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 RESPONDENT

Team Letter: D
Counsel for Respondent
January 31, 2017

QUESTIONS PRESENTED

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

2. Whether a public school district violated a high school student's First Amendment rights by disciplining her for a Facebook post initiated off campus on her personal computer where school authorities conclude that the post was materially disruptive and collided with the right of other students to be secure at school?

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STATEMENT OF JURISDICTION

The judgment of the Fourteenth Circuit was entered on January 5, 2017. The petition for a writ of certiorari was granted. This Court has jurisdiction under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS

The statutory provisions listed below are relevant to the present case. These provisions are reproduced in Appendices A and B.

STATEMENT OF FACTS

On August 1, 2015, Washington County School District adopted a new policy titled the "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" ("Gender Policy"). Affidavit of Thomas James Franklin ("Franklin Aff."), Ex. A. The Gender Policy allows transgender students to participate in school sports based on their chosen gender identity. *Id*. The Gender Policy further states that "[s]tudents have the right to be addressed by a name and pronoun that corresponds with the gender identity that they assert at school." *Id*. The district also approved an "Anti-Harasment [sic], Intimidation & Bullying Policy" ("Bullying Policy") that prohibits harassment, intimidation, bullying, and threats as "inappropriate in public school environments." Franklin Aff., Ex. B.

On November 2, 2015, Ms. Taylor Anderson started a heated exchange with Ms. Kimberly Clark during an intrasquad basketball game at Pleasantville High School. *See* Affidavit of Kimberly Logan Clark ("Kimberly Clark Aff.") at ¶ 4. Ms. Anderson, who was born a member of the male sex and later identified her gender as female, chose to play on the Girls' Basketball Team in accordance with the Gender Policy. *Id*. After Ms. Anderson and Ms. Taylor's brief verbal argument, the referee ejected both of them from the game. Kimberly Clark Aff. at ¶ 4.

Later that night, Ms. Clark vented her frustration and expressed her objections to the Gender Policy on her Facebook page. *Id*. at ¶ 5. Using her home computer, she 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 woodwork lately too...

Franklin Aff., Ex. C. Ms. Clark is not Facebook friends with Ms. Anderson or any other transgender student at Pleasantville High. *Id*. Accordingly, Ms. Anderson could not see Ms. Clark's private post using her own account, nor did Ms. Clark intend for Ms. Anderson to see her post. Kimberly Clark Aff. at ¶ 6.

Two days after Ms. Clark's Facebook post, Ms. Anderson and Ms. Josie Cardona, another transgender student, met with Principal Thomas Franklin. Franklin Aff. at ¶ 7. After showing him a print-out of Ms. Clark's post, their parents "expressed concerns" about letting Ms. Anderson and Ms. Cardona play on the Girls' Basketball Team. *Id*. at ¶ 7. Ms. Anderson's parents also stated that they would keep Ms. Anderson home for two days. *Id*. Principal Franklin stated that "other students" also complained about the Facebook post, but there is no record of the number of students or the substance of their complaints. *Id*. at ¶ 11.

The next day, Principal Franklin met with Ms. Anderson's family and Ms. Clark's family. Affidavit of Alan Bartholomew Clark ("Alan Clark Aff.") at ¶ 14. Ms. Clark told Principal Franklin that she wrote the post but that she only "intended her friends to see it because it stated her views on an important school policy." Alan Clark Aff. at ¶ 6; Franklin Aff. at ¶ 14. She told the principal that she believed the Gender Policy was "unfair, immoral, and dangerous." Alan Clark Aff. at ¶ 7. Ms. Clark's father also shares these views. *Id.* at ¶ 3. She further explained that her remarks about Ms. Anderson were intended "merely as jokes" and acknowledged that it was possible for Facebook posts to "go beyond one's own friends." Kimberly Clark Aff. at ¶¶ 6-7.

Principal Franklin did not conduct further investigation, explaining that Ms. Clark has no history of disciplinary infractions or violent behavior of any sort. *Id*. at ¶ 6. Although Principal

Franklin did not consider Ms. Clark's post a threat, he claimed that it was "materially disruptive" and "collided with the rights of Ms. Anderson, Ms. Cardona, and other transgender students to feel safe at school." *Id.* at ¶ 15. Accordingly, he suspended Ms. Clark for three days pursuant to the Bullying Policy. Franklin Aff. at ¶ 15. Mr. Clark appealed the principal's decision to the Washington Country School Board ("School Board"). Alan Clark Aff. at ¶ 14.

On November 13, 2015, the School Board affirmed Principal Franklin's decision, finding that Ms. Clark's post constituted a true threat under *Virginia v. Black*, 538 U.S. 343 (2003). The School Board also found that the suspension was justified under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506-08 (1969). Alan Clark Aff., Ex. A. On December 7, 2015, Mr. Clark filed a complaint in the District Court for the District of New Columbia, claiming that his daughter was "punished for exercising her First Amendment right to freedom of speech by exposing the lack of fairness, danger and immorality of Washington School District policy." Alan Clark Aff. at ¶ 11. On April 14, 2016, the District Court granted summary judgment in favor of the School District on the grounds that Ms. Clark's post constituted a true threat or otherwise "created a material disruption" and "caused other students to feel unsafe and insecure in their school environment." *Clark v. Washington Cty. Sch. Dist.*, C.A. No. 16-9999 (Dist. N.C. 2016).

The Fourteenth Circuit reversed. The court held that a true threat requires evidence that the speaker had a subjective intent to intimidate. Applying this subjective test, it found that Ms. Clark's post was protected speech because the record failed to demonstrate that she intended to intimidate Ms. Anderson. The court also held that the *Tinker* standard did not apply to off-campus speech because its application would be inconsistent with the core principles of the First Amendment and Supreme Court jurisprudence. The court therefore remanded the case and

instructed the district court to enter summary judgment in favor of Ms. Clark. *Clark v. Washington Cty. Sch. Dist.*, No. 17-307 (14th Cir. 2017).

SUMMARY OF ARGUMENT

The First Amendment prohibits the government from "abridging the freedom of speech." U.S. CONST. amend. I. The Court has recognized rare exceptions for speech that is constitutionally proscribable on the basis of its content, including true threats conveying a serious intent to harm another or disruptive speech implicating the special circumstances of public schools. However, the Court has repeatedly emphasized the "bedrock principle" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *See Texas v. Johnson*, 491 U.S. 397, 414 (1989). This case asks whether the Court will continue to protect its longstanding commitment to a marketplace of ideas or extend the reach of the government into a fourteen-year-old girl's bedroom.

The first issue before the Court is whether Ms. Clark's Facebook post constituted a "true threat" conveying a serious intent to harm another. *See Virginia v. Black*, 538 U.S. 343, 359–60 (2003). Lower courts disagree about whether the intent underlying a true threat is measured using the subjective perspective of the speaker or the objective perspective of a reasonable recipient of the speech. The Court should adopt the subjective approach because it is more consistent with the Court's precedent; permits evidence contextualizing anonymous or ambiguous online speech; and ensures that First Amendment protection is not reduced to a negligence standard, which would permit convictions based on misunderstandings or the unique sensitivity of a recipient.

However, Ms. Clark's speech is not a true threat under either approach. The Court's four-factor analysis of a true threat considers the intent of the speaker, the conditionality of the

speech, the context of the speech, and the reaction of the recipients. *See Watts v. United States*, 394 U.S. 705 (1969). First, Ms. Clark's intent was to contest the school's athletics policy for transgender students and to make a joke about Ms. Anderson, a reasonable explanation for a fourteen-year-old with no history of violence and a private profile inaccessible to the students she referenced. Second, the context of her speech was debate about a public issue, as the Gender Policy informs both paragraphs of her post. Third, her speech was unconditional but ambiguous, amounting to a neutral factor for the analysis. Fourth, the reactions to her speech do not convey a fear of harm. Although the Andersons and Cardonas expressed their concerns, at least two of Ms. Clark's Facebook friends "liked" the post and school officials did not investigate her access to weapons or otherwise take any action demonstrating that they considered it a serious threat of violence as opposed to offensive language inconsistent with their own values. Even using an objective approach that disregards intent to harm, these factors weigh in favor of protected speech.

The second issue before the Court is whether Ms. Clark's Facebook post from her personal computer at home is beyond constitutional protection under the *Tinker* exception for speech that is materially disruptive and collides with the right of students to be secure at school. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). In deciding this question, the Court should resolve a circuit split and preserve students' freedom of speech by holding that *Tinker* does not apply to off-campus speech. Students should be afforded the same rights as other citizens off campus where the special circumstances of the school environment do not justify censorship and where the government would otherwise infringe on parental rights to define what constitutes appropriate speech and punishment inside their own homes, consistent with the cultural, religious, and ideological standards of their family.

Even if *Tinker* applies, Petitioner has not met its burden of showing that Ms. Clark's Facebook post materially disrupted the school or collided with the right of other students to feel secure at school. There is no evidence in the record that Ms. Clark's post was shared amongst students or otherwise the source of a whispering campaign that disrupted classes. There is no evidence that school officials thought Ms. Clark posed a danger to other students, as in serious cases where they would investigate a student's mental health, access to weapons, or past comments about the recipients. And there is no substantial evidence that students felt endangered at school, including Ms. Anderson who initiated the dispute at the basketball game made and was made to stay home by her parents.

Because neither the true threat exception nor the *Tinker* exception justify the censorship of Ms. Clark's speech, the Court should uphold its commitment to freedom of speech and affirm the decision below.

ARGUMENT

I. Ms. Clark's Facebook Post is Not a True Threat

Ms. Clark's Facebook post does not constitute a "true threat" beyond any First Amendment protection. True threats are a narrow category of speech "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). The Court's threshold for a true threat is as high as protecting cross-burning by the KKK or flag-burning by indignant protesters. *See id.*; *Texas v. Johnson*, 491 U.S. 397, 420 (1989). As the Court has explained, "[w]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." *Johnson*, 491 U.S. at 420. In applying the true threat analysis, lower courts disagree about whether to use a subjective standard concerning the speaker's intent to threaten or an objective standard concerning a reasonable person's interpretation of the speech. The Court should address the lower courts' debate and adopt the subjective approach because that is more consistent with its precedent, provides contextual evidence for ambiguous online speech, and avoids a mere negligence standard for First Amendment protection. However, under either approach, Ms. Clark's speech is not a true threat.

A. Lower Courts are Divided Between the Subjective and Objective Approach

Circuit courts disagree about whether the intent underlying an alleged threat should be measured using an objective or subjective standard. The objective standard considers the perspective of the recipient: whether a reasonable person would interpret the speech as a threat. The subjective standard considers the perspective of the speaker: whether the speaker intended their speech to be a threat. The First, Ninth, and Tenth Circuits have adopted the subjective

standard.[1] The Fifth and Eighth Circuits have adopted the objective standard with a threshold requirement that the speaker intended to communicate the speech at issue to the recipient of the threat.[2] The objective standard is thus similar to the subjective standard in that the threshold requirement of the intent to communicate is encompassed in the intent to threaten. The approaches differ, however, in whether a court then proceeds from the perspective of the recipient or the speaker.

B. The Court Should Adopt the Subjective Approach to Evaluating a True Threat

The Court should adopt the subjective standard for three reasons. First, a subjective standard is more consistent with this Court's precedent. In *Virginia v. Black*, the Court held that a Virginia statute banning cross burning with an intent to intimidate did not violate the First Amendment, but the statute could not have a prima facie provision criminalizing the act of cross burning without regard to intent. 538 U.S. 343, 347–48 (2003). The decision turned on a

[1] *See United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014) ("[A] defendant can be constitutionally convicted of making a true threat only if the defendant intended the recipient of the threat to feel threatened."); *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) ("We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."); *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997) ("We believe that the appropriate standard under which a defendant may be convicted for making a threat is whether he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made.").

[2] *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) ("Speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech was a 'serious expression of an intent to cause a present or future harm'. . . .[A]nd a finding of no intent to communicate obviates the need to assess whether the speech constitutes a 'true threat.'"); *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002) ("[A] true threat is a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another. . . . However, the speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it.").

speaker's motivation when burning a cross, even for a speaker as objectively intimidating as the KKK. As the Court explained:

> [A] burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. . . . The prima facie provision . . . does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn.…The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

Id. at 365–66. The Court thus emphasized the intent to threaten as the dispositive consideration, rather than the mere intent to communicate or an objective interpretation of the speech like the Fifth Circuit and Eighth Circuit's approach. This reading is reaffirmed by the plain language used in the Court's definition of a "true threat" as speech "where the speaker *means to* communicate a serious expression of an intent to commit an act of unlawful violence" and "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.* at 359–60 (emphasis added); *see also United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) ("The clear import of this definition is that only intentional threats are criminally punishable consistently with the First Amendment. . . . A natural reading of this language embraces not only the requirement that the communicate itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim") (emphasis in original); *United States v. Heineman*, 767 F.3d 970, 976 (10th Cir. 2014) ("[A] careful review of the opinions of the Justices makes clear that a true threat must be made with the intent to instill fear.").

Second, a subjective standard is necessary to contextualize online speech. The Internet is a dominant form of public discourse across the world, and the First Amendment now reaches

forums as diverse as email, chat rooms, direct messaging services, newsgroups, blogs, social network sites, and shared file services. Brief for American Civil Liberties Union et al. as Amicus Curiae Supporting Petitioner at 24, *Elonis v. United States*, 135 S. Ct. 2001 (2015), (No. 13-983), 2014 WL 4215752. Posts on these forums are often anonymous or ambiguous, obfuscating the speaker's tone, motive, and credibility to others. Even among family and friends, the intended audience can be impossible to control—a speaker may send an email or private message to one person that is then forwarded to dozens of others or delete a post that has already been saved by screen shot or shared. This situation-specific information about a speaker's choices is necessary to identify true threats. *Id.* at 27–28. A subjective intent standard allows the jury to consider more evidence contextualizing the speech than would be considered under an objective standard, including other speech by the speaker clarifying its meaning and the credibility of the threat given the speaker's history or access to weapons. *Id.*

United States v. Bagdasarian illustrates the importance of using evidence of subjective intent to analyze online speech. *See* 652 F.3d 1113 (9th Cir. 2011). There, a man under the username "californiaradial" posted two statements on a Yahoo! finance message board about President Obama with racial epithets and violent language including "he will have a 50 cal in the head soon." *Id.* at 1115. The Court explained that evidence under an objective standard alone would weigh against a finding of a true threat, given the nonviolent context of a financial message board and that only one person who read the statement was sufficiently concerned to notify the authorities. *See id.* at 1121–22. However, two important pieces of evidence came in under the subjective standard: the defendant actually had six firearms in his house, including .50 caliber weapons and ammunition, and had sent two separate emails on Election Day about blowing up cars with his pistol. *Id.* As the court explained, "[n]obody who read the message

board postings, however, knew that he had a .50 caliber gun or that he would send the later emails. Neither of these facts could therefore, under an objective test, have a bearing on whether [his] statements might reasonably be interpreted as a threat by a reasonable person." *Id.* at 1122 (internal citation omitted).

Third, the subjective approach ensures that First Amendment protection is not reduced to a mere negligence standard. Because the objective approach relies on whether a "reasonable person" interprets speech as a threat regardless of the speaker's intent, it acts as a negligence standard that would permit convictions based even on misunderstandings. *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). This is particularly dangerous in criminal cases, where the Court relies on *mens rea* to separate wrongful conduct from otherwise innocent conduct. *Id.* at 2010–11. In civil cases, intent also "avoids the perils that inhere in the 'reasonable-recipient standard,' namely that the jury will consider the unique sensitivity of the recipient." *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997). Otherwise, "a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant." *Id.*

C. Even if the Court Adopts an Objective Approach, Ms. Clark's Post is Protected Speech

The following factors are used to determine whether speech is a "true threat" under the subjective approach: (i) the speaker's intent; (ii) the conditionality of the speech; (iii) the context of the speech; and (iv) the reaction of the recipients. *See Watts*, 394 U.S. at 708. The objective approach includes the same factors with the exception of the speaker's intent to threaten. *See, e.g.*, *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002). The objective approach would instead ask whether Ms. Clark intended to communicate her speech as a threshold inquiry, which is undisputed in this case. Accordingly, the Court may apply the following analysis to

evaluate whether Ms. Clark's speech is a "true threat" regardless of its position on the debate discussed above. Ms. Clark's speech does not constitute a true threat under either standard.

i. Ms. Clark Did Not Intend to Threaten Ms. Anderson

The first factor is Ms. Clark's intent underlying her Facebook post. This inquiry assesses whether 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." *Black*, 538 U.S. at 360. For example, in *United States v. Wheeler*, a man angry from a recent DUI arrest posted a Facebook status ordering "his 'religious followers' to 'kill cops. drown them in the blood of thier [sic] children, hunt them down and kill their entire bloodlines' and provided names." 776 F.3d 736, 738 (10th Cir. 2015). He posted another status four days later stating "if my dui charges are not dropped, commit a massacre in the stepping stones preschool and day care, just walk in and kill everybody." *Id.* The defendant claimed he was "trying to stick it to the man and say f*** you" and would be satisfied if somebody carried out his orders, but he thought he deleted all of his Facebook friends at the time of the post. *Id.* at 741. The Tenth Circuit explained that this revenge motive was "certainly" the type of evidence that showed subjective intent to harm, although his belief that nobody would see his posts was a plausible mitigating factor. *Id.*

Ms. Clark's intent stands in stark contrast to the *Wheeler* defendant's intent to seek revenge by ordering a massacre of police and children. Ms. Clark testified under oath that she meant only to contest the school's athletic policy for transgender students and make a joke about "taking out" Ms. Anderson. Kimberly Clark Aff. at ¶ 5, ¶ 7. This is a plausible explanation for a fourteen-year-old with no history of violence or disciplinary infractions. Furthermore, Ms. Clark was not Facebook friends with Ms. Anderson or other transgender students at her school. *Id.* at ¶ 6. Although she was aware that posts sometimes reach non-friends, Ms. Clark testified that she

did not intend for non-friends to see her post. *Id.* As in *Wheeler*, the expectation that only Facebook friends would see a post on a private profile is reasonable. Accordingly, there is no evidence in the record that Ms. Clark meant to communicate a serious expression of intent to harm Ms. Anderson and other transgender students. This factor weighs against a true threat.

ii. Ms. Clark's Speech Was Unconditional but Ambiguous

The second factor considers the conditionality of Ms. Clark's speech. Language that is unconditional and unambiguous is indicative of a true threat. *See Watts*, 394 U.S. at 707–08; *Doe*, 306 F.3d at 623, 625. For example, in *Doe*, an eighth grade student wrote a four-page letter to his ex-girlfriend describing exactly how he would sodomize and murder her. 306 F.3d at 619, 625. The court emphasized that the letter "expressed in unconditional terms[] that [she] should not go to sleep because he would be lying under her bed waiting to kill her with a knife. . . . As a consequence, the letter was extremely intimate and personal, and the violence described in it was directed unequivocally at [her]." *Id.* at 625.

This factor does not weigh for or against Ms. Clark. On one hand, the three sentences of her Facebook post are far too ambiguous to compare to true threats like the "extremely intimate" four-page letter in *Doe*. She does not reference violence specifically, leaving open reasonable interpretations that taking Taylor out refers to her removal from the basketball team or social ostracism. On the other hand, she mentions Taylor by name and the language is not conditioned on a future event. Thus, this factor is neutral for evaluating the speech.

iii. Ms. Clark's Speech Was Made in the Context of Debating a Public Issue

The third factor is the context of Ms. Clark's post. Speech about public issues is afforded the highest level of First Amendment protection. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("This Court has recognized that expression on public issues has always

rested on the highest rung of the hierarchy of First Amendment values. [S]peech concerning public affairs is more than self-expression; it is the essence of self- government.") (internal citations omitted). In *Watts*, the context of a political rally on the Washington Monument grounds was a dispositive consideration in determining that the statement "if they ever make me carry a rifle[,] the first man I want in my sights is L.B.J." was not a true threat. 394 U.S. at 706, 708. Notwithstanding "an overwhelming[] interest in protecting the safety of its Chief Executive," the Court explained that the defendant's statement should be interpreted against the backdrop of "vituperative, abusive, and inexact" language in public debates. *Id.* at 707–08.

Similarly, Ms. Clark's statement was made in the context of debating a public issue. Three months before Ms. Clark's post, Washington County School District adopted the Gender Policy that permitted Ms. Taylor to participate on the Girls' Basketball Team. *See* Franklin Aff., Ex. A. "This new school policy" was directly referenced in Ms. Clark's post and the source of her frustration, as illustrated by the capital letters and exclamation marks reserved for that paragraph. *See* Franklin Aff., Ex. C. Ms. Clark wrote that she considers the policy unfair, immoral, and against God's law. *See* Franklin Aff., Ex. C. Her use of the word "it" rather than a pronoun for Ms. Anderson may also reference the Gender Policy's statement that "[s]tudents have the right to be addressed by a name and pronoun that corresponds with the gender identity that they assert at school." Franklin Aff., Ex. A. On the same day as the post, Ms. Clark and Ms. Anderson engaged in a verbal disagreement during an intrasquad basketball game and were both ejected from the game. Kimberly Clark Aff. at 4. Ms. Clark explained that she did not intend to threaten Ms. Taylor, and her statement that she'll make sure Ms. Taylor "gets more than just ejected" and will "take [her] out one way or another" may be reasonably read as ensuring Ms. Taylor is removed from the team by having the policy overturned. Indeed, Ms. Clark's post

would be incoherent without the context of the Gender Policy and should accordingly be recognized as protected speech about a public issue.

iv. The Reaction of the Recipients Did Not Portend a Serious Threat of Violence

The fourth factor considers the reaction of the recipients of Ms. Clark's speech. This factor is relevant to both the objective and subjective approaches because it explicates the seriousness of the speech. *See Watts*, 394 U.S. 707–08. For example, in *Burge*, the reaction of school officials in only suspending a student for three and a half days for a violent Facebook post was evidence they did not consider the statement a true threat. *See Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057, 1069 (D. Or. 2015). Specifically, the officials did not investigate whether the student had access to weapons or made other concerning comments and did not contact the police or mental health professionals. This reaction was deemed the most important factor, although the court also considered the reactions of the upset and humiliated victim, a few of his Facebook friends who responded with laughter, and two concerned parents who brought the post to the principal's attention. *Id.* at 1064.

The various reactions to Ms. Clark's speech closely parallel those in *Burge*. The school officials did not investigate Ms. Clark's access to weapons, search her possessions or Facebook for similar posts, or contact the police or mental health professionals. Instead, they were satisfied with having her return to school in the same classes and basketball team after three days, suggesting they were more concerned with punishing offensive language than quelling a serious threat of violence. Although the Andersons and Cardonas brought their concerns to the principal, at least two of Ms. Clark's Facebook friends—the direct and intended audience of the speech—"liked" the post. Franklin Aff., Ex. C. Notwithstanding the Andersons' concern then, the reactions to Ms. Clark's speech on balance suggest it was not a true threat.

Three of the four factors in the true threat analysis demonstrate that Ms. Clark's post was protected First Amendment speech. Although her language was not conditioned on a future event, Ms. Clark intended to contest the school's policy and make a joke about Taylor, the context of her speech was debate about a public issue, and the varied reactions to her speech reflect offense more than fear of harm. This outcome is further affirmed by the Court's requirement to read the record in the light most favorable to Ms. Clark. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 687 (1986). Accordingly, the Court should find that Ms. Clark's speech was not a true threat under either the subjective or objective approaches.

II. The *Tinker* Standard Should Not Apply to Off-Campus Speech

This Court has held that neither "students [n]or teachers shed their constitutional rights to freedom of speech…at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 (1969). However, the Court has not held that schools may regulate students' speech on the other side of the schoolhouse gate. Lower courts have struggled to develop a framework that protects students' right to free speech as well as their right to a secure school environment. As the Ninth Circuit explained, "[o]ne of the difficulties with the student speech cases is an effort to divine and impose a global standard for a myriad of circumstances involving off-campus speech." *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013). Unfortunately, courts have failed to create an adequate "global standard" and have used *Tinker* to unjustifiably erode citizens' free speech rights, expand the already powerful role of school officials, and chill freedom of expression.

A. Applying the *Tinker* Standard to Students' Off-Campus Speech is Not Sufficiently Tailored to the Special Circumstances of Schools

This Court has vigorously protected free speech by allowing the government to regulate speech only in well-defined and narrow circumstances. *See Chaplinsky v. New Hampshire*, 315

U.S. 568 (1942). In the context of public schools, the Court has permitted school administrators to censor speech on only four occasions and always after carefully balancing a student's speech rights against the "special circumstances of the school environment." *See Tinker*, 393 U.S. at 506 (censoring on-campus speech if it is materially and substantially disruptive to the school environment); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (barring plainly lewd or offensive language at a school-sponsored event as "disruptive and contrary to the fundamental values of public school education."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (censoring speech at a school event because it was reasonably attributed to the school's own speech); *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (censoring speech promoting drug use at an off-campus school event). In short, this Court's jurisprudence recognizes that the "special circumstances of the school environment" justify regulation that would be unconstitutional outside of the school environment. *See Tinker*, 393 U.S. at 506.

Instead of recognizing *Tinker* and its progeny as limited exceptions, some lower courts have stretched *Tinker* to regulate students' off-campus speech. The Second, Seventh, Eighth, and Ninth Circuits interpret *Tinker* to allow schools broad power to censor student speech if school administrators reasonably forecast or foresee that the speech will cause a disruption at school. *See Boucher v. School Bd.*, 134 F.3d 821, 829 (7th Cir. 1999); *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012). Similarly, the Fourth Circuit allows schools to sanction off-campus speech if there is a sufficient "nexus" between the off-campus speech and the school community. *Kowalski v. Berkeley County Sch*., 652 F.3d 565 (4th Cir. 2011).

Other courts have declined to extend *Tinker* to off-campus speech. As the Third Circuit noted, "the First Amendment protects students engaging in off campus speech to the same extent

it protects speech by citizens in the community at large." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 936 (3d Cir. 2011) (en banc) (Smith, C.J., concurring); *see also Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004) (declining to apply *Tinker* to a student drawing created off campus and noting the "difficulties posed by state regulation of student speech that takes place off campus). In a separate opinion, a five-member panel went on to explain that "[i]f *Tinker* and the Court's other school-speech precedents applied to off-campus speech, this discussion would have been unnecessary." *Snyder*, 650 F.3d at 938.

A review of this Court's precedent demonstrates that the application of *Tinker* to off-campus speech is inconsistent with the First Amendment. For example, the Court held in *Bethel* that school districts could censor a student's speech at a school assembly laced with sexual innuendo because it undermined the "fundamental values of public school education." 478 U.S. at 686. However, Justice Brennan explained that had the student "given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court's opinion does not suggest otherwise." *Id.* at 688 (Brennan, J., concurring). Similarly, in *Hazelwood*, the Court upheld the decision to censor a school newspaper only after warning that "the government could not censor similar speech outside the school." 484 U.S. at 266. Citing *Tinker*, the Court clarified that its opinion only concerned "educators' ability to silence a student's personal expression that happens to occur *on the school premises*." *Id*. at 271 (emphasis added); *see also Morse*, 551 U.S. 393 (emphasizing that a banner used in a school-sponsored assembly across the street from a high school could be censored because it was an official school function and highly attended by teachers and administrators).

B. School Officials Have Other Means to Address Off-Campus Speech

Apply the *Tinker* standard to off-campus speech would afford unreasonably broad discretion to school officials in a digital age where any communication may find its way onto campus. In fact, school officials already possess the means to regulate off-campus speech that violates the First Amendment. For example, under *Hazelwood*, schools can regulate speech that "bear[s] the imprimatur of the school" off campus. 484 U.S. at 271. Schools may also regulate speech that is considered a true threat, as discussed in Section I. *See Watts v. United States*, 394 U.S. 705 (1968); *Virginia v. Black*, 538 U.S. 343 (2003). Thus, schools already have the tools necessary to address disruptive speech originating off campus without needing to invoke the *Tinker* standard.

To address incidents of cyberbullying, for instance, states may continue to pass legislation requiring schools to implement anti-bullying procedures within the bounds of the First Amendment. Forty-nine out of fifty states have enacted some type of anti-bullying legislation.[3] These policies can allow school administrators to address conflicts between students, without silencing speech they personally find objectionable, by requiring elements like intent. For example, Louisiana's statute defines cyberbullying as "the transmission of any electronic textual, visual, written, or oral communication with the *malicious and willful intent* to coerce, abuse, torment, or intimidate a person under the age of eighteen." La. Stat. Ann. § 14:40.7 (2010) (emphasis added). Thus, schools can protect students without needing the assistance of *Tinker*, and they are not impotent in the face of cyberbullying and harassment.[4]

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[3] *See* Samir Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RES. CENTER (Nov. 2012), http://cyberbullying.us/Bullying_and_Cyberbullying_ Laws.pdf.

[4] However, anti-bullying policies like the Petitioner's Bullying Policy have been routinely struck down by courts when they don't account for intent. For example, the New York Court of Appeals held that a state statute regulating cyber-bullying violated the First Amendment because

C. Extending *Tinker* to Off-Campus Speech Would Preemptively Chill Speech and Trample Parental Rights

School administrators have significant control over students' lives. They can impose security measures such as metal detectors and lock down, monitor all student activity with school cameras, and enforce Zero-Tolerance policies. Under these conditions, the "insidious threat" of chilled speech is a constant in the face of immediate sanctions with limited due process. *See Goss v. Lopez*, 419 U.S. 565, 95 (1975) (holding that prior notice and a hearing were not always required before suspending students); *see also City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 757 (1988) ("The mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."). As this Court has explained, the desire for security in schools cannot justify undue censorship of student speech:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09 (internal citations omitted). Allowing school officials to use *Tinker* to censor students therefore creates an "unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the

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it covered much more speech than was needed to regulate cyberbullying, used vague terms, and failed to give notice as to what was prohibited by law. *See People v. Marquan*, 19 N.E.3d 480 (N.Y. 2014); *see also State v. Bishop*, 368 N.C. 869, 787 S.E.2d 814 (2016) (holding that the statute did not embody the least restrictive means of advancing the state's compelling interest in protecting minors from potential harm).

same extent that it can control that child when he/she participates in school sponsored activities." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011).

The *Tinker* standard also allows schools to censor speech *before* it happens, chilling student's rights to free speech. For example, in *Doninger v. Niehoff*, a school punished a student for using lewd language in a blog post raising awareness about the cancellation of a school event. 527 F.3d 41 (2d Cir. 2011). Although the post was created off campus and contained no threatening language, the court cited *Tinker* in holding that the school rightly punished the student merely because it was "reasonably foreseeable" that the post would "create a risk of disruption." *Id*. at 50-51. Such blatant censorship exemplifies a dangerous tendency to regulate off-campus speech without any limits based on anything deemed disruptive. As this Court has noted, "much political and religious speech might be perceived as offensive to some." *Morse,* 551 U.S. at 409. Arming school administrators with greater reach into student's lives allows administrators to target and censor the kinds of political and religious speech the First Amendment would normally protect.

Finally, applying *Tinker* to off-campus speech would supplant the crucial role of parents in defining what is proper speech or punishment for their children when they are not in school. School officials may not assume the role of *parens patriae*. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1769)) (school officials possess only temporary parental authority, delegated by parents, for carrying out their duties as educators); *see also Thomas v. Bd. of Educ., Granville Cent. Sch. Dist*, 607 F.2d 1043, 1051 (2d Cir. 1979) ("Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of Parens patriae.") This overreach may undermine parents' own cultural, religious,

or ideological standards for their children's speech. Thus, schools should not interfere with parents' discretion over what constitutes offensive behavior and personal responsibility inside their own homes.

III. Ms. Clark Did Not Violate the *Tinker* Standard

If the Court applies the *Tinker* standard, Petitioner must prove that Ms. Clark's speech caused: (A) "substantial disruption of, or material interference with, school activities" or (B) "collision with the rights of other students to be secure and to be let alone." *Tinker,* 393 U.S. at 507. Petitioner failed to demonstrate either occurred.

A. Ms. Clark's Speech Did Not Create Actual or Foreseeable Disruption of the School Environment

Courts have used two approaches for determining whether a student's speech has met the first prong of *Tinker*. Some courts use a "nexus" test, allowing school officials to regulate disruptive student speech if it "was closely tied to the school" based on location and timing. *See Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir.2011) (holding that a student's posts on a webpage ridiculing a fellow student was a sufficient nexus); *see also C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142 (9th Cir. 2016) (holding that a student's off-campus, sexually harassing speech in a public park shortly after school let out was a sufficient nexus). Similarly, the Eight Circuit has ruled that if it is "foreseeable" that the student's speech would reach campus, schools may regulate it as "on-campus" speech. *See, e.g., S.J.W. v. Lee's Summit R–7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012) (holding that a school could punish a student for posting racist and sexually explicit comments about other students on a website hosted on a Dutch domain).

In every case, however, school administrators must demonstrate that the off-campus speech resulted in, or had a likelihood of resulting in, disruption. *See Tinker*, 393 U.S. at 509

(applying an "independent examination of the record" to address whether speech would "substantially interfere with the work of the school"); *see also Boim v. Fulton Cty. Sch. Dist.*, 494 F.3d 978, 983 (11th Cir.2007) ("[S]tudent speech must at least be likely to cause a material and substantial disruption . . . and more than a brief, easily overlooked, *de minimis* impact, before it may be curtailed."). For example, the Third Circuit held in *J.S. ex rel. Snyder v. Blue Mountain School District* that school authorities inappropriately disciplined a student who created a MySpace page to parody a school administrator. 650 F.3d 915 (3d Cir. 2011). Although the court found that the student's speech was "lewd, vulgar, and offensive speech," it still doubted that speech created a disturbance because it originated in the student's home on a personal computer, she restricted access to make her statements private, and the content of the profile was so outrageous that no one could have "taken it seriously." *Id.* at 930; *see also Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (finding that a school failed to demonstrate that a student who created a fake internet profile of his principal created a disturbance).

Similarly, in *Burge*, the court held that a school failed to show a student's Facebook posts about a teacher would be disruptive even though the student stated definitively that the teacher "must be shot." *Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057 (D. Or. 2015); *see also Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986) (holding that a student could not be punished for his vulgar gesture to a teacher off school grounds). The court reasoned that, despite the principal's rebuke, the school did not investigate whether the student had access to guns, contact the police, request a mental health evaluation, or check if the student had made other similar comments. *Burge*, 100 F. Supp. 3d at 1064. There was also no evidence that the student's comments created a "widespread whispering campaign at school or anywhere else." *Id.*

In this case, there is no evidence to demonstrate that Ms. Clark's speech created an actual or foreseeable disruption of the school environment. Like the student in *Blue Mountain*, Ms. Clark wrote the post on her personal computer at home and her profile was private. There was no hint of concern about Ms. Clark's speech for two days after the post, there was no evidence that the post was shared at school or otherwise the source of a "whispering campaign," and there was no record that the principal took any investigative actions other than speaking with the Andersons and Cardonas. As the Fourteenth Circuit explained, this kind of "nebulous fear of potential, ambiguous disruption to the school environment falls squarely within the definition of 'undifferentiated fear' cautioned against by the *Tinker* Court." *Clark v. Sch. Dist. of Washington Cty.*, No. 17-307 (14th Cir. 2016).

B. Ms. Clark's Speech Did Not Intrude Upon the Rights of Other Students

The second prong of *Tinker* allows schools to regulate student speech if it collides "with the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 507. However, as then-Circuit Judge Alito explained, "the precise scope of *Tinker*'s 'interference with the rights of others' language is unclear." *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (striking down a district's anti-harassment policy as overbroad because it prohibited a substantial amount of non-vulgar, non-sponsored student speech). Only the Ninth Circuit has interpreted *Tinker*'s second prong to restrict off-campus speech. *See Wynar v. Douglas Cnty. Sch. Dist.* 728 F.3d 1062, 1072 (9th Cir. 2013). In *Wynar*, the court considered whether a school violated the First Amendment rights of a student who "engaged in a string of increasingly violent and threatening instant messages sent from home to his friends bragging about his weapons, threatening to shoot specific classmates . . . on a specific date, and invoking the image of the Virginia Tech massacre." *Id.* at 1065-66. The court found that the "threat of a school

shooting…represent[ed] the quintessential harm to the rights of other students to be secure." *Id.* at 1072.

Ms. Clark's Facebook post—made at home from her personal computer—did not interfere with the rights of other students to feel secure on campus. Ms. Clark's ambiguous post, which was primarily focused on the Gender Policy, is incomparable to the *Wynar* messages bragging about weapons and about arranging a school shooting on a specific date. Although Ms. Anderson's parents chose to keep Ms. Anderson home from school, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. Moreover, there is no indication that Ms. Anderson herself—who initiated the verbal dispute during the basketball game—felt insecure. Thus, the record, which must be read in the light most favorable to Ms. Clark, fails to show that her speech collided with the rights of other students on campus.

CONCLUSION

For the foregoing reasons, Ms. Clark requests that the Court affirm the judgement below.

Respectfully submitted,

Team D
Counsel for Respondent
Date: January 30, 2017

COMPETITION CERTIFICATE

Team D affirms the following:

1. All copies of the brief are the work product of the members of the team only;
2. the team has complied fully with its law school honor code; and
3. the team has complied with all the Rules of the Competition.

Sincerely,

Team D

APPENDIX A

U.S. Const. Amend. I

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.

APPENDIX B

LSA-R.S. 14:40.7

§ 40.7. Cyberbullying

Effective: August 15, 2010

A. Cyberbullying is the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.

B. For purposes of this Section:

(1) “Cable operator” means any person or group of persons who provides cable service over a cable system and directly, or through one or more affiliates, owns a significant interest in such cable system, or who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

(2) “Electronic textual, visual, written, or oral communication” means any communication of any kind made through the use of a computer online service, Internet service, or any other means of electronic communication, including but not limited to a local bulletin board service, Internet chat room, electronic mail, or online messaging service.

(3) “Interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(4) “Telecommunications service” means the offering of telecommunications for a fee directly to the public, regardless of the facilities used.

C. An offense committed pursuant to the provisions of this Section may be deemed to have been committed where the communication was originally sent, originally received, or originally viewed by any person.

D. (1) Except as provided in Paragraph (2) of this Subsection, whoever commits the crime of cyberbullying shall be fined not more than five hundred dollars, imprisoned for not more than six months, or both.

(2) When the offender is under the age of seventeen, the disposition of the matter shall be governed exclusively by the provisions of Title VII of the Children's Code.

E. The provisions of this Section shall not apply to a provider of an interactive computer service, provider of a telecommunications service, or a cable operator as defined by the provisions of this Section.

F. The provisions of this Section shall not be construed to prohibit or restrict religious free speech pursuant to Article I, Section 8 of the Constitution of Louisiana.

Credits

Added by Acts 2010, No. 989, § 1.

LSA-R.S. 14:40.7, LA R.S. 14:40.7

Current through the 2016 First Extraordinary, Regular, and Second Extraordinary Sessions.