaction of the listeners. 394 U.S. at 708; *Doe*, 306 F.3d at 625; *D.J.M.*, 647 F.3d at 764.

a. The context surrounding the Post shows a reasonable person would understand the Post to be transmitting a true threat of violence.

To determine whether speech conveys a true threat, the objective listener standard requires courts to take the context of the speech into consideration. *Watts*, 394 U.S. at 708. In *Watts*, the speaker was at a political rally and spoke to convey his opposition to being drafted into the Vietnam War. *Id*. In context, this Court agreed with the speaker's contention that his speech was "a kind of very crude offensive method of stating a political opposition to the President." *Id*. Conversely, in *Cain*, the district court found that in the context of a hostile, physical confrontation, nonspecific threats constituted a true threat. 418 F. Supp. 2d at 476 (holding hostile behavior would lead "[a]ny

reasonable person on a sidewalk in Manhattan . . . [to] . . . interpret such a statement as a threat"). Prior to Respondent authoring the Post, Ms. Anderson engaged Respondent in a loud and disruptive verbal argument during a basketball scrimmage, resulting in the referee ejecting both girls from the game. *Clark I*, slip op. at 2. Rather than conveying a political opinion, as Respondent contends, "Taylor better watch out" and "I'll take IT out one way or another" constitute nonspecific threats of physical harm following a heated verbal confrontation. Affidavit of Alan Bartholomew Clark at ¶ 11; Clark Aff. at ¶ 5; Franklin Aff., Ex. C. Therefore, the context surrounding Respondent's Post shows that the language contained within the Post constituted a true threat.

b. The Post conveyed unconditional threats.

Once courts have analyzed the context of the speech, the objective listener standard requires courts to decide whether the threat contained within that speech was conditioned on other events occurring. In *Watts*, the alleged threats were conditional on whether the speaker would actually be drafted; as he was not, this Court held that the conditional language meant the speech at issue did not constitute a true threat. 394 U.S. at 708. Conversely, in *Doe*, the Eighth Circuit found that the most disturbing aspect of the threats contained within the letter at issue was the unconditional nature of the threats. 306 F.3d at 625. Though the appellate court did not address the conditionality of the statements on their face, the Post did not contain conditional statements. Franklin Aff., Ex. C. As the district court correctly noted, at most, the statements could be considered conditional on the next meeting between Ms. Anderson and Respondent, which is inevitable given the high school setting. *Clark II*, slip op. at 5. Therefore, the Post constituted unconditional threats.

c. The audience who heard about and read the Post treated the post as a threat and not as a joke.

Finally, the objective listener standard requires courts to analyze the reaction the speech provokes from readers and listeners. *Watts*, 394 U.S. at 708. In *Watts*, the speaker's remarks elicited laughter from both the speaker and the crowd who had heard the remarks. *Id*. at 707. Conversely, in finding a letter containing misogynistic language and threats of violence constituted a true threat, the Eighth Circuit in *Doe* determined that where the targeted individual was frightened and found crying after reading the letter, given the circumstances surrounding the communication of the letter, a reasonable recipient would have perceived the letter as a serious expression of an intent to harm. 306 F.3d at 619. As to the Post, the record clearly establishes that the Post engendered fear in the minds of the readers. *See, e.g.*, Franklin Aff. ¶¶ 7, 9. The Andersons and the Cardonas' expressed concern about their daughters coming to school. *Id*. at 7. In fact, the Andersons even kept Taylor home for two days after learning of the Post's existence. *Id*. Therefore, the audience clearly understood the Post as constituting a threat.

II. PETITIONER DID NOT VIOLATE THE FIRST AMENDMENT WHEN IT CONCLUDED THAT RESPONDENT'S POST, ADDRESSING A TRANSGENDER STUDENT, WAS MATERIALLY DISRUPTIVE AND COLLIDED WITH THE RIGHTS OF OTHER STUDENTS TO BE SECURE, AND THEN DISCIPLINED RESPONDENT FOR THE POST.

The First Amendment does not immunize Respondent's Post from Petitioner's discipline because Respondent's Post is unprotected under the student speech doctrine, which this Court outlined in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Respondent's constitutional claim falls under the student speech doctrine because the contested speech addressed a fellow student's participation in a school activity and arose with a reasonable anticipation of reaching fellow students. Under *Tinker*, school authorities can regulate student speech if they reasonably conclude that the speech (1) materially disrupts school activities, or (2) collides with

the right of other students to be secure and let alone. *Id*. at 503, 309. Respondent's Post falls under the *Tinker* standard because it (1) qualified as student speech, (2) created a disruption with school activities, and (3) violated other students' right to be secure and let alone at school. Therefore, Petitioner did not violate the First Amendment when it disciplined Respondent for the Post.

A. *Tinker* is the appropriate framework to review Respondent's Post, which constitutes student speech because it addressed a fellow student engaged in a school activity.

This Court should evaluate Respondent's Post under its student speech doctrine because the Post addressed fellow students, concerned their school activities, and mentioned her future encounters with other students at school. The free speech rights of "students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Instead, this Court established criteria to evaluate First Amendment rights of public school students in *Tinker*. 393 U.S. at 513. Under the *Tinker* standard, if student speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" then it may not claim First Amendment protection. *Id.*

To determine what qualifies as student speech under *Tinker*, the borders of school property are not rigid cut-off points that curtail school authority to regulate student expression. *See Morse v. Frederick*, 551 U.S. 393, 401 (2007) (finding no First Amendment violation when a principal suspended a student for unfurling a banner across the street from school, not on school property, that displayed prohibited speech). The internet creates a metaphysical question of where speech occurs, but that is less analytically important than the effect of speech in the school environment. *See Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011) (looking past the "metaphysical question of where [a student's] speech occurred when she used the internet as the medium" to consider that she knew her speech could "reasonably be expected to reach the school or impact the school environment").

Digital content creates uncertainty about whether speech in cyberspace occurred at school, so courts must use some analytic tool to determine if case-specific factors provide a sufficient nexus to the school itself to justify school district regulation. *Tinker* established the law's benchmark rule for that very purpose. *See R.L. v. Cent. York Sch. Dist.*, 183 F. Supp. 3d 625, 647 (M.D. Pa. 2016) (applying *Tinker* to find a student's ostensible school bomb threat posted on social media did not receive First Amendment protection).

As a result, the location where Respondent posted her statement to Facebook—namely, the fact it originated from an off-campus rather than on-campus computer—cannot be dispositive to its First Amendment protection. The borders of school-owned property are not rigid cut-off points for student speech when this Court considers students' physical banners at school activities, and the law offers no basis for imposing more rigidity when students' internet speech addresses school activities. *See Morse*, 551 U.S. at 401. Nor does Respondent's use of the internet as a medium of speech move the Post categorically outside the realm of student speech doctrine. Respondent's Post addressed school activities and the welfare of her fellow students. *See* Franklin Aff., Ex. C. She later admitted to foreseeing that her friends would likely forward the Post to the targeted student, along with other classmates. Franklin Aff., at ¶ 14. These affected students and their families dealt with the impact of Respondent's speech at school, and sought redress from school officials. Franklin Aff., at ¶ 9. Consequently, this Court should apply *Tinker's* two-part test to this case in order to discover whether Respondent's Post qualifies as student speech subject to Petitioner's discipline.

B. Respondent's Post materially disrupted school activities when targeted students could not safely participate in school activities, meeting the first category of unprotected student speech under *Tinker*.

Regardless of the physical location where Respondent authored the Post, the nexus between her speech addressing fellow students and the disrupted school activities justified Petitioner's

discipline. Petitioner also acted on a reasonable forecast of disruption or material interference with school activities to limit student speech that was inconsistent with its basic educational mission. Therefore, the First Amendment does not immunize Respondent from Petitioner's discipline.

1. Respondent's Post materially disrupted the school environment when it created an unsafe environment for targeted students, regardless of her location when she authored the Post.

The First Amendment does not preclude Petitioner from acting on a reasonable forecast that Respondent's Post would materially disrupt the school environment because her student speech addressed a fellow student concerning school activities. The Constitution does not protect student conduct, even out-of-class conduct, that materially disrupts classwork. *Tinker*, 393 U.S. at 513 (stating courts should evaluate student conduct, whether "in class or out of it," by considering material disruption or invasion of the rights of other students). The Fourth Circuit considered how *Tinker* should logically apply to the internet, and found using home internet as a medium of communication does not protect disruptive conduct when a reasonable person could expect it to impact the school environment. *Kowalski*, 652 F.3d at 573 (finding a sufficient nexus between speech and a school environment when a student "pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment").

Similarly, the Second Circuit suggested that both off-campus and on-campus conduct should warrant a similar analysis, on the basis that are be similarly foreseeable. *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008); *see also Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007) ("[O]ff-campus conduct can create a foreseeable risk of substantial disruption within a school. . . ."). Even in the era before social media, the First Amendment did not protect off-campus speech that can materially disrupt on-campus activity. *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 829 (7th Cir. 1998) (applying *Tinker* and law applicable to student

speech when the district court determined that a student's off-campus newspaper article advocated on-campus activity).

Respondent materially disrupted schoolwork when she named a fellow student, Ms. Anderson, and warned that Ms. Anderson "better watch out at school" because Respondent would "take IT out one way or another." Franklin Aff., Ex. C. Ms. Anderson could not safely return to class for two days, materially disrupting her school environment and classroom experience. Franklin Aff. at ¶ 9. Ms. Anderson's parents contacted the school officials for redress, so they understood that Respondent's student speech was a school issue. Franklin Aff. at ¶ 7. Two affected students' families also feared for their safety in classrooms and in school activities, particularly basketball, after Respondent's Post decried their "freak of nature" participating in the game. Franklin Aff. at ¶ 9; Franklin Aff., Ex. C.

In effect, the disruption to Respondent's fellow students, their classes, and their teachers created a nexus between Respondent's disruptive speech and the school environment. Because this Court evaluates student speech differently than adult speech in other settings to prevent this disruption, this Court should follow the Fourth Circuit's reasoning and focus not on the internet as Respondent's medium of communication, but rather focus on the disruptive impact of the Post. *See Kowalski*, 652 F.3d at 573. When Respondent pressed her keys at home, she knew the electronic response would reach beyond her home to the school environment, and later conceded that she knew the affected transgender students would likely see the Post. Franklin Aff. at ¶ 14. With this acknowledgment, Respondent effectively conceded that her conduct would foreseeably disrupt the school environment. This foreseeability provided Petitioner with a basis to anticipate material disruption, and to respond without infringing on any speech immunized by the First Amendment.

2. Respondent's Post materially disrupted the school environment because it was inconsistent with Petitioner's basic educational mission.

The First Amendment does not prohibit Petitioner from responding to Respondent's disruptive Post because Respondent's targeted, defamatory speech is inconsistent with Petitioner's basic educational mission. As this Court established in *Tinker*, one basis for a school district to regulate speech is upon a reasonable forecast of "substantial disruption of or material interference with school activities." 393 U.S. at 514. One example of particularly disruptive speech that a school need not tolerate is "student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school . . . ." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citation omitted) (quoting *Fraser*, 478 U.S. at 685). In order to protect that basic educational mission, "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning" at their school. *Kowalski*, 652 F.3d at 572. As a result, schools may determine a student's "targeted, defamatory" speech "aimed at a fellow classmate" creates a disruption warranting discipline without violating the First Amendment. *Id*. at 574.

Respondent engaged in targeted, defamatory speech directed at a fellow classmate when she called out a fellow student by name, warning that she better "watch it" at school, and referencing her with a derogatory pronoun (the non-human "it"). Franklin Aff. at Ex. C. Therefore, her speech was inconsistent with Petitioner's basic educational mission, which required a safe environment for students as set forth in its Anti-Harassment, Intimidation & Bullying Policy. Franklin Aff. at Ex. B. In short, because Petitioner found that Respondent's targeted, defamatory speech violated the Anti-Harassment, Intimidation & Bullying Policy through online intimidation and threats, it was inconsistent with Petitioner's basic educational mission and thus materially

disrupted the school environment. Consequently, the First Amendment does not impede Petitioner's ability to discipline Respondent in response to her disruptive student speech.

C. Respondent's Post collided with the rights of her fellow students with verbal assaults that inflicted intimidation and harassment, meeting the second category of unprotected student speech under *Tinker*.

Even if Respondent's Post was not actually disruptive, the First Amendment would still not impede Petitioner's ability to discipline Respondent because the Post collided with the rights of her fellow students. The law recognizes another independent justification for school districts to regulate student speech, arising when speech constitutes an "invasion of the rights of others" at school. *Tinker*, 393 U.S. at 513. If the First Amendment immunized this type of speech, it would set up a "collision with the rights of other students to be secure and to be let alone." *Id.* at 508. In considering the rights of students to be secure and let alone, lower courts have recognized that threatening speech and conduct can violate those rights. *See Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013) (holding MySpace posts threatening school shooting and targeting specific named students violated the rights of students).

In a key Ninth Circuit case, later vacated on mootness grounds, a t-shirt message collided with the rights of other students because its derogatory statement about sexual orientation amounted to verbal assaults on fellow students. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) ("Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses."), *vacated sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007). The Tenth Circuit reached a similar conclusion, finding that a student's display of the confederate flag at school could "interfere with the rights of other students to be secure and let alone," implicitly as a consequence of its psychological effect

of intimidation and harassment toward other students. *W. v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000).

Respondent's Post set up an inevitable collision between her speech and the right of targeted students to be secure and let alone, both generally at school and specifically at basketball scrimmages. In the same way that posting about violence against other students on MySpace invaded their rights in *Wynar*, so too did Respondent's intimidation on Facebook invade the rights of the student she named specifically, as well as other students Respondent's speech reached. As Respondent conceded, she knew the Post would likely reach school and the targeted student, inflicting upon them a direct verbal assault based on a core-identifying characteristic. *See* Franklin Aff. at ¶ 14. This circumstance bears no relationship to protected speech under the First Amendment. Instead, Respondent's post implicates the unique educational environment of public schools. Consequently, school districts must regulate student speech to preserve their educational environment and protect the rights of their students. Consequently, the school district did not violate the First Amendment when it suspended Respondent for violating the rights of other students to be secure and let alone.

CONCLUSION

For the foregoing reasons, this Court should REVERSE the judgment of the Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

School District of Washington County,

New Columbia

By its attorneys

BRIEF CERTIFICATE

1. The work product contained in all copies of Team C's brief is in fact the work product of the team members;
2. Team C has complied fully with our school's governing honor code; and
3. Team C has complied with all Rules of the Competition.