No. 16-9999

IN THE

Supreme Court of the United States

_____

SCHOOL DISTRICT OF WASHINGTON COUNTY, NEW COLUMBIA
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 OF PETITIONER

_____

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For Petitioner

QUESTIONS PRESENTED

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

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

BRIEF CERTIFICATE

Team Letter Q certifies the following:

1. The work product contained in all copies of this team's brief is in fact the work product of the team members,
2. This team has complied fully with the school's governing honor code, and
3. This team has complied with all Rules of the Competition.

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INTRODUCTION

Public schools play a vital role in educating the next generation of American citizens. This Court has recognized the important role public schools play in our society on countless occasions, and urged deference to school boards and officials in questions of curriculum and discipline, so that they may foster an environment conducive to learning and civility. Accordingly, school officials possess the authority to proscribe student speech in certain instances, so long as it respects a student's First Amendment rights.

STATEMENT OF THE CASE

On August 1, 2015, the Washington County School District (the "School District") adopted a policy allowing transgender students to participate in school-sponsored sports based on their chosen gender identity. R-2. Taylor Anderson, a 15-year old sophomore transgender girl, joined the Girls' Basketball team at Pleasantville High. *Id.* During an intrasquad practice on November 2, 2015, she was involved in an argument with her teammate Kimberly Logan Clark, a 14-year old freshman. *Id.* As a result, both were ejected from the game. *Id.* That night, Ms. Clark posted the following message to her Facebook page:

> I can't believe Taylor was allowed to play on a girls' team! That boy (that IT!!) should never be allowed to play on a girls' team. TRANSGENDER is just another word for FREAK OF NATURE!! This new school policy is the dumbest thing I've ever heard of! It's UNFAIR. It's IMMORAL and it's AGAINST GOD'S LAW!!!
>
> Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too…

Id. Catching wind of the post, Ms. Anderson's parents and the parents of Josie Cardona, another transgender student at Pleasantville High, met with the school principal Thomas Franklin on

November 4, 2015 to voice their concerns that Ms. Clark might resort to violence. R-2, R-3. The Andersons kept Ms. Anderson at home for two school days following the post. *Id.*

On November 5, 2015, Principal Franklin met with Ms. Clark and her parents. *Id.* He showed them the Facebook post, and copies of the policy. *Id.* Ms. Clark stated that she was simply joking, and that she thought only her friends would see the post, though she conceded that it she knew it could potentially be passed to others. *Id.* She was suspended for three days. *Id.* On November 13, a letter was mailed to Mr. Clark from James Jones, Chair of the District Disciplinary Review Board, detailing the basis for the suspension. *Id.* The letter explained that the second portion of Ms. Clark's post constituted a true threat, and that her post had been "materially disruptive" to the school, and "clearly collided with the rights of other students to be secure in the school environment." R-3, R-21. Ms. Clark filed a complaint on December 7, 2015 in the United States District Court for the District of New Columbia, alleging that the School District had violated the First Amendment. R-3. The parties filed cross motions for summary judgment on January 10, 2016. R-2. On April 14, 2016, the district court granted the School District's motion and denied Ms. Clark's. R-12. Ms. Clark appealed to the Fourteenth Circuit, which remanded with instructions to enter summary judgment in favor of Ms. Clark. R-25, R-39. The School District petitioned for writ of certiorari and this Court granted it. R-40.

SUMMARY OF ARGUMENT

The School District's decision to suspend Ms. Clark was a permissible response to her speech under two well-established exceptions to the First Amendment. First, Ms. Clark's Facebook post constituted a "true threat" that was directed specifically at Ms. Anderson, and more generally, to other transgender students at Pleasantville High. The speech clearly satisfies an objective test, as the language used by Ms. Clark objectively suggested that a threat had been

made. Moreover, even though a subjective only standard is unnecessary in true threat cases, Ms. Clark's speech satisfies a subjective standard as well. Second, Ms. Clark's speech satisfied either prong of the *Tinker* standard, which allows for regulation of student speech (1) when it collides with the rights of other students to be secure and let alone, and (2) when it reasonably leads school authorities to forecast substantial disruption of school activities, or when disruption or disorder actually occurs on campus. Moreover, given the realities of communication in the technology age, the suspension is a permissible regulation of "off-campus" speech.

STANDARD OF REVIEW

The Court reviews a grant of summary judgment de novo. *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 438 (5th Cir. 2012) (citing *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 991-92 (5th Cir. 2005)). Summary judgment is appropriate where the non-movant fails to establish facts in support of essential elements of his case. Fed. R. Civ. P. 56(a); *Celotex v. Catrett*, 477 U.S. 317, 321 (1986). In reviewing a summary judgment motion, the Court must make all factual inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ARGUMENT

I. The Suspension of Ms. Clark Did Not Violate the First Amendment because the Second Part of her Facebook Post Constituted a "True Threat."

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. However, its protections are not unlimited. *See e.g., Schenck v. U.S.*, 249 U.S. 47, 51 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theater and causing a panic."). As this Court has consistently reasoned, certain speech may be prohibited because it is not the type

intended to be protected by the First Amendment. In fact, this Court has recognized exceptions for a number of different types of speech. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (copyright infringement); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Roth v. U.S.*, 354 U.S. 476 (1956) (obscenity); *New York v. Ferber*, 458 U.S. 747, (1982) (child pornography); *Peel v. Atty. Registration & Disciplinary Comm'n of Illinois*, 491 U.S. 91 (1990) (commercial speech); *Watts v. United States*, 394 U.S. 705 (1969) (true threats); *See Tinker v. Des Moines Indep. Comm'y Sch. Dist.*, 393 U.S. 503, 509 (1969) (school speech).

A. **The true threat exception provides that a government entity may constitutionally proscribe speech that communicates a threat of unlawful violence in order to protect innocent persons from fear of violent attack – regardless of the speaker's intent.**

Under the "true threat" exception to the First Amendment, the government may proscribe speech that constitutes a "true threat." This Court first articulated the exception in *Watts v. United States*. 394 U.S. at 705. In *Watts*, during a political rally at the Washington Monument, the defendant stated that he had received his draft classification but did not intend to go to war, and that if "they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." *Id.* He was prosecuted under a 1917 statute which made it illegal to threaten the President. *Id.* The Court ruled that the statute was constitutional on its face, but reasoned that any statute making a form of speech criminal must be interpreted with the commands of the First Amendment in mind, to distinguish threats from constitutionally-protected speech. *Id.* at 707. Accordingly, because the defendant's statement was not understood as a true threat by his listeners, and because it was stated in a conditional manner, the Court ruled that the government had failed to demonstrate a "true threat." *Id.* at 708. To reach this conclusion, the Court considered the context

in which the statement was made, how it was received by the crowd, and the statement itself. *Id.* But it did not precisely define the contours of a true threat.

The Court attempted to add some clarity in *Virginia v. Black*. 538 U.S. 343 (2003). In that case, three men were separately convicted of violating Virginia's cross-burning statute, which provided that it was unlawful for any person to burn a cross with the intent to intimidate a person or group of person. Va. Code Ann. § 18.2–423 (1996). In a separate provision, the statute also provided that any cross burning shall be prima facie evidence of an intent to intimidate a person or group or persons. *Id.* The Court found that the ban on cross-burning was a constitutional restraint on the freedom of expression, because true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual." *Black*, 583 U.S. at 359. However, it ruled that the provision establishing prima facie evidence of intent to intimidate was unconstitutional because it interpreted the term "intimidation" as requiring the speaker "direct a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* The Court did not define, however, the outer limits of what language is proscribable under the true threat exception, nor did it expressly state the elements of a true threat.

However, to clarify the definition of "true threat", the Court considered the various definitions thereof in *Elonis v. U.S.* 135 S.Ct. 2001 (2015). In *Elonis*, the Court reasoned that definitions of "threat" which include reference to an intent to inflict harm merely refer to the content of the communication itself, rather than the author's intent. *Id.* at 2008. The Court considered Webster's definition of threat as "'an expression of an intention to inflict loss or harm on another by illegal means'" and concluded that this definition "speaks to what the statement conveys – not to the mental state of the author." *Id.* Accordingly, when the Court in *Black* stated

that a true threat encompasses those statements that constitute an "expression of an intent to commit an act of unlawful violence as to a particular individual", we now understand that it was referring merely to the content of the message, rather than the subjective intent of the speaker. *Black*, 583 U.S. at 359. The Court further clarifies with an illustrative example, saying that an anonymous letter stating "I'm going to kill you" would constitute a threat under this definition, regardless of whether the author intended it to be understood as a joke. We are accordingly left without guidance from the Court as to whether language must be conveyed with a certain subjective intent of the speaker in order to be afforded the protection of the first amendment.

Thus, After *Elonis*, a statement may be considered a true threat when it conveys an expression of intent to commit an act of unlawful violence. According to *Watts*, the court will look at the statement itself, the context surrounding the statement, and how the statement was received by the audience to determine whether the statement conveys such an expression. Under *Black*, where the statement or message is intimidation rather than a direct threat, it is a "true" threat if the 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 360. Accordingly the speaker must *mean* to communicate a statement. However, the Court has explicitly left unanswered whether a speaker who conveys a direct threat must have the requisite intent with regard to how that threat will be understood – and if so, what level of intent is required. *See Elonis*, 135 S. Ct. at 2012.

1. *A speaker's intent is irrelevant to whether the speech is protected under the First Amendment, unless the speech has inherent value.*

a. *The First Amendment does not Require Specific Intent for Most Other Exceptions.*

This Court has consistently held that specific intent is not necessary to satisfy most other First Amendment exceptions. In defamation suits, the government need only prove that a

"statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *see also Gertz,* 418 U.S. at 328 (affirming the actual malice standard). Accordingly, the government need not prove that the speaker specifically intend to defame a public official. *Id.* Moreover, a plaintiff need not prove actual malice if the speech is not a matter of public concern. Instead, he may rely on a negligence standard that considers the speaker's knowledge of the falsity of the statement. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Accordingly, for defamation claims, knowing, reckless and even negligent action may satisfy the exception - all of which are short of the purposeful action requirement adopted by the district court in the instant case.

Likewise, under the fighting words exception, the government need not prove that the speaker purposefully intends to provoke a fight. Rather, the state may proscribe speech which, "when addressed to the ordinary citizen, [is], as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971). This standard requires merely recklessness or even negligence on the part of the speaker. In addition, a person may be charged under an obscenity statute if they merely have knowledge of the nature and character of materials he possesses, regardless of whether he intends them as obscene or even believes them to be obscene. *Hamling v. United States*, 418 U.S. 87, 120 (1974). This, of course, is another recklessness standard. Similarly, the First Amendment does not protect a person who knowingly transmits child pornography – regardless of whether his or her purpose was to promote child pornography. *X-Citement,* 513 U.S. at 78. Finally, the First Amendment does not require that a teacher or school administrator find purposeful intent to disrupt the school environment to proscribe certain student conduct. *See Morse v. Frederick*, 551 U.S. 393, 401

(finding that the school administrator could discipline a student for displaying a sign stating "bong hits 4 jesus" because they concluded it advocated drug use, regardless of the student's stated intent of merely putting nonsense on a sign to attract television attention).

b. *Incitement is the only exception to the First Amendment which requires purposeful intent, because inciting speech often possesses a component of valuable speech.*

Only the incitement exception considers the speaker's specific intent. As this Court determined in *Brandenburg*, speech may only be proscribed for inciting violence if the advocacy is both (1) directed to inciting or producing imminent lawless action, and (2) likely to produce such imminent lawless action. 295 U.S. at 447. In reaching this conclusion, the Court rested on the notion that it is necessary, in a free democracy, to be able to discuss the moral propriety or necessity of resorting to force and violence to overthrow the government. *Id.* Moreover, *Brandenburg* involved a criminal conviction, where mens rea is generally required.

c. *Threatening speech is valueless, and thus, intent should be irrelevant.*

There is no inherent value in speech that directly threatens another person. Accordingly, such threats of violence are outside the protections of the First Amendment because individuals have a right to be free from fear of violence, from the disruption that fear engenders, and from the possibility that the violence will occur. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992). The standard adopted by the Fifth Circuit reflects this understanding – it holds that speech is a "true threat and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent'" to commit unlawful violence. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004); *contra United States v. Cassel*, 408 F.3d 622 (2005) (finding that the true threat exception only applies when a defendant charged with criminal intimidation subjectively intends to threaten the victim with physical

violence). This standard adheres to the Court's instruction in *R.A.V.* to proscribe only the constitutionally unprotected part of the speech – namely, the part which provokes fear of violence. 505 U.S. at 388. The subjective intent of the speaker may make the speech more objectively threatening, but the subjective intent is not what makes the speech unprotected. *Id.* Regardless of the purpose of the speech, speech is unprotected if the speaker knows, or should have known, that the speech would be understood by the audience as a threat.

2. *The specific intent of the speaker is not necessary for speech to be protected by the First Amendment – mens rea requirements of criminal law ensure a speaker is not convicted without the requisite specific intent for making threats.*

a. *Criminal statutes that proscribe such speech have a mens rea requirement of specific intent in order for a person to be convicted of violating the statute.*

At issue in this case is whether specific intent is required for the speaker to lose First Amendment protection, or if the intent element is rather required mens rea element of the crime of threatening another. Mens rea, in general refers to the actors mental state or culpability with regards to a certain action. The concept comes from the common law where it was understood that crime "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand" *Morissette v. United States*, 342 U.S. 246, at 251 (1952). Mens rea is an important element of a crime, and the court will presume that scienter, or knowing action, is a required element of a statutory crime that criminalizes otherwise innocent conduct. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). There are generally four different levels of mental culpability – purposeful action, knowing action, reckless action and negligent action.

Confusing the matter is that much of the case law regarding true threats concerns defendants who have been charged and prosecuted for violating a criminal law that requires a mens rea of specific intent. *See e.g. Elonis*, 135 S. Ct. at 2012 (finding that mere negligence was

not enough to satisfy the mens rea of the statute prohibiting threats, but not answering whether mens rea is required for certain speech to be fall outside the First Amendment). When analyzing these cases, then, it is important to distinguish between the mens rea requirement of the crime, and the intent required for the speech to constitute a true threat. *See, e.g., Black,* 583 U.S. at 359 (finding that the mens rea element of the crime required specific intent – without reaching on the issue of whether intent is required by the First Amendment).

b. *Subjective intent makes more sense as a mens rea element of a crime, not as a requirement of the exception, because it has little application in a civil context.*

Further, the specific intent requirement adopted by the Ninth Circuit makes little sense in a school environment. A student can be, and frequently is, punished for talking out of turn, for calling kids names, or for saying impolite or inappropriate things to other students. There is generally never a requirement that the student specifically intend his or her conduct – the fact that he or she engaged in it is usually enough to allow the teacher to punish the student. Accordingly, to require the school to prove that Ms. Clark subjectively intended her speech as a threat would greatly undermine the schools authority and meddle to a level not required by the Court.

3. *The Ninth Circuit's requirement of subjective intent is based on a misinterpretation of the Court's holding in Black, which the court clarified in Elonis.*

Subjective intent to threaten is not required by this Court's "true threat" cases. Thus, the Ninth Circuit misunderstood *Black,* made obvious by this Court's finding in *Elonis*. *Cassel*, 408 F.3d 622; *Elonis,* 135 S.Ct. 2001. In interpreting the Court's holding in *Black*, the Ninth Circuit quoted *Black*'s definition of true threats as encompassing statements where the speaker means to communicate an expression of an intent to commit unlawful violence – and stated that "[t]he

clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment . . . A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." *Cassel*, 408 F.3d at 631. The Court clarified this definition of true threats in *Elonis*, as explained above, where the Court explained that its definition in *Black* refers to the content of the message itself, rather than to the mental state of the speaker. *Elonis,* 135 S.Ct. at 2008.

4. *A subjective intent standard is functionally useless, because in every Ninth Circuit true threat case, objective and subjective intent always exist together.*

Since the Ninth Circuit's adoption of the two prong objective and subjective standard, it has never found speech to be objectively threatening and lacking in subjective intent, or vice versa. *See, e.g. United States v. Toltzis*, 2016 WL 3479084 (N.D. Cal., 2016) (finding defendant's statements satisfy both the objective and subjective test); *Burge ex rel. Burge v. Colton School Dist. 53*, 100 F. Supp. 3d 1057 (D. Or. 2015) (finding no true threat under an objective and subjective standard); *Iboa v. Biter*, 2014 WL 1117171 (C.D. Cal. 2014) (finding defendant's statements to be objectively and subjectively threatening); *Wells v. Alberts*, 2014 WL 28857 (W.D. Wash. 2014) (finding that an inmate's letters were both objectively and subjectively threatening). Moreover, the court frequently rolls its analysis of subjective intent into its mens rea analysis for the crime, suggesting that this requirement is one already satisfied by the mens rea requirements of criminal law. *See, e.g., United States v. Stewart*, 420 F.3d 1007, 1019 (9th Cir. 2005). Accordingly, it may be best that the specific intent requirement to be left to the criminal mens rea requirements of criminal statutes.

B. **Ms. Clark's Posts were True Threats under the Objective Test**

Ms. Clark's Facebook post can reasonably be understood as a threat. Specifically, she stated "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-18. This statement is not a political statement about the virtues of the school's policy towards transgender students, but rather, a targeted statement about her intentions for Ms. Anderson. Although there may arguably be more than one way to interpret this phrase, a reasonable reader could understand it as a threat to inflict physical violence upon Ms. Anderson. In fact, according to Merriam-Webster, "take out" means to eliminate, kill, destroy or knock out. Meriam Webster Online Dictionary: https://www.merriam-webster.com/dictionary/take%20out. In addition, given the fact that she refers to Ms. Anderson as an "IT", a pronoun typically reserved for objects, we can further infer, merely from the statement itself that she is conveying personal animus towards Ms. Anderson which is supportive of a reading that she meant she would exercise physical violence upon Ms. Anderson.

It is true that Ms. Clark did not directly send her post to Ms. Anderson, but rather posted it online for only her friends to see. However, Ms. Clark herself admitted that she was aware the post could be shared and shown to Ms. Anderson or the other student. R. 23. Ms. Clark, accordingly, threatened Ms. Anderson when Ms. Anderson found out about the posting as it was inevitably shared by Ms. Clark's friends. The true threat exception does not, like the fighting words exception, require that the speaker communicate the threat directly to the intended victim – but rather courts have held a variety of convictions for threatening statements so long as they are communicated to a third person. *See, e.g. United States v. Castillo*, 564 Fed. Appx 500 (11th Cir. 2014) (finding that a man could be convicted for threatening the president for posting on his

Facebook account that he was going to kill the president); *compare Porter*, 393 F.3d at 616 (finding that a defendant must, however, intentionally *communicate* the threat either to the object or a third person). Ms. Clark intentionally communicated her threat to third persons, her Facebook friends, and she may accordingly be punished by the school.

C. **Ms. Clark's Posts were true threats under the subjective test**

Even were the court to adopt the subjective intent requirement for the true threat exception, the lower court's decision must still be overturned because there is not sufficient evidence from which to conclude that Ms. Clark did not subjectively intend her statements as a threat. Ms. Clark stated in her affidavit that she intended her statements as a joke, but such a statement is not enough to find that, as a matter of law, Ms. Clark did not intend to threaten Ms. Anderson. The evidence suggests that the two had a very heated argument and that they were both ejected from a basketball game, meaning that, at the time Ms. Clark wrote her post she could have actually intended Ms. Anderson to be threatened.

II. **The School's Regulation of Ms. Clark's Speech was Appropriate under the *Tinker* Doctrine, and Thus, Not a Violation of the First Amendment.**

Even if this Court concludes that Ms. Clark did not make a "true threat," the suspension was an appropriate regulation of Ms. Clark's speech under the Supreme Court's *Tinker* doctrine, which recognizes an exception to the First Amendment when a student's speech "intrudes upon the work of the school or the rights of other students." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). But before examining why Ms. Clark's speech satisfies the exception, it is worth considering the context from which the doctrine derives. In *Tinker*, three students were suspended for wearing black armbands at their respective schools in silent protest of the Vietnam War. *Tinker*, 393 U.S. at 504. The students argued that wearing armbands was

protected by the First Amendment. *Id.* at 504. The Southern District of Iowa found the suspensions reasonable, and the Fifth Circuit affirmed. This Court granted certiorari. *Id.*

Given the "special characteristics of the school environment," the *Tinker* Court was forced to wrestle with competing interests – namely, the principle that "students [do not] shed their constitutional rights to freedom of speech at the schoolhouse gate," and the "comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the school." *Id.* at 506-07. Accordingly, the Court struck a balance, finding that schools may only regulate student speech in two scenarios. First, a student's speech may be restrained if it "colli[des] with the rights of other students to be secure and to be let alone." *Id.* at 508. And second, the speech may be restrained if it "might reasonably . . . le[ad] school authorities to forecast substantial disruption of or material interference with school activities," or if "disturbances or disorders on school premises in fact occurred." *Id.* at 514. As the act of wearing armbands was merely "a silent, passive expression of opinion" akin to "pure speech," it was not the type of "aggressive, disruptive" speech contemplated by the exception. *Id.* at 508. Consequently, the Court found a First Amendment violation and reversed the Fifth Circuit decision below. *Id.* at 514.

The case at hand involves significantly more intrusive and disruptive student speech, and thus, warrants a very different conclusion. Unlike the speech in *Tinker*, Ms. Clark's Facebook post collided with Ms. Anderson's and Ms. Cardona's right to be secure and let alone, led the School Board to reasonably forecast a substantial disruption to school activities, and caused actual disruption to school activities, satisfying both prongs of the *Tinker* analysis. Accordingly, the school's decision to suspend Ms. Clark was a constitutional exercise of its authority to regulate certain student speech. Thus, the Fourteenth Circuit's decision should be reversed.

A. **Ms. Clark's Speech Collided with Ms. Anderson's and Ms. Cardona's Right to Be Secure and to Be Let Alone.**

1. *Ms. Clark's suspension was not a regulation of protected "viewpoint" speech, but rather, a permissible response to a targeted threat to another student's rights.*

As *Tinker* made clear, the First Amendment unequivocally protects "passive expression of opinion," because that speech is akin to "pure speech." *Tinker*, at 393 U.S. at 508. And conversely, "aggressive" speech that collides with the right of another student to be secure and let alone is unequivocally unprotected. *Id*. So then, what about speech in the middle that contains both? Certainly, not all speech containing components of constitutionally-protected speech is protected. And certainly, the inverse is not necessarily true either. Thankfully, *Tinker* provided some clarity on this question as well. Specifically, the *Tinker* Court stated, "to justify prohibition of a particular expression of opinion, [a school] must be able to show that its action was caused by *something more than a mere desire* to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509 (emphasis added).

A 2013 decision from the Eastern District of Michigan is particularly instructive. In *Glowacki v. Howell Pub. Sch. Dist.*, students and teachers at a Michigan high school were encouraged to take part in national Anti-Bullying Day by wearing purple to raise awareness about the bullying of LGBT youth. No. 2:11-cv-15481, 2013 WL 3148272, at *2 (E.D. Mich. Jun. 19, 2013). An economics teacher, who was taking part in the day himself, asked one of his female students to remove her Confederate flag belt buckle. *Id.* at *3. A male student named Daniel witnessed the encounter and asked "why [she] could not wear the Confederate flag belt when students and teachers could wear purple shirts and display rainbow flags." *Id.* The teacher explained that the flag symbolized discrimination against African-Americans, prompting Daniel to complain that the purple shirts discriminated against him and other Catholics like him who did

not "accept gays." *Id.* The teacher threw him out of class and wrote him up for "unacceptable behavior." *Id.* Daniel challenged in federal district court. *Id.* at *1.

Interpreting *Tinker*, the court reasoned that "in determining whether a regulation interferes with the rights of other students, courts must ensure that school officials target truly harassing speech, not mere expressions of unpopular opinions, and [that] policies must not discriminate on the basis of student viewpoints." *Id.* at *7. More specifically, it found that the "[l]anguage in *Tinker* implies that some sort of threat or direct confrontation is a necessary predicate" to satisfaction of the "invasion on the rights of others" prong. *Id.* at *8. As there was no evidence that Daniel's comments about homosexuality "threatened, named, or targeted a particular individual," the court found that he had not "impinge[d] upon the rights of other students," and thus, the *Tinker* prong had not been satisfied. *Id.* at *8 (finding that the speech "did not identify particular students for attack but simply expressed a general opinion").

Though Ms. Clark's Facebook post may arguably contain some general opinion speech about transgender persons, it also unquestionably contains aggressive, confrontational, and sometimes downright threatening speech – speech which unambiguously names and targets Ms. Anderson, not to mention other transgender persons at the school. Specifically, the second paragraph of Ms. Clark's post states: "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-2. Accordingly, the suspension "was caused by something more than a mere desire to avoid the discomfort and unpleasantness" of Ms. Clark's viewpoint. *See Tinker*, 393 U.S. at 509. More to the point, the suspension was a reasonable response by a school principal to aggressive, targeted speech that collided with other students' rights to be secure and let alone, unlike the general expressions of opinion at issue in *Tinker* and *Glowacki*.

2. *Ms. Clark's suspension was a permissible regulation of psychologically-harmful, bullying speech.*

Moreover, upon closer examination of the *Tinker* "right to be secure and let alone," Ms. Clark's Facebook post fits the mold of another form of speech that the *Tinker* framework intended to regulate. Specifically, while the ideas of "security" and being "let alone" readily suggest a student's right to physical wellbeing and privacy, courts have also recognized a clear mental component as well. *See, e.g., Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) ("[S]peech capable of causing psychological injury . . . may interfere with the rights of other students to be secure and let alone, even though there was no indication that any student was physically accosted . . ."); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (finding that speech that "substantially interfere[s] with a student's educational performance" may be regulated under *Tinker*). As this Court held in *Hill v. Colorado*, the right to be let alone—"the most comprehensive of rights and the right most valued by civilized men"—includes "[t]he unwilling listener's interest in avoiding unwanted communication." 530 U.S. 703, 716-17 (2000). That interest becomes far more important "when persons are powerless to avoid it." *Id.* at 716. And as the Ninth Circuit reasoned in *Harper v. Poway Unified Sch. Dist.*, the right to be 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." 445 F.3d 1166, 1178 (9th Cir. 2006) (judgment later vacated when students graduated and school policies were amended, rendering claims moot); *see also, e.g., Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002) ("Even where harassment by name calling does not involve a [discriminatory] component, and even where there is no special history of disruption, prohibition accompanied by threat of sanction is—and has always been—a standard school response. Students cannot hide behind the First Amendment to protect

their 'right' to abuse and intimidate other students at school."). Thus, a school official may restrain speech if it is determined to be unwanted harassing, abusive, or intimidating to other students. In more plain terms, in addition to speech that is physically confrontational, school officials can regulate bullying speech under *Tinker* without violating the First Amendment.

Despite the wealth of authoritative cases supporting this line of reasoning, the Fourteenth Circuit chose a different route for its "collides with rights of other students" prong analysis. Specifically, the court analogized Ms. Clark's post to the speech in *Burge v. Colton Sch. Dist. 53*. 100 F. Supp. 3d 1057 (D. Or. 2015). In *Burge*, an eighth-grader voiced his frustrations about his health teacher in a post to Facebook, writing in response to one friend, "Ya haha she needs to be shot." *Id.* Though he deleted the post within twenty-four hours, another student anonymously placed a printout of the post in the principal's mailbox six weeks later. *Id.* at 1061. He was suspended for three and a half days. *Id.* On summary judgment, the District of Oregon only considered whether his post could be regulated under *Tinker*'s "material disruption to classwork" prong. But given "the absence of evidence that [he] had committed acts of violence in the past, had access to guns, or had any serious discipline problems," it concluded that "no reasonable fact-finder could conclude that his comments were reasonably likely to cause the type of future disruption required by *Tinker*." *Id.* at 1074.

In the case at hand, the Fourteenth Circuit's analysis turned on the few similarities it found between the student in *Burge* and Ms. Clark. Specifically, it determined that Ms. Clark had "never been disciplined before," had "no known propensity to violence," and had "made no specifically violent remarks." R-37. Accordingly, the court reasoned, Ms. Clark's post was "not the stuff of material disruption or a significant enough collision with the rights of others to justify the sanctions imposed under the *Tinker* standard." *Id.* However, the Fourteenth Circuit's heavy

reliance on *Burge* is problematic because *Burge* was not a "collides with rights of other students" case at all. Rather, if anything, a *teacher's* rights were at issue in *Burge*, not another students' rights to be secure and let alone, which of course, are the rights that specifically afforded protection under *Tinker*. Thus, *Burge* is not authoritative whatsoever with respect to the "collides with rights of other students" prong in a *Tinker* analysis.

Moreover, setting aside the Fourteenth Circuit's faulty reliance on *Burge*, it still completely misapplied the *Tinker* standard. Specifically, the circuit court based its decision on its finding that Ms. Clark had made "no specifically violent remarks." Even if that were true, whether speech is "specifically violent" does not dictate whether it collides with the rights of other students to be secure and let alone. Again, as the Ninth Circuit determined in *Harper*, the standard should contemplate whether speech would cause a young person to question their self-worth and their rightful place in society. *Tinker* is concerned with a student's physical *and* mental well-being, and thus, the applicable question is whether a student's speech is harassing, abusive, or intimidating towards other students.

Ms. Clark's speech certainly fits within this standard. When she called Ms. Anderson "That boy (that IT!!)," said "TRANSGENDER is just another word for FREAK OF NATURE!!!," and claimed that allowing Ms. Anderson to play on a girls' team was "IMMORAL and . . . AGAINST GOD'S LAW!!!," her speech was harassing and abusive, and would likely cause a young person like Ms. Anderson to question her self-worth and rightful place in society. And her speech was undoubtedly intimidating when she warned, "Taylor better watch out at school, I'll make sure IT gets more than ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too . . . ." In fact, the Fourteenth Circuit itself even recognized the psychological impact that Ms. Clark's words likely

had on her targets, stating that it "sympathize[d] with the distress the post caused Ms. Anderson and Ms. Cardona." R-36; *see also* R-37 ("Ms. Anderson, Ms. Cardona . . . and perhaps a few other students were upset about the post."); R-37 ("We do not mean to suggest that Ms. Anderson, Ms. Cardona, and possibly others did not suffer as a result of Ms. Clark's cruel remarks."). Accordingly, Ms. Clark's speech collided with the rights of Ms. Anderson and Ms. Cardona to be secure and let alone.

B. **Ms. Clark's Speech Led the School Board to Reasonably Forecast a Substantial Disruption to School Activities.**

Even if student speech does not collide with the rights of another student to be secure and let alone, it may still be regulated if it "might reasonably . . . le[ad] school authorities to forecast substantial disruption of or material interference with school activities," or if actual "disturbances or disorders [occur] on the school premises." *Tinker*, 393 U.S. at 514. Thus, interference may be "actual or nascent." *Id.* at 508. Ms. Clark's speech satisfies either one.

1. *Ms. Clark's post led to an actual disturbance on the school premises.*

At the outset, Ms. Clark's post fits squarely within the *Tinker* exception for speech that causes an actual disturbance on the school premises. Specifically, Ms. Clark's post caused Ms. Anderson and Ms. Cardona to get visibly upset on school grounds, and forced Ms. Anderson to miss two days of school. Accordingly, the regulation of Ms. Clark's speech was permissible on that basis. *See, e.g.*, *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 572-73 (4th Cir. 2011) (finding that a student's Myspace page "caused the interference and disruption described in *Tinker* as being immune from First Amendment protection" because it caused the target to leave school, "as she did not want to attend classes that day, feeling uncomfortable about sitting in class with students who had posted comments about her on the Myspace webpage").

2. *Under any standard, Ms. Clark's post reasonably led school authorities to forecast substantial disruption or material interference with school activities.*

Even if this Court determines that there was no actual interference or disruption on school premises, under *Tinker*, school officials can also regulate speech that might reasonably lead them to forecast substantial disruption or material interference with school activities. To determine what happens when speech is not certain to reach the school community at the time it is "spoken," some courts have fashioned their own standards. In the Eighth Circuit, "*Tinker* applies . . . where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting." *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012). Conversely, the Fourth Circuit simply asks whether the speech has a "sufficient nexus" with the school. *Kowalski*, 652 F.3d at 577. Still, others, like the Ninth Circuit, have been "reluctant to try and craft a one-size fits all approach," and simply ask whether speech involved "an identifiable threat of school violence." *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013). Under this test, schools may "discipline off-campus comments that pose less of a threat [than a true threat] as long as they could substantially disrupt or materially interfere with school activities." *Burge*, 100 F. Supp. 3d at 1071-72.

Under any test, the Ms. Clark's suspension was permissible. As the district court reasoned, Ms. Clark's post was "overtly offensive and thoroughly degrading to the entire transgender community," and a "targeted attack" on Ms. Anderson and other transgender students in general. R-10. Moreover, Ms. Clark posted her comments to Facebook, and thus, she either knew or should have known that it "would be seen by her fellow students and thereby cause a material disturbance of the school environment." R-10. Accordingly, both the "reasonably foreseeable" and "sufficient nexus" tests were satisfied. Moreover, given the Ninth Circuit's low standard for threats that could substantially disrupt or interfere with school

activities, that test is likely satisfied as well. Thus, the School District's decision to suspend Ms. Clark was a permissible regulation of speech under this Court's *Tinker* doctrine.

C. **The School District had the Constitutional Authority to Discipline Ms. Clark for Off-Campus Speech.**

1. *The nature of communication in the technology age compels a finding that off-campus speech can be regulated under the Tinker doctrine.*

As the Fourteenth Circuit recognized, "technology has fundamentally altered the way virtually all people - especially teenagers - communicate," and as a result, the "boundaries of a school campus" have become much more difficult to define. R-38, R-39. Yet, according to the Fourteenth Circuit, only the "means and channels through which we communicate have changed," while the "essential nature of speech" has remained. R-38. In the "pre-internet world of *Tinker*," that court reasoned, students were free to say "offensive, even vicious and cruel, things . . . about one another" in various off-campus venues, and "no one [would have] supposed that school authorities could regulate [their] speech or discipline the . . . speakers." *Id.* Thus, as the speech of contemporary students on social media sites is not "qualitatively different," their speech must be protected as well. *Id.*

But the Fourteenth Circuit's logic is flawed for a few reasons. First, there is at least one important "qualitative" difference which the court failed to consider between the nature of the pre-Internet off-campus speech and the speech that takes place today on social media websites. That is, for pre-Internet speech "in one another's homes, on playgrounds, in shopping malls, at parties, and in a myriad of other off-campus venues" to reach the school community and have the impact that *Tinker* sought to prevent, it almost necessarily involved a level of hearsay, while a student's post to Facebook on his Facebook account does not. *See id.* In other words, a social

media post would be more indicative of a speaker's intent to reach certain recipients—in the context of *Tinker*, those recipients might be a student targeted by bullying speech, or a school community that the speech might materially disrupt. This should not be a surprising conclusion for regular Facebook users, who understand that their posts can be viewed by their own friends and by strangers as well, even if the user never explicitly intended it to reach that audience. Thus, much like an off-campus "message directed to teachers or administrators, whether oral, handwritten or electronic," a Facebook post "could well be considered on-campus speech because of the intended recipients." *See id.*

Second, despite the Fourteenth Circuit's suggestion that off-campus speech from the "pre-Internet world of *Tinker*" was untouchable, one recent Ninth Circuit case suggests that even non-Internet speech occurring off-campus is not protected when one of the *Tinker* prongs is met. In *C.R. v. Eugene Sch. Dist. 4J*, a pair of disabled sixth-graders were bullied by a group of seventh-graders off-campus on their way home from school. 835 F.3d 1142, 1146 (9th Cir. 2016). A school instructional aide witnessed the encounter, and questioned the sixth-graders about what had happened. *Id.* The next day, the seventh-graders admitted to having made inappropriate and harassing comments to the sixth-graders, and the alleged ringleader was suspended. *Id.* at 1147. On appeal, the Ninth Circuit noted that at least one of the sixth-graders "reported feeling scared and uncomfortable after the encounter," and concluded that this reasonably led the school to "expect that those feelings would cause [the student] to feel less secure in school, affecting her ability to perform as a student and engage appropriately with her peers." *Id.* at 1152-53. And moreover, as the harassment had been ongoing, "the school could reasonably expect the harassment to escalate further if allowed to go unchecked," thereby

depriving the sixth-graders of the right to be secure at school. *Id.* at 1153. Thus, the suspension was permissible under *Tinker*, even though the speech had occurred off school property.

Third, and most importantly, the Fourteenth Circuit's view of how the world operates today is, frankly, outdated and misinformed. In the technological age, "[s]peech should not be defined by the computer on which it originates." Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict between Schools and the First Amendment*, 2003 Wis. L. Rev. 1213, 1237 (2003). Rather, as most Internet users understand intuitively, "Internet speech resides in cyberspace, which is borderless and exists where there is a connection to the Internet." *Id.* (*citing Reno v. ACLU*, 521 U.S. 844, 851 (1997) ("Cyberspace--located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.")). Likewise, a Facebook user intuitively understands that the information she posts to Facebook may possibly be viewed by anyone with a Facebook account. Thus, when a Facebook post originates from a student's home computer and that post comes to the attention of school authorities, it is no more geographically off-campus than an oral, handwritten, or electronic "message directed to teachers or administrators." R-38; *see also R.L. v. Central York Sch. Dist.* 183 F. Supp. 3d 625, 639 (M.D. Pa. 2016). Perhaps the most damning evidence of the Fourteenth Circuit's lack of awareness of this principle is the fact that, with the exception of its decision, the other Circuits have consistently recognized a school's authority to regulate off-campus speech. *See, e.g., Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (rejecting plaintiff's position that "*Tinker* does not apply to speech which originated, and was disseminated, off-campus . . . [because] it fails to account for evolving technological developments, and conflicts not only with [the Fifth] circuit's precedent, but with that of every

other circuit to have decided [the] issue"); *see also e.g.*, *Wynar*, 728 F.3d at 1069 (9th Cir. 2013); *Kowalski*, 652 F.3d at 577 (4th Cir. 2011); *Lee's Summit*, 696 F.3d at 777 (8th Cir. 2012).

2. *Public policy considerations weigh in favor of adopting a standard that allows for at least some regulation of off-campus speech.*

Moreover, public policy weighs in favor of adopting a standard that allows for the regulation of *at least some* off-campus speech. Take for instance, the recent case of *R.L. v. Central York Sch. Dist.* In that case, a student reported finding a note that there was a bomb at school, causing an evacuation and a cancellation of classes while the police investigated the threat. *Central York*, 183 F. Supp. 3d at 629. Just hours after being released from school, R.L. posted to Facebook from his home computer, "Plot twist, bomb isn't found and goes off tomorrow." *Id.* at 630. He was suspended the next day. *Id.* Regardless of R.L.'s actual intent, the court found that "[i]n the wake of the shootings at Columbine, Sandy Hook, and Virginia Tech . . . it would be reckless . . . to force school districts . . . to hesitate, or at worst, ignore suspicious speech that threatens harm like that of R.L. for fear of litigation over their response." *Id.* at 640; *see also Wynar*, 728 F.3d at 1069. Accordingly, the court ruled that school administrators "should be able to address that [sort of] speech [under *Tinker*], regardless of whether it was transmitted over the telephone to the school, on a piece of paper at the school, or on a student's social media page." *Id.* Thus, in *at least some* situations, public policy concerns are so great that the boundaries of *Tinker* must expand beyond the school to capture off-campus speech. Therefore, the Fourteenth Circuit's rigid standard necessarily fails.

CONCLUSION

For these reasons, the Fourteenth Circuit's decision should be reversed.