No. 16-9999

Supreme Court of the United States

WASHINGTON COUNTY SCHOOL DISTRICT,
Petitioner,

v.

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

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

BRIEF FOR RESPONDENTS

Team V
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether Ms. Clark's Facebook post constituted a "true threat" beyond the protection of the First Amendment.

II. Whether the Washington County School District violated Ms. Clark's Constitutional rights under the First Amendment when she was disciplined for a Facebook post initiated off-campus and on her own personal computer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEALS CASES

CONSTITUTIONAL PROVISIONS

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fourteenth Circuit was entered on January 5, 2017. Following the judgment, Petitioner subsequently filed a petition for certiorari, which this Court granted. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL PROVISIONS INVOLVED

The text of U.S. Const. Amend. I. is set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

Kimberly Clark, the Respondent, was a 14 year old freshman at Pleasantville High School when the circumstances of this litigation arose. R. at 2. Ms. Clark was born a member of the female sex and identifies as female. R. at 13. Prior to this incident, she had never been subject to any disciplinary action nor did she have any history of violent behavior. R. at 13, 23.

Taylor Anderson was a 15 year old sophomore at Pleasantville High School. R. at 2. Ms. Anderson was born a member of the male sex and identifies as female. R. at 13. The School District of Washington County adopted the "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students," (hereinafter "Nondiscrimination in Athletics policy") which requires "all athletics programs and activities be conducted without discrimination based on. . . gender expression or gender identity. . ." R. at 15. In accordance with the policy, Ms. Anderson was allowed to participate on the girl's basketball team along with Ms. Clark.

On November 2, 2015, Ms. Anderson engaged Ms. Clark in a verbal argument about an adverse referee call during an intrasquad basketball game. R. at 23. Later that evening Ms. Clark wrote a Facebook post at home from her personal computer. In her Facebook post Ms. Clark expressed her opinion that the Nondiscrimination in Athletics policy was "unfair and dangerous" R. at 24. She also stated in her Facebook post that, "Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too. . ." R. at. 18. Ms. Clark intended only for her friends to see this post but was aware of the possibility that others may see it as well. R. at 23. Ms. Clark was not friends with Ms. Anderson or any other transgender students on Facebook. R. at 23.

On November 4, 2015, Ms. Anderson's parents along with the parents of Josie Cardonas, another transgender student, met with Thomas J. Franklin, the principal of Pleasantville High School, to discuss Ms. Clark's online post. The students' parents brought with them a printout of Ms. Clark's Facebook post and expressed their concerns about allowing their children to participate in school in light of the post's subject matter. R. at 13-14. A few other students expressed their views about the post to Principal Franklin as well. R. at 14.

Following these events, Principal Franklin met with Ms. Clark and her parents. Despite the Clarks' insistence that this was an expression of Ms. Clark's political views and that her remarks "were intended merely as jokes," Principal Franklin suspended Ms. Clark for three days. R. at 14, 23. In response to this action, Alan Clark, Ms. Clark's father, appealed to the Washington County District Disciplinary Review Board with concerns that this would remain a part of Ms. Clark's permanent academic record and therefore would negatively impact her academic and employment opportunities. R. at 19-21. The Review Board affirmed Principal Franklin's actions finding that "the post, specifically the second portion, has been materially disruptive of the high school learning environment and that the second portion quote above clearly collides with the rights of other students to be secure in the school environment." R. at 21.

On December 7, 2015, Mr. Clark filed a complaint seeking declaratory relief and alleging that the School District violated Ms. Clark's First Amendment right to freedom of speech. R. at 3. In opposition, the School Board contended that the disciplinary measures were appropriate to deal with a "true threat" to other students that disrupted the Pleasantville High School learning environment. R. at 1. The United States District Court for the District of New Columbia concluded that Ms. Clark's Facebook post did not deserve First Amendment protection. R. at 4. As a result, the district court upheld the School District's actions as constitutional. R. at 4.

Mr. Clark appealed the District Court's decision to the Fourteenth Circuit Court of Appeals. R. at 25. The Fourteenth Circuit held that Ms. Clark's Facebook post did not constitute a "true threat." R. at 32. Further, the Court held that the Washington County School District could not constitutionally discipline Ms. Clark for an off-campus Internet post that originated in her home and from a personal computer. R. at 37-39. Thus, the court concluded that Ms. Clark's Facebook post was entitled to First Amendment protection and remanded the case to the District Court with instructions to enter summary judgment in favor of Ms. Clark. R. at 39.

SUMMARY OF THE ARGUMENT

Ms. Clark's Facebook post was not a "true threat" and is therefore entitled First Amendment protection. To determine whether Ms. Clark's Facebook post constitutes a "true threat," this Court should adopt the subjective intent standard for assessing statements under the "true threat" exception to the First Amendment. The subjective intent standard is consistent with this Court's precedent and appropriately considers on the context of speech. Under the subjective intent standard, Ms. Clark's Facebook post is not a "true threat" because Ms. Clark did not intend her words to be understood as a threat. However, even if this Court decides to adopt the objective intent standard, Ms. Clark's Facebook post still does not constitute a "true threat" because an "objectively reasonable person" would not interpret Ms. Clark's Facebook post as a "serious expression" to cause harm.

Furthermore, Ms. Clark was unconstitutionally disciplined for a Facebook post, written on her own personal computer and off school grounds, because the *Tinker v. Des Moines* substantial disruption standard should not be extended beyond the school context. The Fourteenth Circuit correctly withheld from applying the *Tinker* standard to off-campus speech, because extending the doctrine would be inconsistent with this Court's recognition of the special characteristics of the school environment, and would give schools virtually limitless authority to control student speech. However, even if this Court does apply the *Tinker* standard, Ms. Clark's Facebook post was neither "materially disruptive" nor did it "collide with the right of other students to be secure at school."

ARGUMENT

I. MS. CLARK'S FACEBOOK POST DOES NOT CONSTITUTE A "TRUE THREAT" BEYOND THE PROTECTION OF THE FIRST AMENDMENT.

The U.S. Constitution grants freedom of speech protections for citizens with few exceptions. The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . ." U.S. Const. amend. I. This Court emphasized the First Amendment's expansive protections in *Texas v. Johnson* stating, "if there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414 (1989). Accordingly, exceptions to the First Amendment's expansive protections developed by lower courts have been very limited and directed at speech which has "low value and inflict[s] … serious harm." *United States v. Cassel*, 408 F.3d 622, 627 (9th Cir. 2005).

Lower courts have developed two different standards to define the "true threat" exception to the First Amendment. In *Virginia v. Black*, this Court defined "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. 343, 344 (2003). Following *Black*, the federal circuits have disagreed over the type of intent that is required for a speaker's statement to be considered a "true threat." Some circuits have adopted an "objective intent" standard, while others have adopted a "subjective intent" standard. The objective intent standard is a two-prong analysis wherein courts must first determine whether the speaker "intended to communicate" the statement in question, and if so, whether "an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'" *Porter v. Ascension Parish Sch. Bd.,* 393 F.3d 608, 616-18 (5th Cir. 2004). By contrast, the subjective intent standard contains only one inquiry, whether the speaker

"intended his words or conduct to be understood by the victim as a threat." *Cassel*, 408 F.3d at 628.

This Court should adopt the subjective intent standard because it is consistent with this Court's own precedent and considers the context of the speech. The subjective intent standard conforms with this Court's pronouncement in *Virginia v. Black*, defining "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 344. This Court has also previously emphasized that context is important. *See Watts v. United States*, 394 U.S. 705, 706-08 (1969). The subjective intent standard, unlike the objective standard, takes context into account, thereby ensuring the protection of speech, which does not constitute a "true threat." Under the subjective intent standard, Ms. Clark's Facebook post does not constitute a "true threat." The facts in the record demonstrate that Ms. Clark "did not intend her words or conduct to be understood by the victim as a threat" and thus, based on the principles underlying the subjective intent standard and this Court's previous decisions, Ms. Clark's Facebook post should not be considered a "true threat." *See Cassel*, 408 F.3d at 628.

However, if this Court chooses to adopt the objective intent standard, Ms. Clark's Facebook post still does not constitute a "true threat" because her post does not satisfy this standard's two-prong test. Although Ms. Clark may have intended others to see her Facebook post, a reasonable person would not interpret Ms. Clark's Facebook post as a "serious expression of an intent to cause a present or future harm." *Porter*, 393 F.3d at 616. Because the second prong is not satisfied, Ms. Clark's Facebook post does not constitute a "true threat."

A. This Court should adopt the subjective intent standard to determine when speech constitutes a "true threat."

The subjective intent standard has been used by lower courts to determine what constitutes a "true threat" under that exception to the First Amendment. The subjective intent standard focuses on whether the speaker actually intended to threaten a recipient of the statement and considers the context in which the statement was made. These considerations are important because they focus on the speaker, rather than an abstract, objective listener. By focusing on the speaker, courts are more likely to protect the First Amendment rights of American citizens and keep the limited exceptions to First Amendment protection limited.

Under the subjective intent standard, Ms. Clark's Facebook post is not a "true threat" because she did not intend her words or conduct in her Facebook post "to be understood by the victim as a threat." *See Cassel*, 408 F.3d at 628. Instead, Ms. Clark used her Facebook post as a platform to express how a new school policy interfered with her religious values and opinions. The second portion of Ms. Clark's Facebook post was also harmless, as Ms. Clark did not intend this part of her Facebook post to be a serious statement of violence.

1. The subjective intent standard is consistent with this Court's precedent.

Consistent with this Court's precedent in *Virginia v. Black*, the subjective intent standard focuses on the mindset and intent of the speaker when determining whether his or her statement constitutes a true threat. In *Black*, this Court discussed whether a Virginia statute that criminalized cross burnings violated Virginia residents' First Amendment rights. 538 U.S at 347-50. A majority of this Court determined that a statute banning cross burnings would not offend the First Amendment as long as the statute required an intent to intimidate, a type of "true threat."

Id. at 367.[1] As part of this discussion, this Court's plurality opinion defined a "true threat" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 344. A majority of justices agreed that an actual "intent to commit an act of unlawful violence" was a necessary element of the "true threats" definition, or in that case an "intent to intimidate." *Id*; *see also Cassel*, 408 F.3d at 632-33.

As the Ninth and Tenth Circuits have stated, a plain reading of this Court's "true threats" definition supports the subjective intent standard. *See Cassel,* 408 F.3d at 630-34; *United States v. Heineman,* 767 F.3d 970 , 978 (10th Cir. 2014). In *United States v. Cassel*, the Ninth Circuit stated that the "the clear import of [*Black's* true threat] definition is that only *intentional* threats are criminally punishable consistently with the First Amendment." 408 F.3d at 631 (emphasis in original). The Ninth Circuit emphasized that, "a natural reading of [*Black*'s] language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." *Id.* (emphasis in original). This Court's definition of intimidation in *Black* supports this interpretation: "intimidation in the constitutionally proscribable sense of the word is a type of "true threat," where *a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear* of bodily harm or death." *Black*, 538 U.S. at 344 (emphasis added).

The Fifth Circuit, a leading proponent of the objective intent standard, and other circuits who use the objective intent standard have ignored *Black*'s language and have only incorporated the first portion of the "true threats" definition into their analyses. *See*, *e.g.*, *Porter*, 393 F.3d at 616. These courts only include the element that states the speaker must intend to communicate

[1] Justices Scalia and Thomas joined in Part III of the *Black* plurality which contained this Court's definition of "true threats." *See Black*, 538 U.S. at 368 (Scalia, J., concurring).

their alleged threat, meaning that the speaker wanted or intended others to hear his or hers speech. Therefore, these courts ignore the second half of the "true threats" definition that emphasizes a subjective intent standard. *See id.* A recent dissent out of the Fifth Circuit characterized that circuit's approach as "effectively amount[ing] to the very kind of negligence standard that the Supreme Court has rejected for determining whether a speaker may be held liable on the basis of his words." *Bell v. Itawamba Sch. Bd.*, 799 F.3d 379, 421 (5th Cir. 2015) (Dennis, J., dissenting). Judge Dennis's misgivings indicate that the objective intent standard may not rest on principled grounds.

The subjective intent standard becomes particularly important when courts consider controversial political speech. Because controversial political speech is often inherently offensive to some, considering the actual intent of the speaker, rather than the objective perspective of the average, anonymous listener is critical. In *Snyder v. Phelps,* this Court decided that the First Amendment protects statements about "public concerns" despite their controversial nature. 562 U.S. 443, 448-58 (2011). A statement is a "public concern when it can be 'fairly considered as relating to any matter of political, social, or other concern to the community.'" *Id.* at 453 (quoting *Connick v. Myers,* 461 U.S. 138, 146 (1983)). This includes speech about "God's law." *See id*.

The facts of this case demonstrate why it is critical to consider the actual intent of the speaker when determining whether a statement constitutes a "true threat." In her Facebook post, Ms. Clark expressed an opinion about a new school district policy that allows transgender students the opportunity to participate on sports teams that match their gender identity. R. at 18. Ms. Clark explained in her affidavit, "I stated my issues with Taylor Anderson playing on the girls' team and my concern that allowing transfemale students born biological males to play on a

girls' basketball team is unfair and dangerous, as well as my belief that it is immoral and against God's law. . ." R. at 23. She described her statements about sexual orientation and rules governing high school athletics as "important public policy matters." R. at 24. As in *Snyder v. Phelps*, this portion of Ms. Clark's Facebook post is protected speech because she is speaking out against a school district's policy and her views on sexual orientation, a "public concern," and therefore these statements were not a "true threat."

2. The subjective intent considers the context of speech, an important consideration when determining if a statement should receive First Amendment protections.

The subjective intent standard takes the context of speech into account, which is important in considering whether a statement should receive First Amendment protection. In *Watts v. United States*, this Court stressed the importance of context when considering whether a man should receive First Amendment protection after he stated "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706-07. In its discussion, this Court focused on facts that revealed the context of the speaker's statements, such as evidence that the speaker made the statements while at a political debate and that the crowd and him laughed at his statements. *See id.* Context plays an important role in protecting speaker's rights because a statement made in one particular context may hold a different meaning in a separate context. If courts do not consider the context of speech, they endanger freedom of expression and improperly exclude certain types of speech from First Amendment protection.

Asking "whether a speaker intended his words or conduct to be understood by the victim as a threat," uncovers facts that reveal the context of the speaker's statements. *Cassel*, 408 F.3d at 628. This includes the circumstances that surround where and why the speaker made a particular statement. The objective intent standard, by contrast, relies on an abstract "reasonable person" analysis that ignores the nuances of a particular situation, such as the political rally in

Watts or the unique online community in this case. Although Ms. Clark "was aware that Facebook posts sometimes go beyond one's own friends," she believed that she was expressing a personal opinion to a self-selected group of friends in an online forum. R. at 23. Ms. Clark stated that she used the language in her post in a joking manner, which is consistent with the type of speech one uses when one is communicating with one's friends. R. at 23.

Furthermore, the facts in the record reveal that the disagreement between Ms. Clark and Ms. Anderson was related to a complex personal relationship. Ms. Anderson engaged Ms. Clark in a verbal confrontation at an intraquad basketball game which concerned a disagreement about a referee's decision and was wholly unrelated to Ms. Clark's objections to the new school policy. R. at 23. Finally, the record lacks any evidence that Ms. Clark had made any threats to Ms. Anderson or other transgender students in the past, therefore it is unreasonable to conclude that Ms. Clark intended Ms. Anderson actual harm based on her gender identity status or otherwise.

Facts and context matter. Without them, entire categories of speech, particularly emotional or controversial speech, will go unprotected. Ms. Clark's case is a classic example of why it is important to consider the actual intent of the speaker and the context in which speech occurs. For these reasons, this Court should adopt and apply the subjective intent standard to this case and in determining whether statements can be construed as true threats.

B. Even if the Court adopts the objective intent standard, Ms. Clark's post still does not constitute a "true threat" because a reasonable person would not interpret her post as a serious threat.

Even if this Court decides to adopt the objective intent standard, Ms. Clark's Facebook post still cannot be labeled a "true threat." Under the two-prong objective intent inquiry, a speaker has only communicated a "true threat" if the speaker "intended to communicate the statement," and if "an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'" *Porter*, 393 F.3d at 616. Ms. Clark's

Facebook post does not satisfy the two=prong inquiry because no objectively reasonable person would believe that Ms. Clark seriously meant to harm Ms. Anderson.[2]

The facts presented do not satisfy the second prong of the objective intent inquiry because no "objectively reasonable person" would interpret Ms. Clark's statements as a "serious expression of an intent to cause a present or future harm." Considering Ms. Clark's age and her non-violent past, including with respect to her peers that identify as transgender, it is highly improbable that an "objectively reasonable person" would interpret her statement as a "serious expression" of an intent to do harm. R. at 2, 23, 32. Rather, Ms. Clark's statement is reflective of an ordinary teenage outburst lacking any serious conviction. Teenagers regularly use social media to express frustration through empty threats or socially isolate their peers. *See* R. at 2, 23, 32. Thus, an "objectively reasonable person" would be unlikely to consider Ms. Clark's Facebook post to be a serious expression of an intent to cause a present or future harm.

Furthermore, Ms. Clark's statements are exceptionally vague and do not express the same level of harm as "true threats" in cases applying the objective intent standard. For example, in *Doe v. Pulaski County Special Sch. Dist.*, the Eighth Circuit held that a letter written by a student and stating that the student wanted to murder and sexually assault a fellow classmate constituted a true threat. 306 F.3d 616, 619-20 (8th Cir. 2002). In *Lovell by & Through Lovell v. Poway Unified Sch. Dist.,* the Ninth Circuit determined that "there is no question that any person could reasonably consider the statement '[i]f you don't give me this schedule change, I'm going to shoot you,' . . .to be a serious expression of intent to harm or assault." 90 F.3d 367, 372 (9th Cir. 1996). Both of these cases concern explicit threats of malicious physical harm to a third person.

[2] We do not dispute that Ms. Clark intended for others to receive the statement contained in her Facebook post, satisfying the first requirement of the objective intent standard. However, given our contention that the second prong of the inquiry has not been met, this is irrelevant.

Ms. Clark's statements, on the other hand, are incredibly vague. Ms. Clark stated that she would make sure Ms. Anderson gets "more than just ejected" (referring to the basketball game where the argument between them took place) and that she would "take [Ms. Anderson] out one way or another." R. at 18. These statements do not communicate any type of harm, let alone a specific threat. Accordingly, it would be unreasonable to interpret Ms. Clark's Facebook post as a serious expression of an intent to do harm to Ms. Anderson or any other transgender student.

II. THE WASHINGTON COUNTY SCHOOL DISTRICT VIOLATED MS. CLARK'S FIRST AMENDMENT RIGHTS BY DISCIPLINING HER FOR A FACEBOOK POST THAT WAS INITIATED ON HER OWN PERSONAL COMPUTER AND OFF SCHOOL GROUNDS.

The Washington County School District violated Ms. Clark's First Amendment rights when it punished her for a Facebook post published off-campus and from her home computer. The District Disciplinary Review Board attempted to justify Ms. Clark's punishment by stating that her online post was "materially disruptive of the high school learning environment and … [that it] collid[ed] with the rights of other students to be secure." R. at 21. Although the Review Board's language mirrors that of the "substantial disruption" standard set forth in *Tinker v. Des Moines*, it is inappropriate to apply that case's exception to First Amendment protection in the schools to speech made off-campus. *See Tinker v. Des Moines*, 393 U.S. 503 (1969). Therefore, Ms. Clark's Facebook post was protected by the First Amendment and the Washington County School District's punishment was unconstitutional.

While the *Tinker* standard should not be applied to off-campus speech, if this Court does apply that standard, Ms. Clark's Facebook post is still deserving of protection under the First Amendment because it did not rise to the severity of a substantial disruption nor did it collide with the rights of others. Because Ms. Clark's Facebook post does not meet the *Tinker* standard, and holds no tangible connection to the school, the post is protected by the First Amendment.

A. The Fourteenth Circuit Correctly Withheld From Applying the *Tinker* Standard to Speech That Originated Off-Campus.

In *Tinker*, this Court recognized that even though students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," exceptions to these rights should exist in the public-school context. 393 U.S. 503, 506. This Court reached this conclusion "in light of the special characteristics of the school environment" and the need to defer to school officials' authority "to prescribe and control conduct within schools." *Id.* at 506-08. Thus, *Tinker* created a precedent that otherwise-protected speech could be restricted in a school setting, but only if it materially and substantially disrupts class work or if it invades the rights of others. *Id.* at 513.

Since the *Tinker* ruling, lower courts have split as to whether *Tinker's* substantial-disruption test governs off-campus student speech. *Compare Thomas v. Bd. of Educ. Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050, 1053 n. 18 (2d Cir. 1979) (distinguishing *Tinker* in a case involving off-campus expression) *and Porter,* 393 F.3d at 615, 620 (*Tinker* does not apply to students' off-campus speech), *with S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012) (*Tinker* standard applied to off-campus speech in circumstances where it is reasonably foreseeable that the speech will reach the school community) *and Kowalski v. Berkeley City Sch.*, 652 F.3d 565, 573 (4th Cir. 2011) (applying *Tinker* where there was a sufficient nexus between the off-campus speech and the school community).

Despite conflicting opinions, the Fourteenth Circuit appropriately withheld from applying the substantial disruption standard to Ms. Clark's Facebook post, because the *Tinker* standard should not apply outside of the school context. This Court adopted the *Tinker* exception due to the special characteristics of the school environment, and explicitly limited its application to on-campus speech. *Tinker,* 393 U.S. at 510. This Court has consistently reaffirmed that limits on

student speech within the school context would not otherwise apply to speech off-campus. *See Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); and *Morse v. Frederick,* 551 U.S. 393, 403 (2007). If applied outside of the school context, the substantial disruption standard would give school administrators virtually limitless authority to regulate student speech. Accordingly, this Court's precedent and public policy indicate that the *Tinker* standard should not be applied off-campus.

1. Throughout the Tinker Line of Cases, This Court has Continuously Distinguished Between First Amendment Protections Available to On-Campus versus Off-Campus Speech Due to the Special Characteristics of the School Environment.

Throughout the *Tinker* line of cases, this Court has continuously relied on the special characteristics of the school environment to distinguish between the protections afforded to on-campus and off-campus speech. In *Tinker*, three public school students were suspended from school for wearing black armbands to protest the government's policy in Vietnam. 393 U.S. at 504. This type of symbolic act would typically be protected by the Free Speech Clause of the First Amendment, but the student's actions conflicted with school regulations created to prevent disturbances in the school. *Id.* at 508. Although *Tinker* ruled that the students' actions were constitutionally protected, this Court adopted a new precedent that otherwise-protected speech could be restricted in a school setting, but only if it materially and substantially disrupts school operations or if it invades the rights of others. *Id.* at 513. This new rule was "in light of the special characteristics of the school environment" and the need to defer to school officials' authority "to prescribe and control conduct within schools." *Id.* at 506-08.

Since *Tinker*, this Court has rendered three decisions that have broadened the authority of school officials to regulate on-campus speech due to the special characteristics of the school environment. In *Bethel Sch. Dist. v. Fraser*, this Court held that the rights of students at public

schools are not "coextensive with the rights of adults in other settings." 478 U.S. at 682. Therefore, when a student was punished for delivering a speech at a high school assembly containing lewd and vulgar language, this Court found that school officials did not violate the student's First Amendment rights by disciplining the student. *Id*. at 685. Although *Fraser* broadened the restriction on free speech within the school context, the holding has been understood to mean that "if [the] respondent had given the same speech outside of the school environment, he could not have been penalized." *Id.* at 688 (Brennan, J., concurring); *see also Kuhlmeier*, 484 U.S. at 266.

Next, in *Hazelwood Sch. Dist. v. Kuhlmeier*, this Court found that a high school principal was justified in eliminating two pages from an article that was to be published in a school publication, because the censorship was reasonably related to legitimate pedagogical concerns. 484 U.S. at 27. This Court once again differentiated between censorship in the school context and the "real" world. *Id*. at 271-72. "A school must be able to set high standards for the student speech that is disseminated under its auspices… and may refuse to disseminate student speech that does not meet those standards." *Id. Kuhlmeier* acknowledged that schools may regulate some speech "even though the government could not censor similar language outside of the school context. *Id*. at 266.

Finally, this Court's most recent student speech case held that the First Amendment does not require schools to tolerate expression that promotes illegal drug use at school sponsored events. *Morse*, 551 U.S. at 410. This Court determined that a field trip, which occurred during normal school hours and that was sanctioned by the principal, was clearly within the boundaries of school speech precedent governed by the *Tinker* line of cases. *Id*. at 400-01. If *Tinker* and this Court's other school-speech precedents applied to off-campus speech, this discussion would have

been unnecessary. In agreement, Justice Alito essentially recognized that *Tinker's* substantial disruption test does not apply to students' off-campus expression in his concurrence. *See id.* at 422 (Alito, J., concurring) (noting that *Tinker* allows schools to regulate "in-school student speech… in a way that would not be constitutional in other settings").

Each of these cases emphasize that the "special characteristics of the school environment" reduce the scope of First Amendment protections afforded to on-campus speech. The special characteristics of the school environment exist because mandatory attendance laws force students to be exposed to a school's curriculum, supervision, and the speech of other students. Additionally, most parents, realistically, have no choice but to send their children to a public school and have little ability to influence what occurs there. *Id.* at 424 (Alito, J., concurring). As a result, *Tinker* emphasized the need for authority for states and for school officials "to prescribe and control conduct in the schools." *Tinker*, 393 U.S. at 507.

The unique characteristics of the school environment are not present when student speech occurs outside of school. When student speech occurs off-campus, students are not required to listen to that speech. Also, schools have no custodial responsibility for students outside of their supervision, and while student speech occurring outside school supervision may threaten students under school supervision, such risks may be protected against under the "true threat" doctrine. *See Morse*, 551 U.S. at 410; *Id*. at 427 (Breyer, J., concurring in part and dissenting in part). Therefore, as Justice Alito opined in *Morse*, "any argument for altering the usual free speech rules in the public schools … must instead be based on some special characteristic of the school setting." *Id.* at 424 (Alito, J., concurring). Because off-campus speech has no relation to these "special characteristics," neither *Tinker* nor the rest of the school speech precedent should apply to off-campus speech.

Further, limiting the application of the *Tinker* standard to on-campus speech would be more consistent with the text of the *Tinker* opinion itself. The basis for lower courts' application of the substantial disruption standard to off-campus speech appears to be from specific language in *Tinker*:

> "[C]onduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-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."

J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 313 n. 15 (3d Cir. 2010) (Chagares, J., concurring in part) (quoting *Tinker*, 393 U.S. at 313). However, immediately preceding the language above, *Tinker* lists the "cafeteria", the "playing field," and the "campus during authorized hours," as areas where a student's rights extend beyond the classroom. 395 U.S. at 512-13. The absence in this list of any locations outside of a school's supervision makes evident that *Tinker's* holding does not control students' off-campus rights. Instead, this Court meant for the language "in class or out of it" to ensure that on-campus speech is subject to regulation under *Tinker*, even if it occurs outside of the actual classroom. Therefore, an analysis of the language that lower courts have relied upon to broaden the application of the substantial disruption standard is actually consistent with limiting its application to on-campus speech.

2. *Applying Tinker outside of the school context would give schools virtually limitless authority to control student speech.*

Applying the substantial disruption standard to speech outside of the school context, especially to Internet speech, would give school officials overly broad authority. If this Court applies *Tinker* beyond the school context, it would empower schools to regulate students' expressive activity "no matter where it takes place, when it occurs, or what subject matter it

involves—so long as it causes a substantial disruption at school." *J.S. ex rel. Snyder,* 650 F.3d at 939 (Smith, J., concurring).

There are certainly circumstances where off-campus speech can lead to disruptions inside the school. However, even in these contexts, particularly when broad societal issues are involved, it would be inappropriate for school authority to reach speech beyond the schoolhouse. For example, Judge Smith in *Snyder* warned against the threat to freedom of speech if school officials were permitted to target student expression political opinions off-campus, stating that "those who championed desegregation in the 1950s and 60s caused more than a minor disturbance in Southern schools." *Id.* Even if opinions expressed off-campus eventually lead to conflicts or other disturbances to the school environment, allowing school officials to penalize a student solely for expressing his or her opinion while not in school would produce an unacceptable chilling effect on free expression. Thus, if the authority afforded to school officials under the substantial disruption standard were extended to off-campus speech, students' ability to express their opinions on their own time would be seriously diminished.

This concern is intensified considering that school officials may be granted qualified immunity when students challenge their decisions for deprivation of rights. *See Porter*, 393 F.3d at 614. School officials cannot be subject to a damage award unless their conduct violates "'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As a result, few families would choose to absorb the cost of litigation to reverse a suspension that has already been served, without the possibility of receiving monetary compensation. Therefore, school officials would have little incentive to protect students' First Amendment rights and would have very little fear that their disciplinary decisions would be reversed.

Applying the substantial disruption standard to speech outside of school is not necessary to protect against the most troubling problems created by student speech. As discussed in Part I of this brief, speech that a reasonable person would interpret as a threat to student or teacher safety may be disciplined under the "true threat" doctrine regardless of where the speech occurred. *Watts*, 394 U.S. at 707. As a result, school boards still have recourse to punish the most dangerous off-campus student speech without the limitless authority of extending the substantial disruption standard.

Although petitioner is trying to extend the substantial disruption standard to off-campus speech, the *Tinker* Court understood that "when educating the young for citizenship… we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 383 U.S. at 507. An overly broad application of the substantial disruption standard to off-campus speech would be doing just that.

B. Even if This Court Does Apply *Tinker*, Ms. Clark's Facebook Post sas Neither "Materially Disruptive" nor did it "Collide With the Right of Other Students to be Secure at School."

Even if this Court does apply the *Tinker* exception to off-campus speech such as Ms. Clark's Facebook post, she is still entitled to First Amendment protection and therefore the discipline imposed on her was unconstitutional. Under *Tinker*, schools may restrict speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities" or that collides "with the rights of other students to be secure and to be let alone." 383 U.S. at 513. Ms. Clark's Facebook post falls into neither of these two categories.

Ms. Clark's Facebook post did not rise to a substantial disruption under *Tinker* as applied by other lower courts to off-campus speech. To justify the restriction of student speech, a school

must show that its action was caused by something more than a mere desire to avoid "discomfort and unpleasantness." *Id.* at 509. Also, the school board must demonstrate "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Id.* at 514. Finally, lower courts have required some sort of tangible connection to the school before applying the substantial disruption standard to speech that originates off-campus. *See Bell*, 799 F.3d at 393 (a student may be disciplined when he or she "intentionally directs" speech at the school community); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012) (applying the *Tinker* standard to off-campus speech in circumstances where it is reasonably foreseeable that the speech will reach the school community); *Kowalski,* 652 F.3d at 577 (requiring a sufficient nexus between the off-campus speech and the school community must exist to uphold a disciplinary action). Regardless of which standard this Court applies, there is insufficient evidence in the record of an actual or foreseeable disruption of the school environment to justify Ms. Clark's suspension.

For example, in *Kowalski*, a high school student was suspended for creating a webpage that ridiculed a fellow student. *Kowalski*, 652 F.3d at 567. The court applied the substantial disruption test after determining that the nexus between the student's speech and the high school was sufficiently strong to justify the action taken by school officials. *Id*. at 573. In coming to this conclusion, the court relied on the fact that the webpage made its way into the school and was accessed first by one of the high school's students from a school computer. *Id.* at 574.

While it may be argued that Ms. Clark's Facebook post carried a nexus to a school-sponsored event, because the initial altercation arose from a high school intrasquad scrimmage, there is insufficient evidence in the record to suggest that an actual or foreseeable disruption of the school environment would occur in the future as a result of Ms. Clark's post. R. at 36. If this

Court held that this post created a reasonably foreseeable disruption, then any student posting outside of the school environment could be subject to reduced protections under the substantial disruption standard. Therefore, it would be unreasonable to assume that Ms. Clark's Facebook post might have reasonably lead school authorities to forecast a substantial disruption of school activities.

Second, Ms. Clark's Facebook post did not "intrude upon the rights of others" within the meaning of *Tinker*. In accordance with *Tinker*, schools may also restrict speech that "intrudes upon … the rights of others" or that "collides with the rights of other students to be secure and to be let alone." 383 U.S. at 508. Being secure involves "not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006).

Wynar v. Douglas Cnty. Sch. Dist. offers an example of when off-campus Internet speech, made by a student, was found to intrude on the rights of others at school. 728 F.3d 1062 (9th Cir. 2013). In *Wynar*, a student began posting instant messages that were "increasingly violent and threatening." *Id.* at 1065. The messages threatened to shoot specific classmates, invoked the Virginia Tech Massacre, and provided specific dates for when he would "take out" people. *Id.* at 1065-66. The *Wynar* court found these messages to "represent the quintessential harm to the rights of other students to be secure," and upheld the disciplinary measures taken by the school as being constitutional. *Id.* at 1072.

Ms. Clark's Facebook post pales in comparison to the graphic and detailed messages sent in the *Wynar* case. Although Ms. Clark's post highlighted transgender students as a group and specifically named Ms. Anderson, it did not explicitly reference that she would harm them as

was seen in *Wynar*. Further, unlike the messages in *Wynar*, Ms. Anderson's Facebook post was extremely ambiguous and could have had a number of different meanings. In applying the *Tinker* standard, the *Wynar* court depended on a specificity in date and manner of violence that is not present in Ms. Clark's post. As a result, Ms. Clark's Facebook did not rise to a significant enough collision with the rights of others to justify the sanctions imposed against her.

CONCLUSION

For the foregoing reasons, Ms. Clark's Facebook post does not constitute a "true threat" and thus, deserves First Amendment protections. Moreover, under the *Tinker* standard, the Washington County School District cannot constitutionally discipline Ms. Clark for her Facebook post that originated off-campus and from her personal computer. Therefore, this Court should affirm the Fourteenth Circuit's decision to remand this case back to the District Court with instructions to enter summary judgment in favor of Ms. Clark.

APPENDIX

U.S. Const. Amend. I

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