Docket No. 16-9999 **TEAM F**

In the Supreme Court of the United States

March Term 2017

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

Petitioner,

v.

WASHINGTON COUNTY SCHOOL DISTRICT,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM F
Counsel for Respondent

QUESTIONS PRESENTED

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

2. Whether a 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 United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on January 5, 2017. Petitioner timely filed a petition for writ of certiorari, which this Court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Alan Bartholomew Clark ("Alan Clark") brought this suit on behalf of his daughter, Kimberly Logan Clark ("Ms. Clark"), requesting declaratory relief based on the School District of Washington County's ("School District") violation of Ms. Clark's First Amendment right to freedom of speech. Record 1. Mr. Thomas James Franklin ("Principal Franklin") is the principal of Pleasantville High School, which is a part of the School District. Record 13. Principal Franklin suspended Ms. Clark after she posted offensive statements on her Facebook page about Ms. Taylor Anderson ("Ms. Anderson"). Record 14. Alan Clark appealed Ms. Clark's suspension to the Washington County School Board. Record 20. The School District rejected Alan Clark's appeal and upheld Ms. Clark's suspension. Record 22.

Subsequently, Ms. Clark filed suit against the School District in the United States District Court for the District of New Columbia ("District Court"). Record 1. Both the School District and Ms. Clark filed cross motions for summary judgment. Record 1. On April 14, 2016, the District Court granted summary judgment in favor of the School District, finding that the School District did not violate Ms. Clark's First Amendment rights. Record 2, 4, 12. The District Court specifically held that Ms. Clark's statements constituted a "true threat" and therefore were not entitled to First Amendment protection. Record 4. The District Court further held that Ms. Clark's statements materially disrupted her school environment and interfered with the right of

other students to be secure at school. Record 4. Accordingly, the District Court found that Ms. Clark's suspension was constitutional. Record 4.

Ms. Clark appealed the District Court's holding to the United States Court of Appeals for the Fourteenth Circuit. Record 25. On January 5, 2017, the Fourteenth Circuit correctly held that Ms. Clark's suspension violated the Free Speech Clause of the First Amendment. Record 25. Particularly, the Fourteenth Circuit held that Ms. Clark's speech did not constitute a "true threat" beyond the protection of the First Amendment. Record 25. Further, the Fourteenth Circuit held that Ms. Clark's speech did not satisfy either prong of the *Tinker* standard. Record 36; *Tinker v. Des Moines Independent Community School Dist*, 393 U.S. 503, 508 (1969). Accordingly, the Fourteenth Circuit reversed the District Court's decision to grant summary judgment in favor of the School District and remanded the case to the District Court with instructions to enter summary judgment in favor of Ms. Clark. Record 39.

STATEMENT OF FACTS

Respondent, Ms. Kimberly Clark ("Ms. Clark"), and Ms. Taylor Anderson ("Ms. Anderson") attend Pleasantville High School in Pleasantville, New Columbia. Record 13, 23. Ms. Anderson is transgender; specifically, she was born male but identifies as female. Record 2. Ms. Clark and Ms. Anderson are both members of the Girls' Basketball Team at Pleasantville High School. Record 2. Ms. Anderson is permitted to participate in the Girls' Basketball Team by the School District's "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" policy, which allows students to participate in athletic teams based on their selected gender identity. Record 2, 15. Both Ms. Clark and Alan Clark believe that the policy is "dangerous" and "unfair." Record 19, 24.

On November 2, 2015, during an intra-squad scrimmage, Ms. Anderson engaged Ms. Clark in a verbal disagreement over a referee's call, which resulted in both players being ejected from the scrimmage. Record 23. Frustrated by the events of the scrimmage, Ms. Clark went home that evening and vented to her Facebook "friends" via a post stating:

> 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…

Record 18. This post was made from her personal computer in her private residence, and was meant only for her "friends" on Facebook. Record 23. Ms. Clark and Ms. Anderson are not Facebook "friends," nor is Ms. Clark "friends" on Facebook with any transgender student at Pleasantville High School. Record 23.

Ms. Anderson was not in school the next two days, November 3, 2015 and November 4, 2015. Record 14. On November 4, 2015, Ms. Anderson, fellow transgender Pleasantville High School student Josie Cardona, and both girls' sets of parents met with Pleasantville High School Principal Thomas James Franklin ("Principal Franklin"). Record 14. They presented Principal Franklin with a printed screenshot of Ms. Clark's Facebook post, which was taken on the evening of November 3, 2015, twenty-two hours after the post was made. Record 14, 18.

The next day, November 5, 2015, Principal Franklin summoned Ms. Clark and her parents. Record 14. When questioned by Principal Franklin, Ms. Clark admitted to writing the post, but explained that her post was written in jest. Record 23. Despite Ms. Clark's clarification that the statements were jokes, Principal Franklin immediately suspended Ms. Clark

for three days. Record 14. Principal Franklin based the suspension on his opinion that Ms. Clark's off-campus speech had been "materially disruptive" to the school's learning environment. Record 14. Principal Franklin opined that her post "collided with the rights of Ms. Anderson and Ms. Cardona, and other transgender students to feel safe at school." Record 14.

Specifically, Mr. Franklin relied on the Washington County School District's "Anti-Harassment, Intimidation & Bullying Policy" ("The Policy") to determine that Ms. Clark's off-campus speech could be punished. Record 13-14. The Policy states, in relevant part, that the School District "prohibit[s] harassment, intimidation, bullying and threats communicated by any means, including electronic, oral, written, or physical acts, contacts, messages, or other communications. . ." Record 17. Ms. Clark and her parents appealed the punishment, but the School District affirmed the suspension. Record 22. Unless overturned by this Court, Ms. Clark's suspension will likely "negatively impact [Ms. Clark's] future, including college admissions and employment opportunities." Record 20. This stain on Ms. Clark's record violated her First Amendment rights and unjustly shamed her before her peers. Record 20.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit finding that the suspension of Ms. Clark violates the Free Speech Clause of the First Amendment. The Free Speech Clause is violated by Ms. Clark's suspension because Ms. Clark's speech did not constitute a "true threat" as contemplated by *Virginia v. Black.* 538 U.S. 343 (2003). In *Virginia v. Black*, this Court signaled that true threats require the speaker to possess the subjective intent to cause fear of violence through their speech. *Id.* at 359; ("'True threats' encompass those statements where the speaker means to communicate *a serious expression of an intent* to commit an act of unlawful violence to a particular individual or group

of individuals.") (emphasis added). This interpretation of the true threat doctrine has been followed by both the Ninth and Tenth Circuits. *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005); *See also United States. v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014). Because Ms. Clark lacked the subjective intent to threaten Ms. Anderson, her speech cannot constitute a true threat. However, even if this Court imposes an objective standard, which asks whether a reasonable recipient would interpret the speech as a threat, *Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 616 (5th Cir. 2004), Ms. Clark's speech still would not constitute a true threat. Because her statements were vague and lacked any specificity or references to violence, a reasonable recipient could not find her speech to be a true threat.

Furthermore, Ms. Clark's speech does not fall within the purview of the standard this Court established in *Tinker v. Des Moines Independent Community School Dist*, 393 U.S. 503, 508 (1969). Under the *Tinker* standard, a school may punish student speech only if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. Ms. Clark's non-violent speech was made off-campus and on her personal computer. This Court has never applied the *Tinker* standard to any off-campus speech not occurring at a school-sanctioned event. As such, Ms. Clark's speech does not fall within the parameters of speech that the school has authority to regulate.

Even if this Court were to apply the *Tinker* standard to Ms. Clark's Facebook post, her speech would still be protected. *Tinker* only applies to student speech that causes a material disruption or interferes with the rights of other students. 393 U.S. at 508. Ms. Clark's speech does not satisfy either of those requirements. As such, even if *Tinker* is applied, Ms. Clark's speech is still protected by the First Amendment. Therefore, Ms. Clark's suspension violates the Free Speech Clause of the First Amendment.

ARGUMENT

I. WASHINGTON COUNTY SCHOOL DISTRICT'S SUSPENSION OF MS. CLARK VIOLATED HER CONSTITUTIONAL RIGHT TO FREE SPEECH BECAUSE HER SPEECH DID NOT CONTAIN TRUE THREATS.

The First Amendment prohibits the government from abridging the freedom of speech, which is essential to American democracy. U.S. Const. art. I; *Palko v. State of Conn.*, 302 U.S. 319, 327 (1937) ("[Freedom of speech] is the matrix, the indispensable condition, of nearly every other form of freedom."). As such, "discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). The First Amendment applies in all instances, unless otherwise expressed by this Court. Examples of unprotected speech include false statements of fact, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); obscenity, *Roth v. United States.*, 354 U.S. 476, 485 (1957); child pornography, *New York v. Ferber*, 458 U.S. 747, 764 (1982); and fighting words, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). Additionally, like all American citizens, students enjoy the right to speak freely. *Tinker v. Des Moines Independent Community School Dist*, 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students.").

One narrow category of unprotected speech is "true threats." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)). This Court defines a true threat as a statement in which "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 359. Although true threats do not require that the speaker "intend to carry out the threat," the speaker must have "the intent of placing the victim in fear of bodily harm or death." *Id.* at 360, 369. Additionally, although a criminal statute was in dispute in *Virginia v.*

Black, numerous lower courts applied *Black*'s standard to civil disputes as well. *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004); *See also Doe v. Pulaski Cnty Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002); *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005).

The primary issue with the "true threat" standard is the ambiguity in regards to whose perspective is determinative. As a result, the courts of appeals disagree on which standard is proper. Some circuits have properly imposed a subjective standard, examining whether the individual that made the alleged threat intended for her speech to intimidate. *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005); *See also United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014). Other circuits have incorrectly applied an objective standard, asking whether an objectively reasonable individual would find the speech to be a serious expression of an intent to cause future or present harm. *United States v. Clemens*, 738 F.3d 1, 3 (1st Cir. 2013); *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012); *Porter*, 393 F.3d at 616; *Doe*, 306 F.3d at 616. Regardless of which standard this Court applies, Ms. Clark's statements do not rise to the level of a true threat and are therefore protected under the First Amendment.

A. THE NINTH AND TENTH CIRCUIT'S SUBJECTIVITY STANDARD IS THE PROPER STANDARD FOR ANALYZING WHETHER SPEECH CONTAINS TRUE THREATS BECAUSE THE SUBJECTIVE STANDARD REMAINS TRUE TO THIS COURT'S REASONING IN *VIRGINIA V. BLACK*.

The subjective standard is most appropriate when examining whether a statement is a true threat. As noted above, there is a circuit split regarding which standard is most proper. This circuit split has led to complications in the lower courts. *See Burge ex. rel. Burge v. Colton School Dist. 53*, 100 F. Supp. 3d 1057, 1068 (D. Or. 2015). In *Burge*, the court analyzed whether a true threat was present in a case in which a student wrote that his teacher needed to be shot. *Id.* at 1060, 1068-70. Because the court was unsure of which test was proper, it applied

both tests.[1] Although the court ultimately found that the comments did not constitute true threats, *Burge* illustrates the need for this Court to clarify which standard is proper. This Court's guidance is needed so that schools may better craft their own policies regarding student speech and true threats. As explained below, the subjective standard would best serve this role.

Both the Ninth and Tenth Circuits have applied the subjective standard when analyzing whether speech contains true threats. *Cassel*, 408 F.3d at 633; *Heineman*, 767 F.3d at 975. By using the subjective standard, the Ninth and Tenth Circuits correctly interpret *Virginia v. Black*. Although this Court in *Virginia v. Black* did not expressly endorse any test for determining whether a true threat is present, the majority's opinion indicated that there is certainly a subjective aspect to be considered when making that determination. *Black*, 538 U.S. at 359. Likewise, in *U.S. v. Parr*, the Seventh Circuit stated that "it is more likely . . . that an entirely objective definition is no longer tenable" post-*Black*. 545 F.3d 491, 500 (7th Cir. 2008).

In *United States v. Cassel*, the defendant attempted to dissuade an individual from buying a lot in his neighborhood, stating "that if [the potential purchaser] tried to build anything on [the lot], that it would definitely burn . . . That if [the potential purchaser] left anything there, it would be stolen, vandalized. He would see to that." *Cassel*, 408 F.3d at 624-25. The defendant was charged with interfering with a federal land sale and witness tampering. *Id.* The Ninth Circuit, after analyzing *Virginia v. Black*, concluded that the speaker's subjective intent to intimidate was key. *Id.* at 632-33. That court focused on the "great weight" that this Court placed on the intent requirement in *Virginia v. Black*. *Id.* at 631. The Ninth Circuit specifically stated that the statute struck down in *Black* was found unconstitutional because it made it "unnecessary for the

[1] The court in *Burge* also stated that, "If only one standard applies in the civil context, it is the subjective standard." *See Burge ex. rel. Burge v. Colton School Dist. 53*, 100 F. Supp. 3d 1057, 1068 (D. Or. 2015).

government [to actually] prove the defendant's intent [to intimidate]." *Id.* at 631-32 (citing *Black*, 538 U.S. 343, 365 (2003)). The Ninth Circuit found that, by requiring intent to be proven, this Court indicated that intent is a primary concern when determining whether speech constitutes a "true threat" for the purposes of protected speech. *Cassel*, 408 F.3d at 632; *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987) ("The element of intent [is] the determinative factor separating protected expression from unprotected criminal behavior."). The Ninth Circuit reiterated this holding six years later in *United States v. Bagdasarian*, 652 F.3d 1113, 1118 (9th Cir. 2011) (Stating that *Black* describes a "subjective intent-based true threat inquiry").

The Tenth Circuit concluded similarly in *Heineman*, 767 F.3d at 982. In *Heineman*, the defendant was arrested after sending threatening emails to a professor, including one addressing the professor by his name and including a poem containing violently graphic phrases such as "[c]ome the time of the new revolution we will convene to detail you and slay you, by a bowie knife shoved up into the skull" and "[w]e put the noose ring around your neck and drag you as you choke and gasp." *Id.* at 972. At trial, the major issue was whether the First Amendment, via *Virginia v. Black*, "require[d] the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened." *Id.* at 975. The Tenth Circuit ultimately answered in the affirmative, concluding that *Black* requires courts to determine whether the defendant intended to intimidate. *Id.* at 982.

The Ninth and Tenth Circuits correctly interpret this Court's discussion in *Virginia v. Black*. The phrase "means to communicate a serious expression of an intent" requires that the alleged threat-maker intend to intimidate the recipient. *Heineman*, 767 F.3d at 978 (citing *Black*, 538 U.S. 343, 359 (2003)). Without that subjective intent, *Black*'s definition of a true threat is

not satisfied. Accordingly, the Ninth and Tenth Circuit's reasoning was proper and this Court should apply a subjective standard to Ms. Clark's statements.

B. MS. CLARK'S STATEMENTS DO NOT CONSTITUTE A TRUE THREAT UNDER EITHER OF THE APPLICABLE STANDARDS.

Regardless of which standard this Court applies, Ms. Clark's speech does not contain a true threat and therefore cannot be punished by the School District. Under the subjective standard, which requires that the speaker subjectively intend for her speech to intimidate, Ms. Clark's statements are not true threats. As Ms. Clark explained to Principal Franklin, her statements were meant as jokes, not as an attempt in intimidate Ms. Anderson. Additionally, under the objective standard, which asks whether an objectively reasonable individual would interpret the speech as a serious expression of an intent to cause future or present harm, Ms. Clark's speech falls below the threshold of true threats. A reasonable recipient would not interpret Ms. Clark's single Facebook post - posted after Ms. Anderson engaged her in a verbal altercation - as a threat. Likewise, Ms. Clark's speech did not contain true threats.

1. UNDER THE NINTH AND TENTH CIRCUIT'S SUBJECTIVITY STANDARD, MS. CLARK'S STATEMENTS DO NOT CONSTITUTE A TRUE THREAT BECAUSE SHE LACKED THE SUBJECTIVE INTENT TO THREATEN MS. ANDERSON.

In light of the subjective standard, Ms. Clark clearly did not intend to communicate her statements as a threat. First, Ms. Clark posted her statements outside of school hours on her personal Facebook page from her private residence. Although Ms. Clark was aware that Facebook posts "sometimes go beyond one's own friends," her intended recipients were her Facebook "friends."[2] Ms. Clark is not Facebook "friends" with Ms. Anderson or any other

[2] Facebook's website details the process for adding "friends." Specifically, the website states that "You should send friend requests to friends, family and other people you know and trust on Facebook. You can add a friend by searching for them and sending them a friend request. If they

transgender student, meaning Ms. Anderson did not have direct access to Ms. Clark's profile. Since Ms. Clark did not intend for Ms. Anderson to be the recipient of her statements, Ms. Clark cannot have possessed the intent to communicate her statements to Ms. Anderson. On the contrary, a third party – not Ms. Clark – communicated the alleged threats to Ms. Anderson. Further, Ms. Clark's statements were intended as jokes. While the second half of Ms. Clark's post may have been in poor taste, she did not express a desire to harm or intimidate Ms. Anderson. Absent the requisite intent to communicate the alleged threat to Ms. Anderson, Ms. Clark's statements do not constitute a true threat and are thus protected by the First Amendment.

2. EVEN IF THE OBJECTIVE STANDARD IS APPLIED, MS. CLARK'S STATEMENTS DO NOT CONSTITUTE A TRUE THREAT BECAUSE A REASONABLE RECIPIENT WOULD NOT INTERPRET HER SPEECH AS A SERIOUS EXPRESSION OF AN INTENT TO CAUSE HARM.

Although the subjective standard best aligns with this Court's reasoning in *Virginia v. Black*, certain courts have erroneously applied an objective standard to true threats. *Clemens*, 738 F.3d at 3; *Turner*, 720 F.3d at 420; *White*, 670 F.3d at 508; *Porter*, 393 F.3d at 616; *Doe*, 306 F.3d at 616. The objective standard focuses on a reasonable recipient standard, which this Court has never applied in student speech cases. By disregarding the intent of the speaker, the objective standard ignores the heart of this Court's discussion in *Virginia v. Black*. However, even if the objective standard is applied, Ms. Clark's statements still do not reach the level of true threats.

The objective standard for determining whether a statement constitutes a "true threat" asks whether "an objectively reasonable person would interpret the speech as a 'serious

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accept, you automatically follow that person, and they automatically follow you — which means that you may see each other's posts in News Feed." Facebook Help Center, https://www.facebook.com/help/1540345696275090/?helpref=hc_fnav (last visited Jan. 31, 2017).

expression of an intent to cause a present or future harm.'" *Porter*, 393 F.3d 608, 616 (citing *Doe*, 306 F.3d at 622.).[3] In *Doe*, an eighth-grade student was expelled when violent letters that he wrote were discovered. 306 F.3d at 619-20. The letters, written but never sent to the student's ex-girlfriend, contained "violent, misogynistic, and obscenity-laden rants expressing a desire to molest, rape, and murder" the ex-girlfriend. *Id.* at 619. Specifically, one of the letters included use of the "f-word" at least ninety times, frequently referenced the student's desire to "sodomize, rape, and kill" the targeted ex-girlfriend, and stated that she "should not go to sleep because [the author] would be lying under her bed waiting to kill her with a knife." *Id.* at 625. The Eighth Circuit analyzed whether "a reasonable recipient would have interpreted the letter as a serious expression of an intent to harm or cause injury to another." *Id.* at 624. The court held that considering the "intimate" nature of the letter, and because the letter detailed graphic violence "unequivocally" directed at the ex-girlfriend, "any reasonable recipient would have interpreted the letters as a serious expression of an intent to harm the recipient." *Id.* at 625 - 26.

In *D.J.M. ex rel. D.M. v. Hannibal Public School Dist. No. 60*, a student wrote that his friend had a "357 magnum" and that he would shoot "everyone else" except for the girl he liked. 647 F.3d 754, 758 (8th Cir. 2011). The author named specific students that "would be going" which included classmates he labeled as "midget[s]," "fags," and "negro bitches." *Id.* On another occasion, the author wrote that if he did have a gun, a certain classmate "would be the

[3] Two circuits have also imposed a threshold requirement, which requires that the speaker "intentionally or knowingly" communicate the alleged threat "to either the object of the threat or a third person." *Porter*, 393 F.3d at 616; *Doe*, 306 F.3d at 624. In the circuits imposing this additional threshold requirement, "a finding of no intent to communicate obviates the need to assess whether the speech constitutes a 'true threat.'" *Porter*, 393 F.3d at 616 (citing *Doe*, 306 F.3d at 622). Because an intent to communicate the alleged threat to a third person is enough, Ms. Clark's statements satisfied this requirement; she intended to communicate her speech to her Facebook "friends."

first to die," but followed the statement up by saying "I'm not going to do that . . . not anytime soon." *Id.* at 758-59. The author was eventually suspended. *Id.* at 759. The Eighth Circuit considered whether the author's statements were "true threats" and applied the objective standard. *Id.* at 760, 764. Ultimately, the court held that a reasonable recipient would have read the author's messages as a serious expression of an intent to harm the recipient and concluded that the speech was therefore unprotected. *Id.* at 764.

Under the objective standard, Ms. Clark's statements fail to satisfy the true threat requirement. Her post is incomparable to the true threats found in other cases, lacking detailed, explicit, and violent threats against enumerated victims. A reasonable recipient of Ms. Clark's post would be unable to consider her statements an expression of an intent to cause harm. Ms. Clark did not identify any particular actions that she would take, nor did she reference violence of any kind. Accordingly, Ms. Clark's statements simply lack the specificity needed to allow a reasonable recipient to consider those statements to be a threat.

Ms. Clark's speech does not constitute a true threat under either of the applicable standards. Under the subjective standard, the most faithful application of this Court's reasoning in *Virginia v. Black*, Ms. Clark clearly lacked any intent to communicate a serious expression of an intent to harm Ms. Anderson. Further, even if the objective test is applied, a reasonable recipient could not interpret Ms. Clark's vague statements as declarations of an intent to injure Ms. Anderson.

II. THE *TINKER* STANDARD IS INAPPLICABLE TO MS. CLARK'S POST BECAUSE THE POST CONSISTED OF OFF-CAMPUS SPEECH WRITTEN ON A PERSONAL COMPUTER.

Students, like all American citizens, have a fundamental right to free speech. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be

argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). For over forty years, this Court has narrowly construed public schools' authority to restrict the speech of students without impeding on constitutional rights. *Tinker*, 393 U.S. 503 (1969); *Hazelwood*, 484 U.S. 260 (1988); *Fraser*, 478 U.S. 675 (1986); *Morse*, 551 U.S. 393, 406 (2007); Harriet A. Hoder, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. Rev. 1563, 1567 (2009). Specifically, this Court has held that a student's right to free speech may only be chilled if that speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. While *Tinker* clearly governs in-school speech, this Court has never applied the *Tinker* standard to speech made off-campus and not at a school-sanctioned event. Accordingly, this Court should not apply *Tinker* to Ms. Clark's off-campus speech, which was made at her private residence. However, even if this Court analyzes Ms. Clark's speech under the *Tinker* standard, her speech is still protected because it did not cause a material disruption, nor did it invade upon the rights of other students.

A. THIS COURT HAS NEVER APPLIED THE *TINKER* STANDARD TO SPEECH OCCURRING COMPLETELY OFF-CAMPUS AND NOT AT A SCHOOL-SPONSORED EVENT.

First, the *Tinker* standard should not be applied to off-campus speech, because censoring speech made off-campus and not at a school-sponsored event is inconsistent with this Court's decisions on student speech. In *Tinker*, this Court considered whether students could be punished for wearing black armbands to school, demonstrating their opposition to the Vietnam War. *Id*. at 508. The school officials banned the armbands because of their desire to avoid any disruption that the armbands might cause. *Id.* at 510. This Court rejected the ban, stating that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to

freedom of expression." *Id.* at 508. Instead, school officials must prove that the ban "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

Tinker focused on in-school speech expressed during school hours. *Id.* at 513. ("When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinion . . . if he does so without 'materially and substantially interfer(ing) . . . with the requirements of appropriate discipline in the operation of the school . . .'"). This is apparent from the beginning of the *Tinker* opinion onward; especially considering that this Court analyzed First Amendment rights "applied in light of *the special characteristics of the school environment*." *Id.* at 506 (emphasis added). *Tinker* made no mention of punishing students for speech conveyed in the privacy of their own home. Likewise, because Ms. Clark was off-campus and outside of school hours when she made her speech, *Tinker* is clearly inapplicable. Admittedly, Ms. Clark's opinion of transgender individuals is unpopular and her disparaging statements are certainly unpleasant. Despite this, the School District fails to show that their suspension of Ms. Clark was due to something other than her unfavorable opinion, which is protected by the First Amendment.

Additionally, this Court also addressed student speech in three cases after *Tinker*. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *See also Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2009). In *Fraser*, this Court analyzed whether a student could be punished for speech made at a school assembly involving "an elaborate, graphic, and explicit sexual metaphor." *Fraser*, 474 U.S. at 675. This Court noted that the "freedom to advocate unpopular and controversial views *in schools and classrooms* must be balanced against the society's countervailing interest in teaching students the

boundaries of socially acceptable behavior." *Id.* at 681 (emphasis added). Further, this Court contrasted that case to *Tinker*, because the penalties in *Fraser* were not related to any political ideals. *Id.* at 685. This Court's holding ultimately carved out an exception to *Tinker*'s general rule, stating that a student can be punished for "offensively lewd and indecent speech." *Id.* This Court specifically highlighted the sexual nature of the speech, labeling both "insulting to teenage girl students" and potentially "seriously damaging to its less mature audience." *Id.* at 683.

Student speech was again considered in *Hazelwood School Dist. v. Kuhlmeier*. *Hazelwood*, 484 U.S. 260 (1988). In *Hazelwood*, this Court examined whether a school had to affirmatively promote student speech under the First Amendment by publishing articles detailing students' experiences with pregnancy and parental divorce. *Hazelwood*, 484 U.S. at 264, 270-71. This Court held that educators can "exercise editorial control over the style and content of student speech *in school-sponsored expressive activities*," without violating the First Amendment, if "their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 (emphasis added).

This Court's most recent case on student speech was *Morse v. Frederick*. 551 U.S. 393 (2009). In *Morse*, this Court considered whether students could be punished for displaying a banner, reading "BONG HiTS 4 JESUS," at a school-supervised and school-sanctioned event. *Id.* at 393. This Court held that a principal can "restrict student speech *at a school event*, when that speech is reasonably viewed as promoting illegal drug use." *Id.* at 403 (emphasis added).

As noted by the district court here, which ruled against Ms. Clark, none of this Court's cases involving student speech addressed whether off-campus student speech can be regulated. Record 8. Whereas *Tinker* involved symbolic speech expressed at school, Ms. Clark posted her opinion outside of school; particularly, she spoke at home on her personal computer after school

hours. *Fraser* involved in-school speech that was indecent and lewd. Dissimilarly, Ms. Clark's speech was not in-school, nor was it sexual in nature. She merely gave an unpopular opinion – while outside of school to her Facebook "friends" – which this Court in *Tinker* stated was not enough by itself to justify the school's intervention. *Tinker*, 393 U.S. at 509. *Hazelwood* analyzed a controversy over school-sponsored speech, expressed in a school newspaper, which is factually distinct from the present case. Ms. Clark used her own computer and her own Facebook profile to make the speech, not a school-sponsored medium. Finally, *Morse* involved speech made at a school-sponsored event, while Ms. Clark's speech was made from her private residence. Clearly, Ms. Clark's off-campus, outside-of-school hours speech involves a situation not yet addressed by the Supreme Court and not within the purview of *Tinker* nor its progeny.

B. THE *TINKER* STANDARD SHOULD ONLY BE APPLIED TO OFF-CAMPUS SPEECH IF THAT SPEECH CONTAINS SPECIFIC THREATS OF VIOLENCE OR INCITES ON-CAMPUS ACTIVITY.

The *Tinker* standard is inapplicable to the present case, because Ms. Clark's speech contained no specific, violent threats, nor did it prove any related on-campus activity. Ms. Clark's Facebook post satisfies neither of these standards: her statements were vague and conditional and there was no in-school response to her post. As such, *Tinker* should not be applied to the Facebook post.

Admittedly, some Circuits have incorrectly applied *Tinker* to out-of-school student speech cases. However, the facts of those cases are distinguishable. The Circuits that apply *Tinker* to off-campus speech do so only when that speech includes violent, specific threats towards school community members, *Wisniewski v. Board of Educ. of Weedsport Cent. School Dist.*, 494 F.3d 34 (2d Cir. 2007); *Bell v Itawamba County Sch. Board*, 774 F.3d 280 (5th Cir. 2014); or when that speech is accessed at school or involves a large number of students targeting

another student. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist*., 696 F.3d 771, 778 (8th Cir. 2012); *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011). In the present case, where a single Facebook post was written off-campus and outside of school hours by one student, containing only a personal opinion and vague comments about another student, absent specific threats of violence and without the intent to reach the school community, *Tinker* should not be applied.

1. MS. CLARK'S COMMENTS LACKED SPECIFICITY AND MENTIONED NO VIOLENT ACTIONS.

Unlike the cases in which *Tinker* was applied to off-campus speech, Ms. Clark's comments contained no mention of violence or specific threats. For example, in *Wisniewski v. Board of Educ. of Weedsport Cent. School Dist.*, the Second Circuit applied *Tinker* to a violent drawing of his teacher, made off-campus, which was used as the student's "IM icon." 494 F.3d 34, 38 (2d Cir. 2007). However, unlike Ms. Clark's Facebook post, which was only visible for three days prior to her being suspended, the drawing in *Wisniewski* was visible for three weeks before the artist was suspended. *Wisniewski*, 494 F.3d at 36. Further, the speech in *Wisniewski* included a drawing of a pistol firing a bullet, splattered blood, and the words "Kill Mr. VanderMolen," the targeted teacher. *Id.* at 36.

The Fifth Circuit also applied *Tinker* to off-campus speech in *Bell v Itawamba County Sch. Board*, 774 F.3d 280 (5th Cir. 2014). *Bell* involved a student posting an off-campus recording onto Facebook (and later onto YouTube) that accused two teachers of having sexual intercourse with female students. *Bell*, 774 F.3d at 284. The video, which was viewable to the public for over a week before the student was suspended, included specific and violent lyrics, such as "I'm going to hit you with my rueger" and "going to get a pistol down your mouth." *Id.* at 285. In making its decision, the Fifth Circuit noted that *Tinker* could only be applied to off-

campus speech when the student intends that their off-campus speech "reach the school community" and incorporates specific violent messages. *Id.* at 295. The Fifth Circuit ultimately held that *Tinker* applies "when a student intentionally directs at the school community speech reasonably understood by school officials to *threaten, harass, and intimidate a teacher*, even when such speech originated, and was disseminated, off-campus without the use of school resources." *Id.* at 296 (emphasis added).

The Ninth Circuit applied *Tinker* to off-campus speech in at least two cases, *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) and *Wynar v. Douglas Co. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013). In *LaVine*, the Ninth Circuit applied *Tinker* to a letter written off-campus by a student, but eventually brought to school, which included phrases such as, "I pulled my gun . . . and began to load it", "[T]hrew open the door, bang, bang, bang-bang", and "all I could here, were screams . . . of shear horor, as the students, found their, slayen classmates." *LaVine*, 257 F.3d 981, 983-84. The court justified extending the *Tinker* standard to off-campus because the student had a history of troubling behavior and because the letter contained a graphic description of violence in schools. *Id.* at 989-90. The Ninth Circuit again applied *Tinker* to off-campus speech in *Wynar*, which involved a student writing violent MySpace messages that expressed his desire to bring a gun to school and murder his classmates. *Wynar*, 728 F.3d at 1065-66.[4] In *Wynar*, the Ninth Circuit held that *Tinker* could be applied when a school is "faced with an identifiable threat of school violence." *Id.* at 1069.

[4] The student also stated that he wanted to commit this violence on April 20th, but hadn't decided which April 20th he would choose. *Id.* at 1065. April 20th is significant because it is Adolf Hitler's birthday, the date of the Columbine massacre, and within days of the anniversary of the Virginia Tech massacre. *Id.*

The drawing in *Wisniewski*, which featured a pistol and blood stains, is remarkably dissimilar to the vague comments posted by Ms. Clark, who specified no weaponry or acts of violence. Further, while Ms. Clark mentioned the school's policy regarding transgender students, she did not threaten, harass, or intimidate anyone, teacher or student. Ms. Clark's post did not include specific and violent threatening, harassing, or intimidating language. Additionally, the facts in *LaVine* and *Wynar* are unmatched by those in the present case. Ms. Clark's speech clearly does not involve violence and vitriol like the speech made in *LaVine* and *Wynar*. Therefore, the Second, Fifth, and Ninth Circuits' limited applications of *Tinker* does not support applying *Tinker* to Ms. Clark's off-campus conduct.

2. MS. CLARK'S SPEECH DID NOT SUFFICIENTLY INTERTWINE WITH THE SCHOOL ENVIRONMENT.

The Fourth Circuit applied *Tinker* in *Kowalski v. Berkeley County Schools. Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011). *Kowalksi* involved a 12th grade student who created a discussion group webpage on MySpace under the heading S.A.S.H., which either meant "Students Against Sluts Herpes" or "Students Against Shay's Herpes" (in reference to Shay N., the high school student that was targeted by the webpage). *Kowalski*, 652 F.3d at 567. The author of the webpage invited "approximately 100 people" to join the page; around two dozen students from the author's high school joined the group. *Id.* The webpage's content included edited photographs of Shay N. that claimed she had herpes and featured a sign reading "portrait of a whore." *Id.* at 568. The webpage also included comments that acknowledged that Shay N. had seen the photographs and a comment that stated "screw her." *Id.* Upon notice of the webpage by Shay N.'s father, school administrators suspended the author from school for violating the school's policy against "harassment, bullying, and intimidation." *Id.* at 569. The webpage's author later filed suit, alleging that her First Amendment rights had been violated by

her punishment. *Id.* at 570. The Fourth Circuit applied *Tinker*, finding that a significant number of Kowalski and Shay N.'s classmates had joined the webpage upon Kowalski's invitation. *Id.* at 573. The Court also pointed out that a student at the school accessed the webpage "from a school computer." *Id.* at 574.

The Eighth Circuit applied *Tinker* to off-campus speech when two students created a blog "to discuss, satirize, and 'vent' about events at" their school. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771, 778 (8th Cir. 2012). The blog featured "a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates." *S.J.W.*, 696 F.3d at 773. Within three days, the entire school had learned about the blog and the creators were suspended. *Id.* at 774. However, the blog was not entirely an off-campus activity. The record shows that one of the blog's creators used an on-campus computer to upload files to the blog. Further, the blog was accessed by students at school on more than one occasion. *Id*. at 773.

Unlike the student in *Kowalski*, there is nothing to suggest that Ms. Clark intended for her speech to reach the school community. *See J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 930-31 (3rd Cir. 2011) (stating that when a student posts speech online, being "friends" with classmates on the social media does not necessarily mean that the student is targeting their school). Likewise, nothing in the record suggests that Ms. Clark's speech intertwined with on-campus posting or access in any manner. Furthermore, Ms. Clark's speech was not available to the entire school – Ms. Clark's comment was posted to her Facebook page, which is only viewable by her Facebook "friends." Accordingly, there is no substantial connection between Ms. Clark's off-campus speech and the school community, which means that *Tinker* should not be applied.

3. EXPANDING *TINKER* TO OFF-CAMPUS INTERNET SPEECH IMPERMISSIBLY CHILLS STUDENT SPEECH.

Expanding the *Tinker* standard to off-campus internet speech, especially when that speech does not contain specific and violent threats, would impermissibly chill the free speech rights of students. Although the majority in *Bell v. Itawamba County School Board* applied *Tinker* to an off-campus recording, Judge Dennis's dissent illustrates the danger of extending *Tinker* to off-campus speech. Judge Dennis vehemently disagreed with the majority's holding, stating that it allowed "schools to police their students' Internet expression anytime and anywhere – an unprecedented and unnecessary intrusion on students' rights." *Bell*, 774 F.3d at 405 (Dennis, J., dissenting). Judge Dennis further wrote that "the majority opinion's undue deference to a public school board's assertion of authority to censor the speech of students while not within its custody impinges the very core of our Constitution's fundamental right to free speech." *Id.* at 406, (Dennis, J., dissenting).

The precise censorship Judge Dennis foresaw is self-evident in the present case. Ms. Clark was not in the school's custody when she posted her Facebook status; she was at home, after school hours, and on her personal computer. Although Ms. Clark is a student, nothing else indicates that her statements fall under the umbrella of student speech. Allowing students to be punished for non-violent, off-campus social media posts sets a harsh precedent to follow. Unfortunately, students have always voiced negative opinions of each other. Because this behavior has evolved with the advent of the internet age, these opinions are now often expressed online. Once speech is digitally posted, it exists "nowhere and everywhere at the same time." Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fla. L. Rev. 1090 (2008). As such, it could always be argued that online speech would find its way onto a school campus.

Accordingly, if *Tinker* is applied to off-campus internet speech, it will be impossible to draw the line between allowable internet speech and forbidden internet speech.

Instead of regulating students' online speech, schools should strive to educate their pupils about the risks of posting online and the importance of using social media responsibly. This approach is faithful to Justice Brandeis' concurrence in *Whitney v. California*, 274 U.S. 357, 372 (1927). In *Whitney*, Justice Brandeis proclaimed that "[t]hose who won our independence . . . [knew] that fear breeds repression; that repression breeds hate; that hate menaces stable government; [and] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." *Id.* at 373. This concept still applies today, when students use social media to communicate and to vocalize their criticisms. By preventing students from speaking freely online, their expression is being unreasonably stifled.

Accordingly, this Court should not extend *Tinker* to off-campus online speech when that speech does not include mention of specific violence. Students, like all citizens, must be allowed to express their thoughts and grievances without fear of persecution. Punishing students for online speech that does not satisfy this standard is an impermissible abuse of the First Amendment.

C. EVEN IF THE *TINKER* STANDARD IS APPLICABLE, IT IS NOT SATISFIED IN THIS CASE BECAUSE MS. CLARK'S SPEECH DID NOT CAUSE A MATERIAL DISRUPTION, NOR DID IT INTRUDE UPON THE RIGHTS OF OTHER STUDENTS.

Ms. Clark's speech does not satisfy either prong of the *Tinker* standard. *Tinker* allows student-speech to be limited if that speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." 393 U.S. 503 at 508. Additionally, "*Tinker* requires a specific fear of disruption, not just some remote apprehension of disturbance." *Saxe v. State College Area School Dist.*, 240 F.3d 200, 211 (3rd Cir. 2001).

Further, the disruption in question cannot be the mere objection of other students; if that constituted a material disruption, school officials would be able to restrict all types of expression. *Saxe*, 240 F.3d at 211 (citing *Clark v. Dallas Independent Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992)).

1. MS. CLARK'S SPEECH DID NOT CAUSE A MATERIAL DISRUPTION.

Ms. Clark's speech did not cause a material disruption to the school environment. The Seventh Circuit considered what exactly constituted a material disruption in *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204.* 523 F.3d 668, 674 (7th Cir. 2008). Specifically, the Seventh Circuit stated that a school could only forbid speech if "there is reason to think that [the]… student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school." *Id.* (inferring these examples of material disruption from *Morse* and *Fraser*).

There is no evidence that Pleasantville High School is a "sick school," nor is it foreseeable that student test scores will decline because of Ms. Clark's Facebook post. Further, while Ms. Anderson's parents kept her home from school, there is no evidence to suggest that her absences on November 3rd and 4th were due solely to the Facebook comment posted on the evening of November 2nd, or that other students would miss school. In fact, Ms. Cardona, another transgender student who was allegedly offended by the Facebook post, was present and accounted for at school on November 3rd and 4th without incident. On the contrary, Principal Franklin referenced the verbal disagreement that occurred at the basketball game when discussing why Ms. Anderson's parents kept Ms. Anderson home from school for two days. A single student staying home from school certainly does not indicate an upsurge in truancy.

In *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, the Third Circuit considered whether a student caused a "material disruption." 650 F.3d 915 (3rd Cir. 2011). While off-campus, the student in question created a fake Myspace profile pretending to be one of her teachers, which was "private" and could only be accessed by the student and her friends. *Id.*, 650 F.3d at 920. The profile's "About me" section described the teacher in vulgar and explicit terms. *Id.* at 921. The court's record reflected that nobody took the profile seriously and that the profile was meant as a joke, evidenced by the "outrageous" nature of the page's content. *Id.*[5] The Third Circuit ultimately held that there was no material disruption caused by the profile, nor was a disruption foreseeable. *Id*. at 929. Ms. Clark's statements were also posted on a private Facebook page, which could only be accessed by her Facebook "friends." Her page was not directly accessible by Ms. Anderson or any other transgender individuals. Additionally, the language used in Ms. Clark's post was not vulgar or lewd. Further, the post, which was clearly a reaction to the disagreement at the girls' basketball game, was intended as a joke. Finally, Ms. Clark's post was written off-campus. As such, Ms. Clark's statements are even less disruptive than the MySpace profile in *Snyder*, which was found not to constitute a material disruption.

The Fourth Circuit analyzed the material disruption prong in *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), which involved a student-created webpage containing fellow students' targeted harassment of another student. In regards to material disruption, the court found that because two dozen students from the author's high school became members of the group, the webpage had been accessed at the school, and the webpage's

[5] The MySpace profile's "About me" section stated "HELLO CHILDREN[.] . . . it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] . . . I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man . . ." *Snyder*, 650 F.3d at 921.

name itself contained the word "student," it was reasonably foreseeable that a material disruption would occur at school. *Id.* at 574.

Ms. Clark's statements are incomparable to the speech in *Kowalski*. Ms. Clark posted a single Facebook post. She did not invite other students to view or comment on the post in an attempt to harass Ms. Anderson, nor was the post accessed at school or during school hours. The record does not show that anyone commented on Ms. Clark's post or that it prompted any discussion about Ms. Anderson or other transgender students. Furthermore, after the status was posted on Facebook, only two individuals "liked" the status within twenty-two hours of it being posted. Therefore, Ms. Clark's post is clearly distinguishable from the webpage created in *Kowalski* and did not create a material disruption at Pleasantville High School.

2. MS. CLARK'S SPEECH DID NOT INTRUDE UPON THE RIGHTS OF OTHERS.

Under the second prong of *Tinker*, schools can only punish student speech that "impinge(s) upon the rights of other students." *Tinker*, 393 U.S. at 509. This includes interference that "colli[des] with the right of other students to be secure and to be let alone." *Id.* at 508. However, it is unclear what type of speech rises to the level of infringement referenced by the *Tinker* Court.

In *Chandler v. McMinnville School Dist.*, the Ninth Circuit stated that the rights of other students may be infringed by "vulgar, lewd, obscene, or plainly offensive" student speech. *Chandler v. McMinnville School Dist.*, 978 F.2d 524, 528-29 (9th Cir. 1992) (citing *Hazelwood*, 484 U.S. at 271). In *Harper v. Poway Unified School Dist*., the Ninth Circuit considered whether a student could be suspended for wearing a shirt that stated "BE ASHAMED, OUR SCHOOL HAS EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL" to school on a "Day of Silence" meant to promote "tolerance of others,

particularly those of a different sexual orientation." 446 F.3d 1166, 1171-72 (9th Cir. 2006). The Ninth Circuit specifically noted that the school "had a history of conflict among its students over issues of sexual orientation." *Id.* at 1170. The Ninth Circuit ultimately applied *Tinker* and inquired whether the shirt had caused a substantial interference with school activities. *Id.* at 1178. The court concluded that the shirt "colli[ded] with the rights of other students" and that "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 attack *while on school campuses*." *Id.* at 1178 (emphasis added). *Harper* further focused on the treatment of students "in a school environment" and cited to the consequences of verbal abuse "at school." *Id.* at 1179. Further, the Ninth Circuit specifically noted that their holding was "limited to conduct that occurs in…schools." *Id.* at 1183. Clearly, *Harper*'s holding only applies to on-campus speech. The Ninth Circuit's application of *Tinker* rightfully focuses on interference that occurs within the school environment. In the present case, there was no interference inside or outside of school. Ms. Clark's speech is completely dissimilar from the speech in *Harper*, which involved speech *in school* and focused on protecting individuals from offensive speech made *on-campus*. Further, the Ninth Circuit again highlighted the school's history of disputes involving sexual orientation, which is not apparent in the current case.

In *West v. Derby Unified Sch. Dist. No. 260*, the Tenth Circuit applied *Tinker* when determining whether a student could be suspended for drawing a Confederate flag, in violation of a School District policy that forbade the possession of "any written material…that is racially divisive or creates ill will or hatred." 206 F.3d 1358, 1361 (10th Cir. 2000). The district policy was adopted as a response to incidents of racial tensions between white and black students at Derby High School. *Id.* The Tenth Circuit ultimately held that the suspension was proper

because the school district officials "had reason to believe that a student's display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone." *Id.* at 1366. Specifically, the Tenth Circuit noted that the school had recently seen a "series of racial incidents . . . some of which were related to the Confederate flag . . . [which] included hostile confrontations between a group of white and black students at school and at least one fight at a high school football game." *Id.* This history of racial tension justified the Tenth Circuit's decision to allow the suspended student's punishment to stand. *Id.*

This case is devoid of any analogous history. Although Ms. Clark and Ms. Anderson did engage in a verbal disagreement, there is no documented history of any previous tension between Ms. Clark and Ms. Anderson, or between Ms. Clark and any transgender student, or between any of the students at Pleasantville High School. There was certainly nothing that arose to the level of the multiple confrontations between the white and black students mentioned in *West v. Derby Unified School Dist. No. 260*. The lone disagreement between Ms. Clark and Ms. Anderson occurred during a intrasquad basketball scrimmage, not because of Ms. Anderson's gender.

Considering that there is no history of tension in this case, there is no evidence that Ms. Clark's lone Facebook post is enough to interfere with the rights of other students. Nothing in the record suggests that any students are in jeopardy, particularly Ms. Anderson, Ms. Cardona, or any other transgender student. As noted by the court of appeals below, nothing in the record suggests that Ms. Clark was considered to be violent by her peers, nor does she have a history of violence. Record 31. Thus, there has been no interference with any student's rights. On the contrary, the only student whose rights have been interfered with is Ms. Clark, who has been punished for expressing an opinion on a school policy and for making ambiguous comments

about another student from her own home and from her own computer. Therefore, the second prong of the *Tinker* standard is not satisfied in this case.

CONCLUSION

Ms. Clark's speech is protected under the First Amendment because her speech does not constitute a true threat under either of the applicable interpretations. Further, the *Tinker* standard does not govern Ms. Clark's speech, because her post was written off-campus on her personal computer. Finally, even if the *Tinker* standard applies, Ms. Clark's speech is still protected because it did not cause a material disruption, nor did it interfere with the rights of other students.

For the foregoing reasons, Ms. Clark respectfully requests that this court affirm the decision of the United States Court of Appeals for the Fourteenth Circuit and find that her suspension violated the Free Speech Clause of the First Amendment.