Team O

Brief on the Merits

No. 16-9999

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2016

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 PETITIONER

QUESTIONS PRESENTED

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

2. Whether 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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The order of the United States District Court for the District of New Columbia is unreported and contained in the Record on Appeal (hereinafter "R." 1-12). The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported and contained in the Record on Appeal. R. 25-39.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on January 5, 2017. The 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).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

STATEMENT OF THE CASE

I. Statement of the Facts

In an effort to promote inclusion and prevent discrimination within the public school setting, the Washington County School District ("School District") enacted a policy in 2015 titled "Non-Discrimination in Athletics: Transgender and Gender Nonconforming Students." R. at 15-16. The policy allows students to participate in physical education, club sports, and interscholastic athletics consistent with their chosen gender identity. R. at 15. The School District's goal in enacting this provision is to create a safe, inclusive learning environment for all students. R. at 15. This policy allowed Taylor Anderson, a sophomore at Pleasantville High School, to play on the girls' basketball team because she identifies as a female, although she was born male. R. at 2. Kimberly Clark, a freshman at Pleasantville High School, was born female and continues to identify as such. R. at 13. Ms. Clark is also a member of the girls' basketball team at Pleasantville High School. R. at 23. On November 2, 2015, during an intrasquad basketball game, Ms. Clark and Ms. Anderson got into a verbal altercation, resulting in their ejection from the game. *Id*.

The Facebook Post. At home later that evening, Ms. Clark posted a status on her publicly accessible Facebook page and made an "overtly offensive and thoroughly degrading" comment regarding Ms. Anderson and other transgender students. R. at 10, 23. Her post stated:

> I can't believe Taylor was allowed to play on a girls' team! That boy (that IT!!) should never be allowed to play on a girls' team. TRANSGENDER is just another word for FREAK OF NATURE!!! This new school policy is the dumbest thing I've 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.

R. at 18.

The Reaction. Two days after the post, Ms. Anderson and another transgender student at Pleasantville High School, Josie Cardona, along with their parents, met with Principal Franklin to show him Ms. Clark's post. R. at 13. During the meeting, the Andersons and the Cardonas voiced their concern that Ms. Clark's threatening words would lead to violence against their children because they were transgender. R. at 14. Principal Franklin observed that the Facebook post visibly distressed both girls; their parents were apprehensive in allowing their children to attend school and participate in the girls' basketball team. *Id*. Further, fearing for their daughter's safety, the Andersons kept her home from school the two days after the post was made. *Id*. Principal Franklin also heard complaints about the post from other students in the school, and noted that at least a few students were visibly upset. *Id.*

The Suspension. Principal Franklin arranged a meeting with Ms. Clark and her parents. *Id.* He showed them the Facebook post Ms. Clark wrote, along with the School District's Non-Discrimination in Athletics policy and the Anti-Harassment, Intimidation, and Bullying Policy. *Id*. The Bullying Policy prohibits communication that would reasonably harm a student, interfere substantially with their education, threaten their overall educational environment, and/or substantially disrupt the operation of the school. R. at 17.

Ms. Clark stood by her words, reaffirming that she felt that biologically male transgender students competing on the girls' basketball team was unfair, dangerous, and immoral. R. at 24. Although Ms. Clark stated that her threatening post was a joke, she admitted she knew her message would likely reach Ms. Anderson and other transgender students. R. at 14. Following the meeting with the Clarks, Principal Franklin suspended Ms. Clark for three days pursuant to the School District's Bullying Policy. *Id.*

II. Procedural Posture

The School Board Review. Later that day, Mr. Clark filed an appeal with the Washington County School Board, the governing body of the School District, disputing his daughter's suspension. R. at 20. The school board upheld the prescribed punishment, noting that Ms. Clark's post constituted a true threat, and that it materially disrupted the high school and "clearly collide[d] with the rights of other students to be secure in the school environment." R. at 21.

The District Court. Ms. Clark's father filed a complaint in the District Court where he sought declaratory relief, alleging that the School District violated Ms. Clark's First Amendment rights. R. at 3. The District Court upheld the School District's determination that the Facebook post was a true threat and therefore not afforded First Amendment protection. R. at 4. The court reasoned that even if the statements did not constitute a true threat, the Facebook post created a material disruption at the school and caused other students to feel unsafe and insecure in their school environment, thus giving the school authorities the ability to regulate the communication. R. at 4.

The Court of Appeals. The Fourteenth Circuit Court of Appeals reversed and remanded the case to the District Court with instruction to enter summary judgment for Ms. Clark. R. at 39. The court concluded that Ms. Clark's Facebook post was not a true threat, and was therefore entitled to First Amendment protection. *Id.* The court also held that School District was not authorized to discipline Ms. Clark for her off campus activity. *Id.* The School District appealed and the Supreme Court granted certiorari. R. at 40.

SUMMARY OF ARGUMENT

This Court should reverse the Fourteenth Circuit's decision because (1) Ms. Clark's statement constituted a true threat beyond the protection of the First Amendment and (2) the School

District did not violate Ms. Clark's First Amendment rights by suspending her for her off-campus Facebook post that was materially disruptive and collided with the rights of other students to be secure at school. First, Ms. Clark's Facebook post is not entitled to First Amendment protection because it was a true threat to Ms. Anderson and other transgender students at school. The true threat doctrine was created by this Court to carve out an exception for otherwise protected speech. That is to say, true threats are not afforded First Amendment protection because of the detrimental effect it has on the listener.

To determine whether a statement is a true threat, circuits have generally adopted an objective test, asking whether a reasonable person would interpret the statements as a serious threat. This test focuses on the reasonable person and is fact-intensive, taking into account the full context in which the speaker made the statement. Circuits have also noted that with the increase in school violence, threats from students—particularly through social media outlets—should not be taken lightly. Other courts have considered whether the speaker intended to communicate the threat to the recipient. However, this subjective standard misses the purposes of the true threat doctrine. Here, Ms. Clark's post was a true threat because a reasonable person would believe Ms. Anderson and other transgender students were in danger of bodily harm.

The objective standard furthers the public policy behind why true threats are not protected speech; the purpose behind the true threat doctrine is to protect individuals from the debilitating fear of violence. The objective standard furthers this by focusing on the fear of violence that a reasonable person would feel. However, when a court adopts a subjective standard, requiring the speaker to intend to threaten the recipient, it ignores any reasonable apprehension and fear that the threat creates. Whether or not a serious threat is given First Amendment protection would be based

solely on how the speaker characterizes the statement, ignoring any effect it may have on the recipient.

Second, the District Court correctly applied *Tinker* in upholding the School District's decision to punish Ms. Clark for her off-campus Facebook post. In recent times, the advent of social media has blurred the line between what constitutes on and off-campus speech, placing school officials in the nearly impossible situation of delineating what speech they may regulate. This Court should—as it has done before—take into account the reality of new technologies and not allow students who target their peers online to hide behind the other side of the schoolhouse gate.

Tinker's "material disruption" test was designed to promote school officials' ability to preserve an orderly and educational school environment. While several lower courts have placed threshold requirements on when *Tinker* applies, they all ask one fundamental question: is it reasonably likely for the off-campus speech to reach the school? Here, it was reasonably likely that Ms. Clark's threatening Facebook post would reach the school because it specifically targeted Ms. Anderson and all other transgender students at Pleasantville High School. As a result, it materially disrupted the school environment.

School officials also have a duty to provide a safe environment conducive to education for all students. This was recognized by this Court in *Tinker*, when it espoused that students have the right to be secure and let alone. This was later expanded to prohibit targeting students based on their core identifying characteristic. Ms. Clark's post—specifically targeting transgender students—not only disrupted the school environment, but collided with the rights of those students to be secure. Allowing Ms. Clark's speech to go unpunished would place a school-sponsored badge of inferiority on those targeted students. If students are not secure in schools, schools cannot hope

to achieve their fundamental mission: education. Therefore, this Court should reverse the Fourteenth Circuit's decision and reinstate summary judgment in favor of the School District.

STANDARD OF REVIEW

The issues before this Court are all legal in nature, which this Court reviews *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014). In First Amendment cases, this Court independently examines the statement or action at issue and what circumstances the statement was made to ensure that the statement was made in free expression and without coercion. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

ARGUMENT

I. MS. CLARK'S FACEBOOK POST IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION BECAUSE IT IS A TRUE THREAT.

Ms. Clark's actions fall outside First Amendment protection because her statement constitutes a true threat. The government cannot prescribe what people see, read, speak, or hear under the First Amendment. U.S. Const. amend. I. However, its protections are not absolute; the Supreme Court has recognized certain narrow classes of speech—including "true threats." *Watts v. United States*, 394 U.S. 705, 707 (1969) (creating the true threat doctrine because "a threat must be distinguished from what is constitutionally protected speech."). Such speech is not protected because it is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571 (1942). Federal circuit courts have generally adopted an objective test to determine if speech is a true threat. *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997); *United States v. Francis*, 164 F.3d 120 (2d Cir. 1999); *United States v. Stock*, 728 F.3d 287 (3d Cir. 2013); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 614 (5th Cir. 2004); *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997); *United States v. Aman*, 31 F.3d 550 (7th Cir. 1994); *Doe*

v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002); *United States v. Martin*, 163 F.3d 1212 (10th Cir. 1998).

The majority of circuits have inquired whether a person making the statement "should have reasonably foreseen that the statement [s]he uttered would be taken as a threat by those to whom it is made." *Fulmer*, 108 F.3d at 1491. The Eighth Circuit created a five factor test to determine whether a reasonable recipient would find the statement or action a true threat. *Doe*, 306 F.3d at 623. On the other hand, a minority of circuits have used a subjective test, looking to whether the speaker "intentionally or knowingly" communicated a threat. *United States v. Cassel*, 408 F.3d 622, 630 (9th Cir. 2005). However, this approach goes against public policy and should be rejected by this Court. Accordingly, Ms. Clark's Facebook post is not afforded First Amendment protection.

A. Ms. Clark's statements are objectively true threats.

Ms. Clark's Facebook post is a true threat under the objective standard.[1] The standard for determining whether certain actions or statements are true threats and thus not afforded First Amendment protection, is when a reasonable person would interpret the statements as serious threats. *United States v. Orozco–Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990). Alternatively stated, when a reasonable recipient would believe that the speaker was serious in their threats. *Id*. With the advent and growing popularity of social media, the platforms available to those wishing

[1] Both the objective and subjective standard are interpretations of how courts should determine whether a statement is a true threat. However, "whether a defendant's statement is a true threat or mere political speech is a question for the jury." *United States v. Viefhaus*, 168 F.3d 392, 397 (10th Cir. 1999). That is to say, whether Ms. Clark's speech is political speech or religious speech is of no import because the issue before this Court is what standard should be applied to true threats.

to threaten others is constantly expanding, particularly in the public school setting. It is against this background that Ms. Clark's Facebook post should be analyzed.

A reasonable person would perceive Ms. Clark's words and conduct as a true threat to Ms. Anderson and other transgender students at Pleasantville High School. "For if an individual makes a true threat to another, the government has the right, if not the duty, to 'protect individuals from the fear of violence, from the disruption that fear endangers and from the possibility that the threatened violence will occur.'" *United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)). The objective standard relies on context and "forces jurors to examine the circumstances in which a statement is made." *Id.* at 477.

In *United States v. Wheeler*, Mr. Wheeler, angry after being arrested by Colorado police officers, posted on Facebook: "to my religious followers and religious operatives: if my dui charges are not dropped, commit a massacre in the stepping stones preschool and day care, just walk in and kill everybody." 776 F.3d 736, 738 (10th Cir. 2015). The Tenth Circuit, in employing the objective standard, asked if those who read that statement would reasonably consider that "an actual threat has been made." *Id.* at 743. Additionally, the court utilized a fact-intensive analysis, taking in "the full context of the posts" and the "collective consciousness which includes recent massacres at educational and other institutions by active shooters." *Id.* at 745. In response to Mr. Wheeler's post, one officer called it chilling and his wife responded that she wanted to get comfortable using a firearm; another officer warned the local schools and churches and ensured that his wife was armed. *Id.* at 746. One person who saw the post was so alarmed that they called the police. *Id.* The court ultimately reversed and remanded, finding that the district court erred in not instructing the jury on a wholly separate, subjective standard required by statute. *Id.*

While the Tenth Circuit in *Wheeler* focused primarily on the reactions from the recipients, the Eighth circuit created a non-exhaustive five factor balancing test for determining true threats. *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002). In *Doe*, the Eighth Circuit ruled that expelling a student for a written threat did not violate the First Amendment. *Id* at 619. In that case, the student wrote a disturbing letter about killing his ex-girlfriend that his classmate found, stole, and gave to the ex-girlfriend. *Id.* The student was expelled for violating school policy against making "terrorizing threats against others." *Id.* at 620. The court said that the relevant questions were not whether the student wrote the letter at home, but (1) whether he intentionally or knowingly communicated the letter to his ex-girlfriend or a third party and (2) whether a reasonable recipient would consider the letter a threat. *Id.* at 624. Furthermore, the court looked to a list of five non-exhaustive factors:

> 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened[2]; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

Id. at 623. The Court noted that when the friend found the letter in the student's room, although the student first grabbed the letter out of the friend's hands, he later allowed him to read it, knowing that he might tell his ex-girlfriend because they were friends. *Id.* at 623. Ultimately, the Eighth Circuit held that a reasonable recipient would have perceived the letter as a serious expression of

[2] However, the Ninth Circuit in *Wynar v. Douglas Cty. Sch. Dist.*, relied on a "report by the Secret Service and the Department of Education that examined 37 incidents of targeted school shootings and school attacks found that nearly two-thirds of the attackers had never been in trouble or were rarely in trouble at school." 728 F.3d 1062, 1071 n.8 (9th Cir. 2013) (citing Bryan Vossekuil et al., *The Final Report and Findings of the Safe School Initiative*, U.S. Secret Serv. & U.S. Dep't of Educ., ii, 20 (May 2002), https://www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf.)

intent to harm, so the school's administrators did not violate the student's "First Amendment rights by initiating disciplinary action based on the letter's threatening content." *Id.* at 626-27.

Courts have also acknowledged that the rise of school violence over the years, exacerbated through social media such as Facebook, has greatly affected the landscape of the true threat doctrine. Violence is "prevalent in public schools today, and . . . teachers and administrators must take threats by students very seriously." *Lovell By & Through Lovell v. Poway Unified Sch. Dist*., 90 F.3d 367, 374 (9th Cir. 1996) (holding that a statement made by an angry high school student about the school's guidance counselor was not protected by the First Amendment). "School administrators must be vigilant and take seriously any statements by students resembling threats of violence" including those made online. *Bell v. Itawamba Cty. Sch. Bd*., 799 F.3d 379, 393 (5th Cir. 2015). For instance, Facebook allows users to post on their Facebook page for other users to view, including—but not limited—to Facebook "friends," expanding individuals' capabilities to make true threats. *Elonis v. United States*, 135 S. Ct. 2001, 2004 (2015); *see also Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057 (D. Or. 2015); *Bell*, 799 F.3d at 393; *Wheeler*, 776 F.3d at 736; *Jeffries*, 692 F.3d at 473.

Here, Ms. Clark's statement rises to the level of a true threat. A reasonable person would interpret the statement Ms. Clark made as a serious threat, placing the recipient in danger of bodily harm. Similar to the student in *Wheeler*, Ms. Clark came home irate on November 2, 2015, and made an angry post on Facebook. R. at 23. "Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too." R. at 18.

The Tenth Circuit concentrated on a fact-intensive analysis, which here would examine the effect Ms. Clark's post had on her peers: Ms. Anderson and Ms. Cardona were visibly upset by the

post, their parents were apprehensive about allowing them to go back to school, the Andersons even kept their daughter home for two days for her safety, and other students complained about the post, some visibly upset. R. at 14. Although Ms. Clark claimed that these comments were a joke, there is nothing within the post to indicate such, especially considering she just got into a verbal altercation with Ms. Anderson earlier that day. R. at 23.

Satisfying the *Doe* factors, Ms. Clark intentionally and knowingly communicated to a third party what a reasonable recipient would consider a serious threat. First, the Andersons' reacted to the post by keeping their daughter home for two days, fearing for her safety; other students, including Ms. Cardona, too feared for their well-being. R. at 14. Second, the threat was not conditional. R. at 18. Third, when talking to Principal Franklin, Ms. Clark admitted that her message was likely to get to and alert Ms. Anderson and other transgender students at her high school. R. at 14. So although it was not stated directly to Ms. Anderson or other transgender students, it was made with the knowledge that they were likely to obtain the information. *Id*. Fourth, although the speaker may not have made threats against the person purportedly threatened, Ms. Clark had gotten into a verbal altercation with Ms. Anderson earlier. *Id*. Nonetheless, the Ninth Circuit's *Wynar* decision utilized data to show that nearly two thirds of violent acts in the school setting were from students who had no history of acting out. Fifth, the recipients, Ms. Anderson and all transgender students, had reason to believe the speaker had the propensity to engage in violence, especially after the verbal altercation at the basketball game. R. at 23.

Lastly, Ms. Clark's post put Pleasantville High School on heightened alert for its students' safety. Ms. Clark compromised the safety of all students, not just transgender students, by threatening to "take out" her peers. R. at 18. Accordingly, a reasonable person would perceive Ms. Clark's Facebook post as a true threat.

B. The objective standard should be applied as a matter of public policy.

The objective standard is more in line with the purpose of the true threat exception and should be adopted over the subjective standard. The purpose of the true threat doctrine is to protect individuals from "the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." William Bird, *Constitutional Law-True Threat Doctrine and Public School Speech-An Expansive View of A School's Authority to Discipline Allegedly Threatening Student Speech Arising Off Campus. Doe v. Pulaski County Special School District*, 26 U. Ark. Little Rock L. Rev. 111 (2003) (citing *R.A.V.*, 505 U.S. at 377). It is whether the threat is communicated, not whether there is an intention to carry it out, that determines if the speech becomes unprotected. *United States v. Viefhaus,* 168 at 395-96. The true threat doctrine aims to preserve the recipient's sense of personal safety—the "objective and not the subjective standard best accomplishes this aim." *Aman,* 31 F.3d at 555; *see also Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002) (the purpose of the true threat doctrine "is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm."). And a test that focuses "not on the intent of the speaker but on the effect on a reasonable listener of the speech" furthers the true threat doctrine's purpose of protecting the recipient from fear of serious harm. *Jeffries*, 692 F.3d at 477.

In *United States v. Cassel*, the Ninth Circuit felt "bound" to use a subjective standard, looking to whether the speaker subjectively intended to threaten the recipient. 408 F.3d at 633. In that case, Cassel was living on a property in the Mojave Desert and liked his privacy, so when two different couples tried to move in as his neighbors, he tried to dissuade them by claiming they would be outbid, and telling them "that the surrounding area was inhabited by child molesters, murderers, producers of illegal drugs, devil-worshipers, and witches." *Id.* at 625. Ultimately,

Cassel was charged with two counts of interfering with a federal land sale and two counts of witness tampering, of which he argued that his speech and conduct was protected under the First Amendment. *Id.* The Ninth Circuit applied a subjective intent test and found his statements protected, but admitted that the "chief evil wrought by a threat is its deleterious and coercive effect on the victim . . . and that effect is not diminished merely because the defendant is bluffing." *Id.* at 628.

The court in *Cassel* focused on the subjective intent mentioned in *Black*, but "*Black* involved a criminal statute that expressly included a showing of subjective intent—i.e. a Virginia statute banning cross burning with 'an intent to intimidate a person or groups of persons.'" *People v. Lowery*, 257 P.3d 72, 79 (Cal. 2011) (quoting *Black*, 538 U.S. at 348.) In *Lowery*, the California Supreme Court disagreed with the Ninth Circuit's creation of the subjective standard, "in that it purports to define what is a true threat for federal constitutional purposes, and dangerous, in that it compromises the government's ability to protect individuals from the fear of violence and the disruption that fear engenders." *Id.* at 81.

In *United States v. Kosma*, the Third Circuit pointed out some of the many problems with the subjective test: "a subjective test makes it considerably more difficult for the government to prosecute threats . . . it is also problematic since it defies the purposes behind the Congressional enactment." 951 F.2d 549, 556 (3d Cir. 1991). The true threat doctrine is meant to "prevent disruptions and inconveniences which result from the threat itself, regardless of whether there is any intention to execute the threat." *Id.*

Here, the objective standard furthers the purpose of the true threat doctrine more efficiently than the subjective intent standard. The purpose of the true threat doctrine is to protect, in this case, Ms. Anderson and other transgender students from being threatened and put in fear of harm; this

doctrine is created to protect the recipient and is dependent on the effect on the listener. Applying the subjective intent to Ms. Clark's Facebook post would focus on the fact that Ms. Clark said the post was intended as a joke, even though there was no indication to Ms. Anderson or other transgender students that it was a joke. R. at 23. It would render their fear for their safety meaningless because whether or not Ms. Clark made a serious threat would be interpreted by Ms. Clark herself. This would allow Ms. Clark's post-hoc rationalization for why she made the post to be the primary factor in deciding guilt. Such precedent would allow people to threaten others to the point where the recipient would believe they were in danger of bodily harm, but the speaker could simply escape liability by saying it was a joke. Thus, it would be extremely difficult to prove subjective intent without waiting until the threat itself is carried out.

The objective standard fulfills the purpose of the true threat doctrine by focusing on the harm threats cause their targets, which is who the doctrine aims to protect. Courts should not consider anything that a reasonable listener would not have knowledge of to determine the severity of the threat. While the objective standard does take such context into consideration, the subjective standard focuses solely on the speaker's intention. Accordingly, the objective standard sets proper public policy for furthering the purpose of the true threat doctrine.

II. ALTERNATIVELY, THE SCHOOL DISTRICT HAS THE AUTHORITY UNDER *TINKER* TO PUNISH CLARK FOR HER FACEBOOK POST.

It is well established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). That is not to say that students enjoy their constitutional rights to the same extent as adults. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Instead, students' constitutional rights must be applied in light of the "special characteristics of the school environment." *Tinker*, 393 U.S. at 506; *see also New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)

(holding that in the school context, school officials do not need to adhere to the probable cause requirement for searches, but rather a lesser, reasonableness standard). This is because the determination of what speech is appropriate in the classroom is best left to the school board. *Fraser*, 478 U.S. at 683.

With these principles in mind, this Court held that student speech is not protected by the First Amendment if it either "materially disrupts classwork or involves social disorder," or collides "with the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508, 513. In *Tinker*, a group of students planned to wear black armbands in protest of the Vietnam War. *Id.* at 504. In response, the school district preemptively banned students from wearing armbands and suspended a student for refusing to remove his. *Id.* This Court struck down the ban, holding that the students' "silent, passive expression of opinion" was neither disruptive to the school's work nor did it collide with other students' rights. *Id.* at 508. Instead, this Court concluded that the school district's ban was specifically targeting a form of political expression in an attempt to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509-10.

While this Court has addressed the constitutional implications of student speech on-campus, it has yet to determine how advancements in modern technology have affected this framework when off-campus student speech reaches the schoolhouse gate.[3] On the other hand, every circuit court that has addressed this issue has held that *Tinker* applies to both on and off-

[3] *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (holding public school did not violate student's First Amendment rights by disciplining him for sexually explicit speech made at a school assembly); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988) (holding that a public school prohibiting the publication of a school newspaper article describing students' experiences with pregnancy did not violate student writers' First Amendment rights); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding a public school did not violate student's First Amendment rights by disciplining him for speech "reasonably viewed as promoting illegal drug use").

campus speech.[4] While these circuits may vary as to what circumstances are required for *Tinker's* application, this Court should continue the trend of applying *Tinker* off-campus so school districts can continue to discipline students, such as Ms. Clark, for materially disrupting the school environment. Even if this Court does not find that a material disruption occurred as a result of Ms. Clark's post, it should hold that her comment still collided with the rights of other students—especially Ms. Anderson—to be secure at school.

A. *Tinker* applies to off-campus student speech.

The *Tinker* framework is not limited to the physical schoolhouse gate, but rather extends to off-campus student speech because the "pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction . . . 'mak[ing] any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.'" *Bell*, 799 F.3d at 395–96 (quoting *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-21 (3d Cir. 2011) (Jordan, J., concurring)). Moreover, applying *Tinker* to off-campus speech comports with the trends in both this Court and in the circuit courts to emphasize school districts' ability to protect students from disruptive and threatening speech. *See Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) ("School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place."); *see also Morse*, 551 U.S. at 425 (Alito, J., concurring) ("[D]ue to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence.").

[4] *See Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (en banc); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1071 (9th Cir. 2013).

Beginning with *Tinker*, this Court has increasingly expanded the authority of school districts to respond to harmful speech affecting the school environment. For instance, in *Fraser*, this Court upheld a school district's ability to protect students from using lewd, vulgar, and patently offensive speech in school. 478 U.S. at 684-85. Next, this Court in *Kuhlmeier* extended school districts' authority over student speech to include censorship of student newspaper articles for legitimate pedagogical reasons. 484 U.S. at 273. And finally, this Court held in *Morse* that a school district can restrict student speech that reasonably promotes the use of illegal drugs, even when the student was making the statement across the street from the school. 551 U.S. at 403. This trend illustrates that school districts, rather than courts, are better suited for determining what speech should be prohibited in schools. *See Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico,* 457 U.S. 853, 864 (1982) ("[F]ederal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.'" (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

Likewise, lower courts have interpreted *Tinker* to provide even more protection for students, especially from threatening statements made off-campus. This notion dates back as far as 1979, when Judge Newman observed that "territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority." *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.,* 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring). What was true then is even more so now with the advent of instant messaging and social media and its widespread adoption among students. *Doninger v. Niehoff,* 527 F.3d 41, 49 (2d Cir. 2008). A 2012 study found 20.1 percent of students nationally had been bullied in last year and that 16.2 percent had been cyberbullied. Danice K. Eaton et al., *Youth Risk Behavior Surveillance—United States 2011*, Morbidity and Mortality Weekly Report, 9 (June 8, 2012),

http://www.cdc.gov/mmwr/pdf/ss/ss6104.pdf. And specifically, transgender students are almost twice as likely to be verbally harassed or physically attacked. Sarah Warbelow, *LGBT Youth Legal Landscape*, 23 Temp. Pol. & Civ. Rts. L. Rev. 413, 414 (2014). Protecting students, from threats and harassment by their peers, whether on or off-campus must be of the upmost importance to school officials.

This sentiment was echoed in *Bell*, where the Fifth Circuit noted the difficulty school administrators face in regulating student speech on the internet, which confounds the line between on and off-campus speech. 799 F.3d at 392. This, combined with a recent rise in school violence, led the Fifth Circuit to apply *Tinker* off-campus so that school administrators can be vigilant against student speech that intimidates or threatens violence. *Id.* at 393; *see also Wynar*, 728 F.3d at 1069 ("[W]hen faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."). To hold otherwise would allow students to harass their classmates without punishment merely because they are hiding on the other side of the schoolhouse gate. This is impermissible under *Tinker*. *See Tinker*, 393 U.S. at 513 ("[C]onduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.").

B. Ms. Clark's Facebook post is unprotected speech because it materially disrupted the school environment.

Because Ms. Clark's Facebook post targeted transgender students to the point where Ms. Anderson, a transgender student, no longer felt safe to attend school, it constitutes a material disruption not protected under the First Amendment. While every circuit to have addressed the

issue has applied *Tinker* to off-campus speech,[5] they have not done so in a uniform fashion. Some circuits have instituted threshold requirements before *Tinker* can apply. For instance, the Fourth Circuit requires that speech have a sufficient "nexus" to the school. *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2011). The Second and Eighth Circuits have adopted a "reasonable foreseeability" test for whether student speech will make its way onto campus. *Doninger*, 527 F.3d at 48; *S.J.W. ex rel. Wilson*, 696 F.3d at 777. The Fifth Circuit's approach requires the student to intentionally direct their threatening, harassing, and intimidating speech at the school community. *Bell*, 799 F.3d at 396 (holding that a school district could prohibit a student's threatening rap lyrics originating off-campus). The Ninth Circuit only requires the student's speech to consist of a threat of school violence. *Wynar*, 728 F.3d at 1069 (holding that a school district could prohibit a student's off-campus statements planning a school shooting).

Given the need to balance students' First Amendment rights with the preservation of the school environment, this Court should adopt a combination of the Fourth Circuit's "nexus" requirement and the Second and Eighth Circuit's reasonable foreseeability requirement. These two approaches ask the same fundamental question of whether off-campus speech is reasonably likely to make its way through the physical schoolhouse gate. This approach strikes an appropriate balance between the two countervailing interests—it protects students who seek to keep their otherwise unprotected speech private, while also acknowledging this Court's continued insistence that school officials have comprehensive authority over the regulation of school students. *Compare J.S. ex rel. Snyder*, 650 F.3d at 930 (holding a school district could not punish a student's parody

[5] The Third Circuit addressed off-campus speech without deciding whether *Tinker* applied because the student's parody profile of his principal was not disruptive, but rather "so outrageous that no one could have taken it seriously, and no one did." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011) (en banc).

profile of her principal because she took steps to make the profile private), *with Tinker*, 393 U.S. at 507 ("Th[is] Court has repeatedly emphasized the need for affirming the comprehensive authority . . . of school officials . . . to prescribe and control conduct in the schools."). And it ensures that students are only punished for the natural and reasonably foreseeable consequences of their actions. *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring).

On the other hand, the Ninth Circuit's approach of requiring a threat is under inclusive in because it would hamper schools' abilities to address online harassment and intimidation of other students, as well as other disruptive speech. Under this approach, Ms. Clark could only be disciplined for her speech if it was deemed to be a threat, rather than harassment, even if the effect was the same on Ms. Anderson and other transgender students. Similarly, the Fifth Circuit's approach fails to adequately prevent school disruptions by including an intent requirement. Much like true threats, the purpose of prohibiting disruptive speech is to prevent the adverse effects that fall upon its recipients. And because schools are charged with providing safe educational environments, students who propagate threatening and disruptive speech should not be given the opportunity to justify their intentions post hoc. Regardless, Ms. Clark's Facebook post satisfies these two standards.[6]

In *Kowalski*, the Fourth Circuit applied the "nexus" approach to a student's website dedicated to ridiculing another student. 652 F.3d at 573 (stating the student was a slut and accusing her of having herpes). The website violated the school's policy against bullying and caused the target student to miss school for fear of continued ridicule. *Id.* at 568-69. The student responsible

[6] Ms. Clark's Facebook post satisfies the Ninth Circuit's approach because it threatened another student: "Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another." R. at 18. Her post also satisfies the Fifth Circuit's approach because it specifically targeted Ms. Taylor, and Ms. Clark was aware it would reach her and other transgender students at school. R. at 14, 18.

for the website was suspended from school for ten days and from extracurricular events for ninety days. *Id.* at 569. Despite the fact that it was created off-campus, the Fourth Circuit held that the school district could punish the student because "schools have a duty to protect their students from harassment and bullying in the school environment." *Id.* at 572. The court determined that the student could have reasonably expected the speech to reach her school because other students had access to the website. *Id.* at 573. Applying *Tinker,* the court found that the speech caused a material disruption because the targeted student no longer felt comfortable attending school. *Id.* at 574.

Here, there is a similarly sufficient nexus because not only did Ms. Clark specifically target Ms. Anderson on a publicly accessible forum, but she knew that her speech would reach Ms. Anderson and other transgender students at school. R. at 10, 14, 18. And Clark's post, like the website in *Kowalski*, violated school policy and forced another student, Ms. Anderson, to miss school for multiple days. R. at 14. While the student in *Kowalski* missed school to avoid further verbal abuse, Ms. Anderson missed school to avoid the threat of physical abuse. *Id*. Thus, Ms. Clark's Facebook post is not afforded First Amendment protection under *Tinker's* material disruption standard and her three-day suspension is justified.

In *S.J.W*, the Eighth Circuit applied its reasonably foreseeable standard to a blog designed to discuss and satirize events taking place at the students' school. 696 F.3d at 773. However, the blog grew increasingly vulgar as its posts became focused on offensive, racist, and sexually explicit comments about other students, identifying them by name. *Id.* As a result, the school district suspended the students for 180 days but allowed them to attend another school in the interim. *Id.* at 774. In determining the students' success on the merits of their claim, the Eighth Circuit held that their blog was reasonably likely to reach the school community and cause a material disruption. *Id.* at 777; *see also Doninger*, 527 F.3d at 50-51 (holding it was reasonably

foreseeable for students' blog post to reach school and cause a disruption because it pertained to events at school and invited readers to contact the school). The court determined that the blog was reasonably likely to reach the schoolhouse gate because it mentioned students by name. *Id.* at 778. The court also reasoned that the blog materially disrupted the school because several school computers attempted to access the blog, it distracted some students in class, and parents contacted the school expressing concerns about bullying and safety. *Id.* at 774, 778.

Here, Ms. Clark's Facebook post parallels the blog in *S.J.W.* because it also specifically targeted students, like Ms. Anderson, and thus it was reasonably foreseeable that the post would reach the school community. R. at 18. Further, Ms. Clark's Facebook post was materially disruptive because, like the blog in *S.J.W.*, parents of the students who were targeted in the post came to school to express their fear for their children's safety. R. at 14. Similarly, the effects of Ms. Clark's Facebook post were felt throughout the school as some students complained to Principal Franklin about it, while even more were visibly upset. *Id.* Therefore, the School District has the authority to punish Ms. Clark for her threatening Facebook post because it was reasonably foreseeable that it would reach the schoolhouse gate and caused a material disruption.

C. Ms. Clark's Facebook post is unprotected speech because it collided with the rights of other students to be secure.

Because Ms. Clark's Facebook post targeted students based solely on the fact that they are transgender and threatened to "take them out," her speech collided with the rights of those students to be secure and is not protected by the First Amendment. In addition to the substantial disruption test, *Tinker* held that schools can prohibit speech that "collid[es] with the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508. This is a wholly separate inquiry divorced from any findings of material disruption. Thus, even if this Court finds that there was no material

disruption, Ms. Clark's speech is still unprotected because it interfered with Ms. Anderson and all transgender students' right to be secure and let alone in school.

In *Harper*, the Ninth Circuit applied this aspect of *Tinker* to a student who wore a t-shirt stating, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED. HOMOSEXUALITY IS SHAMEFUL Romans 1:27." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006). The student refused to change his shirt and was forced to remain in the office for the rest of the school day. *Id.* at 1172. The student challenged the school's prohibition of his t-shirt on First Amendment grounds. *Id.* at 1173. The Ninth Circuit held that the student's wearing of his t-shirt collided with the rights of other students "in the most fundamental way." *Id.* at 1178. The court reasoned that school students have the right to be free from attacks, both physical and psychological, based on a "core identifying characteristic, such as race, religion, or sexual orientation." *Id.* This is because such attacks not only serve to make their victims feel inferior, but also interferes with their ability to learn. *Id.*; *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("A sense of inferiority affects the motivation of a child to learn.").

Like the student's t-shirt in *Harper*, Ms. Clark's Facebook post targeted other students based solely because they were transgender. R. at 18. And while both instances of speech were couched in religion, that did not hamper the effects of the words. R. at 14, 18. Parents of transgender students voiced their concern about the post and Ms. Anderson was so apprehensive that she refused to go to school for multiple days. R. at 14. This certainly interfered with her, as well as other transgender students', ability to learn and, in turn, their right to be secure and let alone.

In *Wynar*, the Ninth Circuit again revisited student speech that collided with the rights of other students to be secure and let alone, this time applying *Tinker* to off-campus speech. 728 F.3d

at 1069. There, a student exchanged online messages with a group of friends about planning a school shooting, even naming potential victims. *Id.* at 1065-66. Growing concerned by the student's language, the friends informed the school, which suspended the student for ten days. *Id.* at 1066. In response, the student brought a claim under 42 U.S.C. § 1983 against the school district, alleging a violation of his First Amendment rights. *Id.* The Ninth Circuit held that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*." *Id.* at 1069.[7] The court reasoned that the threatening nature of the speech alone was enough to invade the rights of not only those specific students mentioned, but the student body as a whole. *Id.* at 1072. Thus, the school was justified in taking punitive actions against the student, even if his speech did not rise to the level of a "true threat." *Id.* at 1070 n.7.[8]

Similar to the speech in *Wynar*, Ms. Clark's Facebook post originated off-campus and was brought to the school's attention by concerned students. R. at 13-14. Both instances targeted specific students and left far more students apprehensive about what was to come. R. at 14, 18. Though the speech in *Wynar* is more explicit, Ms. Clark's post is no less threatening. R. at 18. If anything, the ambiguity as to how Ms. Clark was going to "take out" Ms. Anderson and other transgender students only added to their reasonable fear. *Id.* Therefore, like the speech in *Wynar*, Ms. Clark's post should not be afforded any protection because it collided with the rights of others to be secure.

[7] Although the Supreme Court vacated the Ninth Circuit's decision on mootness grounds, the analysis is still informative. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007).

[8] The *Wynar* court also concluded that the speech materially disrupted school because the friends who reported the student were visibly shaken and the targeted student refused to return to school. *Id.* at 1071.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeal for the Fourteenth Circuit and reinstate summary judgment for the School District.

Respectfully Submitted,

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