

Brief on the Merits

No. 16-9999

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 2016

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**WASHINGTON COUNTY SCHOOL DISTRICT,**

*Petitioner,*

v.

**KIMBERLY CLARK, a minor,**

**by and through her father ALAN CLARK,**

*Respondent,*

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

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**BRIEF FOR PETITIONER**

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*Counsel for Petitioner*

## **QUESTIONS PRESENTED**

1. Was a public high school student's Facebook post expressing hostility toward transgender students protected by the First Amendment, or was it a "true threat?"
2. Did a school district have the authority to discipline a student for authoring a threatening Facebook post after an in-person altercation without violating the First Amendment?

**TABLE OF CONTENTS**

QUESTIONS PRESENTED..... iii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES ..... v

STATEMENT OF JURISDICTION..... viii

STATEMENT OF THE CASE..... viiii

STATEMENT OF THE FACTS ..... ix

    I. The School District’s Anti-Harassment and Nondiscrimination Policies ..... ix

    II. Disruptive Altercation and the Facebook Post..... ix

    III. Suspension and Appeal..... x

SUMMARY OF THE ARGUMENT ..... 1

ARGUMENT ..... 2

I. MS. CLARK’S POST CONSTITUTED A “TRUE THREAT,” WHICH THE FIRST AMENDMENT DOES NOT PROTECT ..... 2

    A. Lower courts have applied conflicting standards in analyzing “true threats,” and a cohesive standard is needed to resolve this circuit split ..... 3

        1. The objective standard requires a threat be 1) intentionally or knowingly communicated to either the object of the threat or a third person, and 2) that a reasonable and objective recipient would regard the speech as a true threat ..... 3

        2. The subjective standard requires a finding that the speaker intended his words or conduct to be understood by the victim as a threat..... 4

        3. This Court’s precedent is consistent with the objective standard ..... 5

    B. Ms. Clark’s speech constituted a “true threat” under both an objective standard and a subjective standard ..... 6

1. Under the objective standard, Ms. Clark’s post constituted a “true threat” because Ms. Clark knowingly communicated the threat, and a reasonable and objective reader would regard the post as a threat ..... 6
2. Under the subjective standard, Ms. Clark’s post constituted a “true threat” because she subjectively intended her words and conduct to be understood by the victims as threat ..... 8

II. THE SCHOOL DISTRICT PROPERLY DISCIPLINED MS. CLARK BECAUSE HER POST WAS MATERIALLY DISRUPTIVE AND COLLIDED WITH THE RIGHT OF FELLOW STUDENTS TO BE SECURE AT SCHOOL..... 10

A. The *Tinker* framework should apply to Ms. Clark’s Facebook post, even though it was generated off-campus and posted to a “personal” Facebook page ..... 10

1. The dangers of cyberbullying in the internet age compel a rule that protects the safety of the school environment from harmful online speech ..... 11
2. This Court has not yet articulated the proper rule for whether schools can regulate speech generated off-campus and online, and lower courts differ in their application of *Tinker* to off-campus speech ..... 12
3. *Tinker* should apply to Ms. Clark’s Facebook post because it was reasonably foreseeable that the harmful speech would reach the school community ..... 14

B. *Tinker* authorized the School District to regulate Ms. Clark’s off-campus Facebook post because the post both caused a material disruption and collided with the rights of other students to be secure and to be let alone ..... 15

1. Ms. Clark’s post caused a material disruption because the School District received numerous complaints about Ms. Clark’s post, and the post caused one of the targeted students to miss two full days of class ..... 16
2. Ms. Clark’s post collided with the rights of transgender students to feel safe and secure at school, as well as their right to be left alone ..... 19

CONCLUSION..... 20

## TABLE OF AUTHORITIES

### UNITED STATES SUPREME COURT CASES

<i>Bethel Sch. Dist. No. 403 v. Fraser</i> , 478 U.S. 675 (1986).....	12
<i>Elonis v. United States</i> , 135 S. Ct. 2001 (2015) .....	6
<i>Hazelwood Sch. Dist. v. Kuhlmeier</i> , 484 U.S. 260 (1988) .....	10, 12, 13
<i>Morse v. Frederick</i> , 551 U.S. 393 (2007). .....	11, 12
<i>Tex. v. Johnson</i> , 491 U.S. 397 (1989).....	2, 6
<i>Tinker v. Des Moines Indep. Cty. Sch. Dist.</i> , 393 U.S. 503 (1969).....	passim
<i>Virginia v. Black</i> , 538 U.S. 343 (2003) .....	2, 5, 6
<i>Watts v. United States</i> , 394 U.S. 705 (1968).....	2, 5

### COURTS OF APPEALS CASES

<i>Bell v. Itawamba Cty. Sch. Bd.</i> , 799 F.3d 379 (5th Cir. 2015) .....	10, 13
<i>Boucher v. Sch. Bd.</i> , 134 F.3d 821, (7th Cir. 1998). .....	16, 17
<i>D.J.M. v. Hannibal Pub. Sch. Dist.</i> , 647 F.3d 754 (8th Cir. 2011). .....	7, 8
<i>DeJohn v. Temple Univ.</i> , 537 F.3d 301 (3d Cir. 2008).....	15
<i>Doe v. Pulaski Cty. Special Sch. Dist.</i> , 306 F.3d 616 (8th Cir. 2002) .....	passim
<i>Doninger v. Niehoff</i> , 527 F.3d 41 (2d Cir. 2008).....	10, 11, 12, 13

<i>Harper v. Poway Unified Sch. Dist.</i> , 445 F.3d 1166 (9th Cir. 2006) .....	13, 18, 19
<i>Kowalski v. Berkeley Cty. Sch.</i> 652 F.3d 565 (4th Cir. 2011) .....	passim
<i>Lovell ex rel. Lovell v. Poway Unified Sch. Dist.</i> , 90 F.3d 367 (9th Cir. 1996).....	8, 9
<i>Porter v. Ascension Sch. Dist.</i> , 393 F.3d 608 (5th Cir. 2004) .....	3, 4, 5, 7
<i>S.J.W. v. Lee’s Summit R-7 Sch. Dist.</i> , 696 F.3d 771 (8th Cir. 2012) .....	10, 11 13, 15
<i>United States v. Cassel</i> , 408 F.3d 622 (9th Cir. 2005) .....	3, 4, 5
<i>Wisniewski ex rel. Wisniewski v. Bd. of Educ.</i> , 494 F.3d 34 (2d Cir. 2007) .....	10, 13, 16, 17
<i>Wynar v. Douglas Cty. Sch. Dist.</i> , 728 F.3d 1062 (9th Cir. 2013).....	passim

**OTHER CASES**

<i>Burge v. Colton Sch. Dist.</i> , 100 F. Supp. 3d 1057 (D. Or. 2015).....	17
<i>Clark v. Sch. Dist. of Wash. Cty.</i> , No. 17-307, slip op. at 1 (14th Cir. Jan. 5, 2017) .....	vi, vii
<i>Clark v. Wash. Cty. Sch. Dist.</i> , C.A. No. 16-9999, slip op. at 3 n.1 (DN COL April 14, 2016). .....	vii

**SECONDARY AUTHORITIES**

Kevin Turbert, <i>Faceless Bullies: Legislative and Judicial Responses to Cyberbullying</i> , 33 Seton Hall Legis. J. 651 (2009).....	10, 11, 12, 13
Ronald D. Wenkart, J.D., <i>Disruptive Student Speech and the First Amendment: How Disruptive Does It Have to Be?</i> , 236 Ed. Law Rep. 551 (2008). .....	16
Stephanie Klupinski, <i>Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age</i> , 71 Ohio St. L.J. 611 (2010).....	11

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on January 5, 2017. *Clark v. Sch. Dist. of Wash. Cty.*, No. 17-307, slip op. at 1 (14th Cir. Jan. 5, 2017). Petitioner timely filed a petition for writ of certiorari, which this Court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1331.

## STATEMENT OF THE CASE

Respondent Kimberly Clark, a minor, by and through her father Alan Clark, brought suit under 42 U.S.C. § 1983, against Petitioner Washington County School District (“the School District”). Clark alleged that the School District violated Clark’s First Amendment rights.

In the United States District Court for the District of New Columbia, both Ms. Clark and the School District filed cross motions for summary judgment on January 10, 2015. The parties stipulated that the issues in this case did not include Title IX concerns. *Clark v. Wash. Cty. Sch. Dist.*, C.A. No. 16-9999, slip op. at 3 (DN COL April 14, 2016). Additionally, Ms. Clark has not claimed any violation of due process, and the School District does not attempt to assert qualified immunity as an affirmative defense. *Clark v. Wash. Cty. Sch. Dist.*, C.A. No. 16-9999, slip op. at 3 n.1 (DN COL April 14, 2016).

On April 14, 2016, the District Court granted the School District’s motion for summary judgment for two reasons: 1) Ms. Clark’s post constituted a “true threat” and 2) the post caused a material disruption and cause other students to feel unsafe and insecure in their school environment.

Ms. Clark filed for appeal in the United States Court of Appeals for the Fourteenth Circuit. The Fourteenth Court of Appeals reversed the District Court, holding: 1) Ms. Clark’s post was not a “true threat,” and 2) that the School District did not have constitutional authority under *Tinker v. Des Moines Indep. Cty. Sch. Dist.*, 393 U.S. 503 (1969) to discipline Ms. Clark for her post. *Clark v. Wash. Cty. Sch. Dist.*, No. 17-307, slip op. at 15 (14th Cir. Jan. 5, 2017). The School District filed a petition for writ of certiorari, which this Court granted.

## **STATEMENT OF THE FACTS**

### **I. The School District’s Anti-Harassment and Nondiscrimination Policies**

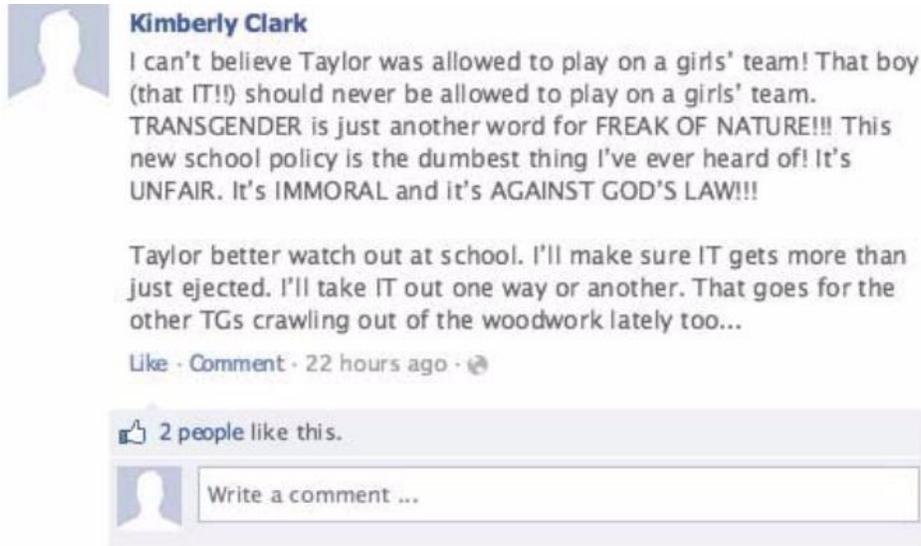
On August 1, 2015, the School Board of Washington County (“the School Board”) approved two new policies for the School District to protect students from harassment, bullying, cyberbullying, and intolerance. R. at 15, 17. Principal Thomas Franklin enforced the School Board policies and protected the safety of all students at Pleasantville High School. R. at 13.

The first policy protects students from discrimination in all School District athletic programs “in order to create a safe, inclusive learning environment” and “offers suggested approaches to specific instances in which the protection and safety of transgender and gender non-conforming students may be threatened.” R. at 15.

The second policy prohibits a student from communicating by any means, whether initiated on school grounds or not, “all forms of harassment, intimidation, and/or bullying based on race...gender, sexual orientation, gender identity...” R. at 17. The anti-bullying policy applies to all School District students “with respect to conduct and contact of any kind.” R. at 17. In order to address the large portion of inter-student communication that takes place off-campus, the School District needed the ability to enforce their policies to ensure students do not bully off school grounds to avoid consequences of their actions. R. at 21.

### **II. Disruptive Altercation and the Facebook Post**

Kimberly Clark was born female and identifies as female. R. at 13. Taylor Anderson was born male and identifies as female. R. at 2. On November 2, 2015, Ms. Clark and Ms. Anderson, became involved in a loud, disruptive verbal altercation at a practice basketball game such that both students had to be ejected from the game. R. at 23. Later that evening, Ms. Clark posted the following message to her Facebook account:



R. at 18. On November 4, 2015, Ms. Anderson’s parents met with Principal Franklin to show him a printout of Ms. Clark’s Facebook post. R. at 13-14. Another transgender student, Josie Cardona, and her parents, joined the Andersons at this meeting. R. at 14. Both students were visibly distressed, and their parents feared that Ms. Clark would carry out her threat. R. at 13. The Andersons were so fearful they kept their child home from school for two days. R. at 14.

### **III. Suspension and Appeal**

On November 5, 2015, Mr. Franklin met with Ms. Clark and her parents to discuss the school-wide impact of her threatening post. R. at 14. Other students had also brought their fears of the post to Principal Franklin. R. at 14. During this meeting, Ms. Clark confessed that she knew some of her friends might pass her post onto other students at Pleasantville High School, including transgender students. R. at 14. After learning of the context and impact of the post, Mr. Franklin suspended Ms. Clark for three days. R. at 14. On November 13, 2016, Alan Clark, Ms. Anderson’s father, appealed the suspension with the Chair of the District Disciplinary Review Board. R. at 21. After review, the Board confirmed Ms. Clark’s suspension. R. at 21-22.

## SUMMARY OF THE ARGUMENT

The School District properly punished Ms. Clark for her threatening Facebook post for two reasons: 1) The First Amendment does not protect the post because it is a “true threat” under both an objective and a subjective standard, and 2) *Tinker* empowers the School District to ensure the safety of its students from threats of physical violence and the harmful effects of cyberbullying.

Ms. Clark’s Facebook post constituted a “true threat” whether this Court analyzes the post under an objectively reasonable person standard or focuses on Ms. Clark’s subjective intent. This Court has not ruled whether a subjective or objective standard applies to “true threats” in civil cases. However, the logic and reasoning of this Court’s precedent is consistent with an objective standard. Therefore, this Court should adopt the objective standard in determining when student speech constitutes a “true threat.” Regardless of which standard this Court adopts, Ms. Clark’s post constituted a “true threat.”

Additionally, the School District had the authority to punish Ms. Clark because: 1) *Tinker* applies to this case, and 2) Ms. Clark’s post caused a material disruption and collided with the right of fellow students to be secure at school. Although this Court has not yet applied *Tinker* to online speech generated off-campus, a growing majority of Courts of Appeals have applied *Tinker* to off-campus speech under the foreseeability test. *Tinker* should apply to this case because it was foreseeable Ms. Clark’s post would reach the school environment. The post caused a material disruption because Ms. Anderson missed classes, and multiple students interrupted their class schedules to meet with Principal Franklin regarding their concerns. Additionally, Ms. Clark’s post interfered with students’ rights to be secure at school because it contained dehumanizing language toward transgender students and threatened their safety.

## ARGUMENT

This Court has consistently held that speech cannot be silenced merely because speech is unpopular or offensive. *Tex. v. Johnson*, 491 U.S. 397, 414 (1989). However, the First Amendment’s freedom of speech protection is not absolute and does not extend to “true threats.” *Watts v. United States*, 394 U.S. 705, 707 (1968) (per curiam). Additionally, because public school administrators have a significant interest in maintaining the safety of the learning environment, free speech protections for public school students have special considerations. *Tinker*, 393 U.S. at 506; *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013).

In this case, Ms. Clark’s Facebook post evades First Amendment protection because it was a “true threat” under any standard. Further, *Tinker* permitted the School District to punish Ms. Clark’s post because it was materially disruptive and infringed on the rights of transgender students to be secure at school.

### **I. MS. CLARK’S POST CONSTITUTED A “TRUE THREAT,” WHICH THE FIRST AMENDMENT DOES NOT PROTECT**

In the criminal context, a “true threat” is a statement where the speaker means to communicate a serious expression of an intent to harm a particular individual or group of individuals. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Watts*, 394 U.S. at 708). To date, this Court has only analyzed “true threats” that have violated criminal statutes. *See Watts*, 394 U.S. at 707. *See Black*, 538 U.S. at 347.

This Court has not decided the proper analysis for “true threats” in the civil context. Conflicting Courts of Appeals have analyzed “true threats” using two different standards: (1) an objective standard which requires a reasonable person to interpret the speech as a “true threat;” and (2) a subjective standard which asks whether the speaker intended the communication to be a

“true threat.” See *Porter v. Ascension Sch. Dist.*, 393 F.3d 608, 616 (5th Cir. 2004); See also *United States v. Cassel*, 408 F.3d 622, 628 (9th Cir. 2005).

**A. Lower courts have applied conflicting standards in analyzing “true threats,” and a cohesive standard is needed to resolve this circuit split**

Both the Fifth and the Eighth Courts of Appeals have applied an objective standard analysis to “true threats” in the civil context. *Porter*, 393 F.3d at 615; *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002). Conversely, the Ninth Circuit has applied a subjective standard, which requires the speaker to have subjectively intended her words or conduct as a threat. *Cassel*, 408 F.3d at 631.

**1. The objective standard requires a threat be 1) intentionally or knowingly communicated to either the object of the threat or a third person; and 2) that a reasonable and objective recipient would regard the speech as a true threat**

Under the objective standard, speech is a “true threat” if it is intentionally or knowingly communicated to either the object of the threat or to a third person. *Porter*, 393 F.3d at 616 n.26. Additionally, an objectively reasonable person would have interpreted the speech as a “serious expression” of intent to cause a present or future harm. *Id.* at 616.

**a. The first element of the objective standard requires a “true threat” to be intentionally or knowingly communicated**

The Eighth Circuit held that the first element of the objective standard is met when the speaker intentionally communicates the threat to the object of the threat or a third party. *Pulaski*, 306 F.3d at 624. In *Pulaski*, a student wrote two letters containing violent, misogynic, and obscenity-laden rants to his former girlfriend. *Id.* at 619. When the student showed the letter to his friend and discussed the letter with his girlfriend, the student intentionally communicated the threat. *Id.* at 624. Additionally, the court confirmed that intentional communication includes both a direct and indirect communication of the threat. *Id.* at 624-25.

The Fifth Circuit also held that speech is not a true threat unless the speaker intentionally or knowingly communicates the threat to others. *Porter*, 393 F.3d at 617-18. In *Porter*, a student accidentally brought a violent drawing to a public school. *Id.* at 611. The student’s older brother had created the drawing years earlier, and the student did not intentionally bring the drawing to communicate a message of any kind to anyone. *Id.* Inadvertently, a classmate of the student discovered the violent drawing, and the school suspended the student. *Id.* Under these circumstances, the Fifth Circuit determined that because the speech was not intentionally or knowingly communicated to a third person, the drawing did not constitute a “true threat.” *Id.* at 618.

**b. The second element of the objective standard requires an objectively reasonable person to interpret the speech as a “serious expression” of intent to cause harm**

The Eighth Circuit examined a “serious expression” of intent to cause harm in *Pulaski*. *Pulaski*, 306 F.3d at 625. In *Pulaski*, a reader of the threatening letter was disturbed enough to take the letter from the author’s home and show it to someone else. *Id.* at 626. When the intended victim of the threat read the letter, she became frightened, started crying, and was so distraught she left school early. *Id.* Because of the violent and explicit speech in letter and the readers’ reactions to the letter, the court concluded that a reasonable person would interpret the letter as a serious expression of intent to cause harm. *Id.*

**2. The subjective standard requires a finding that the speaker intended his words or conduct to be understood by the victim as a threat**

The Ninth Circuit applied a subjective standard to student speech in *Cassel*, 408 F.3d at 631. In *Cassel*, Cassel approached potential buyers of a neighboring lot with angry comments that child molesters, murderers, and devil worshippers inhabited the neighborhood, and that the cyanide poisoned the neighbor’s lungs. *Id.* at 624-25. The court held that Cassel communicated

a “true threat,” because he intended his words or conduct to be understood by the victim as a threat. *Id.* at 628. The court made clear that the speaker is not required to actually intend to carry out the threat or to be capable of carrying out that threat. *Id.* at 631.

### **3. This Court’s precedent is consistent with the objective standard**

This Court has not yet ruled on whether to apply an objective or subjective standard in the context of school discipline, but the objective standard is consistent with this Court’s precedent. *E.g.*, *Watts*, 394 U.S. at 705; *Black*, 538 U.S. at 343; *Porter*, 393 F.3d at 608; *Pulaski*, 306 F.3d at 616. Although previous “true threat” cases *Watts* and *Black* are criminal cases, they provide valuable insight into this Court’s logic and reasoning in analyzing threatening speech. This Court should apply a consistent analysis to student speech in the civil context, and adopt the objective approach.

First, in *Watts*, this Court outlined several factors to help distinguish speech that is a “true threat.” *Watts*, 394 U.S. at 707. One of the Court’s primary considerations was whether a reasonable person would believe that the speech was a true threat. *Id.* This Court noted the reaction of the speaker’s audience, who laughed at the statement at issue, to support the finding that the statement was not a “true threat.” *Id.* The *Watts* analysis is consistent with the objective standard because it examines the content of the speech, the surrounding context, and the reaction of a reasonable listener.

Second, this Court’s ruling in *Virginia v. Black* also incorporated an objective standard. *Black*, 538 U.S. at 367. The objective standard in *Black* required the speaker to intentionally communicate a threat to the object of the threat or a third person. *Id.* at 359-60. Additionally, this Court held that in order to prosecute a cross-burning as a threat, courts must examine the objective circumstances surrounding the cross-burning to determine whether the act would be

reasonably perceived as a threat. *Id.* at 366. Thus, this Court’s holding in *Black* is consistent with adopting the objective standard.

This Court recently decided a case involving a “true threat,” but did not resolve the Courts of Appeals split regarding the speaker’s intent. *Elonis v. United States*, 135 S. Ct. 2001, 2005 (2015). This Court seemed to use an analysis similar to the subjective approach when it required a speaker to communicate with purpose or with knowledge that the speech will be viewed as a threat. *Id.* at 2011. However, *Elonis* did not clearly pronounce that the subjective standard is the proper rule for “true threat” cases. Therefore, *Elonis* does not bind this Court to use a subjective standard in this case, and a clear pronouncement of the proper rule is still needed.

**B. Ms. Clark’s speech constituted a “true threat” under both an objective standard and a subjective standard**

Ms. Clark’s Facebook post should be analyzed in two separate parts. The first paragraph of her Facebook post expressed her political views opposing the school policy, which is protected by the First Amendment. *Johnson*, 491 U.S. at 414. The second paragraph of Ms. Clark’s post contains the “true threat.” Ms. Clark’s threat appeared in this progression: “TRANSGENDER is just another word for FREAK OF NATURE!!!...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 TG’s crawling out of the woodwork lately too...” R. at 2, 18, 26. This language constitutes a “true threat” under both the objective and subjective standards.

**1. Under the objective standard, Ms. Clark’s post constituted a “true threat” because Ms. Clark knowingly communicated the threat, and a reasonable and objective reader would regard the post as a threat**

In order for Ms. Clark’s Facebook post to constitute a true threat under the objective standard, two elements must be met: (1) Ms. Clark knowingly communicated a threat to a third

person; and (2) an objectively reasonable person would consider the post to be a threat. *Porter*, 393 F.3d at 616; *Pulaski*, 306 F.3d at 622.

**a. Clark’s post satisfies the first element of the objective standard because Clark knowingly communicated the threat to a third person**

The first element in the objective standard requires Ms. Clark to have intentionally or knowingly communicated the threat to either the object of the threat, or a third person. *Pulaski*, 306 F.3d at 624. The Eighth Circuit held that a threat does not need to be communicated directly to the object of the threat. *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 762 (8th Cir. 2011). In *D.J.M.*, a student sent private instant messages from his home to a classmate about getting a gun and shooting at least five classmates. *Id.* The recipient showed the threatening messages to school administrators, and the school punished the student. *Id.* at 756. The court held that even though the speech was conveyed through private electronic messaging, it was sufficient to satisfy the first prong. *Id.*

Here, Ms. Clark’s posted her threatening speech to Facebook, an online social media site that allows users to publish “posts” online, viewable by the author’s Facebook friends. R. at 2, 10. Ms. Clark admitted that she had authored the post and intended her Facebook friends to see it. R. at 3, 19. Although Ms. Clark was not Facebook friends with any transgender students, she confessed she knew that at least some of her friends might pass her post onto others. R. at 3, 14. She also knew that some of those who viewed her post were likely to alert Taylor Anderson or other transgender students to her post. R. at 3, 14. Therefore, even though Ms. Clark did not communicate the threat directly to transgender students or to Ms. Anderson, Ms. Clark knowingly communicated the threat to a third party, satisfying the first element of the objective standard.

**b. Clark’s post satisfies the second element of the objective standard because an objectively reasonable person would interpret the post as a “serious expression” of Clark’s intent to harm transgender students**

The second element of the objective standard is met when a reasonable and objective person would feel threatened by the speech. *Pulaski*, 306 F.3d at 625. In *D.J.M.*, the court determined a reasonable person would interpret the speech as a “true threat” because students said they were fearful and approached school administrators to address their concerns. *D.J.M.*, 647 F.3d at 764. Here, Ms. Clark decided to post this threat only a few hours after an emotional and in-person altercation with Ms. Anderson and many students reacted by reporting their fears to Principal Franklin. R. at 2, 14.

After learning of the post, Taylor Anderson and another transgender student were visibly distressed. R. at 3, 13. Two sets of parents came to the school and met with Principal Franklin to voice their fears and protect their children from a potentially violent bully. R. at 2-3. Ms. Anderson missed two school days because of the post. R. at 3, 14. Additionally, other students were visibly upset and complained about the post. R. at 14. Ms. Clark’s posts were public and were brought to the attention of school administrators within days of the posting. R. at 2-3, 26. Therefore, this Court should determine that based on the reactions of the intended victim, parents, and other students at school, Ms. Clark’s Facebook post would cause a reasonable person to interpret the speech as a threat.

**2. Under the subjective standard, Ms. Clark’s post constituted a “true threat” because she subjectively intended her words and conduct to be understood by the victims as threat**

Ms. Clark’s post also constituted a “true threat” under the subjective standard because Ms. Clark intended the victim to understand her speech as a threat. The circumstances surrounding the post prove Ms. Clark’s subjective intent to threaten Ms. Anderson.

In *Lovell*, a student threatened to shoot a school guidance counselor if the counselor did not change the student's schedule to her liking. *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 368 (9th Cir. 1996). Lovell had gone back and forth between her counselor's office and the administrative office for several hours trying to make schedule changes. *Id.* The *Lovell* court applied a subjective standard, which asked whether a reasonable speaker under the same circumstances should have foreseen that his or her words would have the effect of a threat. *Id.* at 372. The court held that there was equal probability that one would foresee such a statement to be interpreted as a serious expression of intent to harm, even though Lovell apologized for her behavior right afterward. *Id.* at 373.

Here, the context shows that Ms. Clark should have foreseen that her post would have the effect of a threat to the safety of transgender students. Like Ms. Lovell, Ms. Clark wrote her post out of anger and frustration, only hours after being ejected from the basketball game. R. at 2, 26. After the altercation with Ms. Anderson, Ms. Clark wrote the Facebook post threatening Ms. Anderson by name, knowing that some of her friends might pass it onto others. R. at 3, 14. Ms. Clark's anger with recent changes in school policy and her lack of self-control during a heated argument with a transgender student prove Ms. Clark's subjective intent to communicate a serious threat. The context here shows that Ms. Clark's pointed and calculated threat goes beyond a mere frustrated utterance or "joke" as Ms. Clark may try to claim after the fact. R. at 2, 5, 16-17, 19. Because Ms. Clark knew that transgender students would see her post, and she threatened transgender students to "watch out," the post constituted a "true threat" under the subjective standard.

## II. THE SCHOOL DISTRICT PROPERLY DISCIPLINED MS. CLARK BECAUSE HER POST WAS MATERIALLY DISRUPTIVE AND COLLIDED WITH THE RIGHT OF FELLOW STUDENTS TO BE SECURE AT SCHOOL

The American public school system's purpose is to enable children to learn, grow, and become contributing members of society. If bullying, threats of violence, or discrimination poison the school environment, students may not feel safe enough to even attend class, let alone focus on their education. Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 Seton Hall Legis. J. 651, 656-57 (2009). Additionally, this Court has determined that the wellbeing of the students deserves special and heightened protection. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

In *Tinker*, the Court permitted the restriction of student speech was limited to speech that invaded and damaged the school environment. *Tinker*, 393 U.S. at 507. This Court determined school officials can prohibit student speech when the speech materially disrupts classwork or invades the rights of others. *Id.* at 513. Here, Ms. Clark's Facebook post caused a material disruption and invaded the right of transgender students to be secure at school.

### A. The *Tinker* framework should apply to Ms. Clark's Facebook post, even though it was generated off-campus and posted to a "personal" Facebook page

Courts of Appeals are split in applying *Tinker* to modern technology and online communication. *Bell v. Itawamba County Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015); *Doninger v. Niehoff*, 527 F.3d 41, 46 (2d Cir. 2008); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2011); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012); *Wynar*, 728 F.3d at 1069. Because of the prevalence of online communication between students both during and after school hours, there is no longer a clear boundary of where a student's interaction with the school environment begins and ends. *Tinker* should apply to online speech that has invaded and caused harm in the school environment; schools should be able to punish speech

that (1) occurred online but was reasonably foreseeable to reach the school environment; and (2) materially disrupted classwork or invaded the rights of other students. *Doninger*, 527 F.3d at 46; *Kowalski*, 652 F.3d at 577; *S.J.W.*, 696 F.3d at 777; *Wynar*, 728 F.3d at 1069; *Tinker*, 393 U.S. at 512-13; *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38-39 (2d Cir. 2007). This framework protects a students' right to free speech without allowing bullies to wreak havoc from behind their computer screen.

**1. The dangers of cyberbullying in the internet age compel a rule that protects the safety of the school environment from harmful online speech**

School districts have a significant interest in protecting the safety of their students.

Cyberbullying online has presented a serious threat to student interactions on-campus. Victims of cyberbullying may experience “low self-esteem, depression, chronic illness ... school problems, familial problems, and suicidal ideation.” Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 Seton Hall Legis. J. 651, 655 (2009). Importantly, cyberbullying has no distinct boundaries. *Id.* at 654. Bullies can reach their victims anytime and anywhere, which compounds the damaging effects of the abuse. *Id.* at 654-55.

Many school districts have implemented safeguards to protect the school environment from the widespread nature and horrendous consequences of cyberbullying. R. at 15. This Court has held that schools have a responsibility to provide an environment free from messages advocating harmful drug use. *Morse v. Frederick*, 551 U.S. 393, 396 (2007). Similarly, schools have a duty to protect their students from harassment and bullying in the school environment.” *Kowalski*, 652 F.3d at 572. Most jurisdictions have taken steps to allow schools to regulate online speech that meets the elements set forth in *Tinker*. *Doninger*, 527 F.3d at 46; *Kowalski*, 652 F.3d at 577; *S.J.W.*, 696 F.3d at 777; *Wynar*, 728 F.3d at 1069.

Although *Tinker* was decided to address on-campus speech, “the essence of *Tinker’s* holding remains: the ability of a school to proscribe speech depends on the content and effect of the speech. There is not a need for a new standard addressing the Internet.” Stephanie Klupinski, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 Ohio St. L.J. 611, 652 (2010). *Tinker* established that schools are justified in restricting student speech when it substantially interferes with the school environment or infringes upon a student’s rights. *Tinker*, 393 U.S. at 512-13. Applying this rule to online speech is a logical extension in the new Internet era. By limiting online comments like Ms. Clark’s based on the test laid out in *Tinker*, schools are only able to both protect students from cyberbullying and ensure that students retain their right to free speech.

**2. This Court has not yet articulated the proper rule for whether schools can regulate speech generated off-campus and online, and lower courts differ in their application of *Tinker* to off-campus speech**

This Court has upheld and expanded a school district’s right to maintain the safety and integrity of the school environment through the restriction of speech. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Hazelwood*, 484 U.S. at 273; *Morse*, 551 U.S. at 396. Restricting online student speech is the natural next step in a “progression of case law favoring an expansion of school jurisdiction and authority while carving specific limitations in students’ speech.” Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 Seton Hall Legis. J. 651, 676 (2009).

First, in *Fraser*, this Court held that a school district can constitutionally prohibit speech that is “lewd and indecent.” *Bethel*, 478 U.S. at 685. In *Hazelwood*, the court ruled that schools may constitutionally limit “school-sponsored speech.” *Hazelwood*, 484 U.S. at 273. Finally, in

*Morse*, this Court held that a school district may restrict speech that promotes illegal drug use. *Morse*, 551 U.S. at 396.

Courts of Appeals have applied different approaches to whether a school district can regulate off-campus student speech. The growing majority rule is the foreseeability test: when speech will foreseeably reach the school environment, *Tinker* applies to off-campus speech. Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 Seton Hall Legis. J. 651, 675 (2009). The Second, Fourth, and Eighth Circuits have each implemented “reasonable foreseeability” as a requirement for *Tinker* to apply to off-campus speech. *Doninger*, 527 F.3d at 46; *Kowalski*, 652 F.3d at 577; *S.J.W.*, 696 F.3d at 777. The Fifth Circuit held that limiting *Tinker* strictly to speech on the physical premises of a school or at a school-sponsored event is “untenable” and “fails to take into account evolving technological developments.” *Bell*, 799 F.3d at 393.

The Ninth Circuit held that “schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*.” *Wynar*, 728 F.3d at 1069. Further, in *Harper*, the Ninth Circuit held that “students who may be injured by verbal assaults on the basis of a core identifying characteristic like sexual orientation have a right to be free from such attacks.” *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) cert. granted, judgment vacated sub nom. *Harper v. Ponway Unified Sch. Dist.*, 549 U.S. 1262 (2007).

This Court should adopt the foreseeability test because it allows schools to restrict potentially threatening and harmful speech. *Wisniewski*, 494 F.3d at 39. This test ensures that students are not insulated from discipline merely because they created the harmful speech off-campus. *Id.* At the same time, a student’s speech which merely causes discomfort or offense will remain protected by the First Amendment. *Hazelwood*, 484 U.S. at 266-67. Therefore, this Court

should apply the *Tinker* analysis to determine if the School District violated Ms. Clark's First Amendment rights.

**3. *Tinker* should apply to Ms. Clark's Facebook post because it was reasonably foreseeable that the harmful speech would reach the school community**

Under the reasonable foreseeability test, it was reasonably foreseeable that Ms. Clark's Facebook post would reach the school community. In *S.J.W.*, the Eighth Circuit determined that a school properly suspended students for creating a website that contained offensive, racist, and sexually explicit comments. *S.J.W.*, 696 F.3d at 773. The court held that *Tinker* applied to the online speech because it was "targeted at" the school environment. *Id.* at 777. The court determined that speech is "targeted at" the school environment when it is reasonably foreseeable that the speech would reach the school environment. *Id.* at 778. Because the author sent the website to students at the school, and the website named classmates by name, the court determined the posts could reasonably be expected to reach the school environment. *Id.*

Here, Ms. Clark targeted her Facebook post toward the school environment by sharing the post with fellow classmates. R. at 10. Her post named Ms. Anderson, criticized specific school policies, and took place directly after an in-school altercation. R. at 2-3. Additionally, Ms. Clark knew that the post was likely to reach other students at school. R. at 3, 14. Therefore, it was reasonably foreseeable that her Facebook post would reach the school environment, and should be considered as communication "targeted at" the school environment. R. at 10.

In *Kowalski*, the Fourth Circuit also found in favor of a school district when it suspended a student for creating a webpage dedicated to bullying a classmate. *Kowalski*, 652 F.3d at 574. The court determined the student's First Amendment claim failed because: (1) the nexus of her

speech to the school's pedagogical interests was sufficient to justify the administrator's actions; and (2) it was foreseeable that her conduct would reach the school. *Id.*

The *Kowalski* court addressed where the speech "occurred" when the speaker used the Internet as her medium. The student speaker created an online harassment group, which two dozen fellow classmates joined. *Id.* at 567. Because the members and the targets of the harassment were students, it was foreseeable that the student's website would reach the school through computers, smartphones, and electronic devices. *Id.* Further, the victim's parents filed their complaint with school authorities, showing that they understood the attack was school-related. *Id.* at 576. The court concluded that school administrators should have the authority to regulate student speech, even if it does not originate at school, if it eventually reaches the school in a meaningful way. *Id.*

As in *Kowalski*, the targeted victim of Ms. Clark's post was a classmate, the targeted audience was the school environment, and the content reached the school premises. Additionally, as in *Kowalski*, the parents considered the attack to be made in school context because they went to Principal Franklin to voice their concerns about the safety of their child at school. *Id.* at 573. Therefore, following the *S.J.W.* and *Kowalski* analysis, *Tinker* should apply to Ms. Clark's post.

**B. *Tinker* authorized the School District to regulate Ms. Clark's off-campus Facebook post because the post both caused a material disruption and collided with the rights of other students to be secure and to be let alone**

*Tinker* makes clear that given "the special characteristics of the school environment," speech that the First Amendment may otherwise protect may still be regulated by public authorities. *Tinker*, 393 U.S. at 506. Courts have recognized school administrators have "comprehensive authority, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. *Id.* at 507. *Tinker* authorizes a school district to regulate off-

campus speech when the speech either causes a material disruption or collides with the rights of other students to be secure and to be let alone. *Id.* at 512. The *Kowalski* court addressed the school's justification for suspending the student for harmful speech. Citing *Tinker*, the court stated that public schools have a "compelling interest" in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying. *Kowalski*, 652 F.3d at 572. *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008).

**1. Ms. Clark's post caused a material disruption because the School District received numerous complaints about Ms. Clark's post, and the post caused one of the targeted students to miss two full days of class**

*Tinker* authorizes restrictions on student speech that cause a material disruption to the school environment. *Tinker*, 393 U.S. at 512. If a school district can show a solid factual foundation of disruption of school activities, then the court is more likely to uphold actions by school officials to prohibit or suppress the speech. Ronald D. Wenkart, J.D., *Disruptive Student Speech and the First Amendment: How Disruptive Does It Have to Be?*, 236 Ed. Law Rep. 551, 559 (2008).

In *Wisniewski*, a school district suspended a student for sending an online icon depicting shooting a teacher to fifteen individuals. *Wisniewski*, 494 F.3d at 39-40. The Second Circuit held that the school did not violate the student's First Amendment rights because the conduct posed a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would materially and substantially disrupt the work and discipline of the school. *Id.* The court noted that the fact that the communication occurred off campus did not necessarily insulate the student from school discipline. *Id.* at 39. The court stated the off-campus conduct created a foreseeable risk of substantial disruption within a school because: (1)

the content was potentially threatening; (2) the icon was distributed to 15 recipients, many of whom were classmates; and (3) the content was communicated to school authorities. *Id.*

In *Boucher*, the school district expelled a student for publishing an article about how to hack the school's computer system. *Boucher v. Sch. Bd.*, 134 F.3d 821, 829 (7th Cir. 1998). Because school authorities had a reason to believe that the article would be disruptive, the court held that the school was justified in restricting the student's speech. *Id.* at 827. The court stated that the article served as a "call to action detrimental to the tangible interests of the school" and encouraged activity destructive to the school's computer system. *Id.*

In *Kowalski*, the court stated that a student-created bullying website caused interference and disruption. *Kowalski*, 652 F.3d at 572. The website created such substantial disorder and disruption in the school that the targeted student was forced to miss school. *Id.* at 573-74. The court concluded the school was authorized to discipline the student because her speech interfered with the work and discipline of the school. *Id.* at 574. Moreover, had the school not intervened, the potential for continuing and more serious harassment was a real threat. *Id.* The court warned that unpunished bullying can have a snowballing effect, resulting in "copycat" efforts by other students or in retaliation for the initial harassment. *Id.* at 574.

Here, Ms. Clark's aggressive and threatening behavior mirrors the facts in *Wisniewski*, *Boucher*, and *Kowalski*. *Wisniewski*, 494 F.3d at 39; *Boucher*, 134 F.3d at 829; *Kowalski*, 652 F.3d at 572. First, as in *Wisniewski*, Ms. Clark's post was potentially threatening to every transgender student in her school, was distributed to many of her classmates, and was eventually brought to the attention of the school authorities. Second, as in *Boucher*, the School District interpreted Ms. Clark's Facebook post as a call to action that would endanger transgender students, in violation of the school's anti-bullying policies. R. at 14. Also, as in *Boucher*, Ms.

Clark threatened to harm students in the future, which gives the court a reasonable inference of potential future disruption. Third, as in *Kowalski*, Ms. Anderson, the intended target of the threat, missed class because of the disruption. R. at 14. It is clear that Ms. Clark's aggressive behavior toward transgender students, in direct disobedience of the School District's anti-discrimination policy, was materially disruptive.

Ms. Clark's speech is distinguishable from *Burge*, where a district court concluded that a school district violated a student's First Amendment rights for punishing a student's violent Facebook comments. *Burge v. Colton Sch. Dist.*, 100 F. Supp. 3d 1057, 1060 (D. Or. 2015). In *Burge*, a student posted comments on his Facebook page from his home computer saying that he wanted to start a petition to have a teacher fired and that "she needs to be shot." *Id.* The district court determined the school district wrongly denied the student's First Amendment rights in suspending the student for his off-campus comments. *Id.* In determining that the comments were not a substantial and material interference, the court stated "the comments did not cause a widespread whispering campaign at school or anywhere else. No students missed class and no CMS employees, including Ms. Bouck, missed work." *Id.* at 1063. Based on the widespread student and parent reaction in this case, the disruption Ms. Clark's behavior caused is distinguishable from *Burge*.

Here, because of the reaction of transgender students, parents, and the uncertainty of the safety of transgender students at school, Ms. Clark's post caused a material disruption to the school environment. Therefore, under *Tinker*, the School District did not violate Ms. Clark's First Amendment rights in suspending her for the post.

**2. Ms. Clark’s post collided with the rights of transgender students to feel safe and secure at school, as well as their right to be left alone**

*Tinker* established that schools may regulate student speech that collides with the rights of other students to be left alone and to feel secure at school. *Tinker*, 393 U.S. at 508. Courts have interpreted this element of *Tinker* to protect students from verbal assaults and threats of violence. *Harper*, 445 F.3d at 1178.

In *Harper*, a student was instructed not to wear a T-shirt to school that read, “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED” and “HOMOSEXUALITY IS SHAMEFUL.” *Harper*, 445 F.3d at 1166. The court determined that the student’s right to wear the shirt must be determined in light of the special characteristics of the school environment. *Id.* at 1176. The court held that “lewd, obscene, indecent, and plainly offensive speech by definition, may well impinge upon the rights of other students.” *Id.* at 1177-78. The court concluded the student’s T-shirt collided with the student’s fundamental right to be free of verbal assaults based on the core identifying characteristic of their sexuality. *Id.* at 1178.

Here, Ms. Clark infringed upon her fellow students right to be free from verbal assaults on the basis of sexual orientation as defined in *Harper* because her post called a transgender student “it” and a “freak of nature.” R. at 2. Ms. Clark threatened 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.” R. at 2. This speech infringed on Ms. Anderson’s right to be free from verbal assaults on the basis of her transgender identity. Therefore, the School District was justified in punishing Ms. Clark.

In *Wynar*, a high school student engaged in a string of violent instant messages that threatened violence to specific classmates, intimating that he would “take out” people at the school, and invoking images of the Virginia Tech massacre. *Wynar*, 728 F.3d at 1064-65. The

Ninth Circuit determined the school district did not violate the student’s First Amendment rights when it disciplined the student. *Id.* at 1069-70. Because the messages targeted specific students by name and threatened the student body as a whole, the court found that this speech constituted “the quintessential harm to the rights of other students to be secure.” *Id.* at 1072.

Ms. Clark’s Facebook post is similar to the messages in *Wynar*. She threatened transgender students when she said, “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 2. Ms. Clark’s Facebook post clearly violated students’ rights to be secure. After reading the post, Ms. Anderson and a fellow transgender student were visibly distressed. R. at 13. The Andersons kept their daughter home from school for two days because of the incident. R. at 14. Both students expressed concern that Ms. Clark might resort to violence. R. at 3. Later on that same day, other students were visibly distressed complained about the post to the principal of the high school. R. at 14.

The widespread student reaction to Ms. Clark’s post is precisely the type of threat to the safety of the school environment that *Tinker* contemplated when it established that speech may be regulated in “carefully restricted circumstances.” *Tinker*, 393 U.S. at 513. Therefore, the School District properly punished Ms. Clark because the Facebook post interfered with students’ rights to be free of verbal assaults and physical threats based on their gender identity.

### **CONCLUSION**

The School District respectfully requests this Court reverse the United States Court of Appeals for the Fourteenth Circuit and reinstate the District Court’s judgment in favor of the School District because Ms. Clark’s Facebook post constituted a “true threat,” was materially disruptive, and collided with the rights of transgender students to be secure at school.

## **BRIEF CERTIFICATE**

The work product contained in all copies of Team Y's brief are the work product of Team Y members only. No member of Team Y has received any outside assistance for any part of creating this brief. Team Y has fully complied with its law school honor code. Team Y has fully complied with each Rule of the Competition.

Signed in accordance with Competition Rules