IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW COLUMBIA

KIMBERLY CLARK, a minor, by and through her father ALAN CLARK, Plaintiff, v. WASHINGTON COUNTY SCHOOL DISTRICT, Defendant,	)	C.A. No. 16-9999

MEMORANDUM OPINION AND ORDER

This case involves an action brought by Alan Clark on behalf of his daughter Kimberly Clark challenging the constitutional validity of disciplinary measures meted out by Thomas Franklin, the principal of Pleasantville High School in the School District of Washington County (the "School District") and upheld by the Washington County School Board. The principal suspended Ms. Clark for posting offensive statements on her Facebook page following an incident at a high school basketball game. Ms. Clark contends that this suspension for off-campus internet speech posted from her personal computer while she was in her own home violated her right to free speech pursuant to the First Amendment to the United States Constitution in a way that impacts both her high school years and her college application prospects. Ms. Clark seeks a declaratory judgment that her suspension was unconstitutional and an order requiring the school district to extinguish any record of the suspension. The School Board contends that the disciplinary measures were appropriate to deal with a "true threat" to other students that disrupted the Pleasantville High School learning environment by undermining the right of transgender students to feel safe and secure in their school.

On January 10, 2015, the School District and Ms. Clark filed cross motions for summary judgment. Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, a court must grant a movant's Motion for Summary Judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts are material if they would affect the outcome of the case. *Anderson*, 477 U.S. at 248. A court must view all facts and reasonable inferences drawn from them in a light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986), and a court "may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

The free speech protections enshrined in the First Amendment are immensely important, but courts long have recognized that appropriate management of educational settings may require school administrators to restrict speech in limited circumstances. The advent of the internet as a

communication medium has made it much more difficult for school administrators to fulfill their obligation of maintaining a school environment conducive to learning for all students. After reviewing the materials submitted by both parties and hearing the oral arguments presented by counsel, in accordance with the First Amendment and the applicable case law, the Court holds that the School District's actions were reasonable under the circumstances and that the School District did not violate plaintiff's First Amendment rights. Accordingly, the Court hereby enters Summary Judgment in favor of the School District with respect to Ms. Clark's claims and denies her cross motion for summary judgment.

I. Facts

The material facts in this matter are not in dispute. On August 1, 2015, Washington County School District adopted a new policy titled the "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" (hereafter "Nondiscrimination in Athletics Policy"). The Nondiscrimination in Athletics Policy allows transgender students to participate in school sports based on their chosen gender identity. Affidavit of Thomas James Franklin (hereafter "Franklin Aff."), Ex. A. Taylor Anderson, a 15-year-old sophomore at Pleasantville High School at the time of the events that gave rise to this litigation, was born a member of the male sex, but later identified her gender as female. Franklin Aff. at ¶ 6. Until the passage of the new school policy, Ms. Anderson was restricted to playing on teams associated with the male sex, because she was identified as a male at birth. After the adoption of the new policy, however, Ms. Anderson joined the Girls' Basketball team at Pleasantville High. At the time, Ms. Clark, who was born a member of the female sex and identifies as a female, was a 14-year-old freshman at Pleasantville High and a member of the Girls' Basketball team. Affidavit of Kimberly Logan Clark (hereafter "Kimberly Clark Aff.") at ¶¶ 1-2. Ms. Clark has no history of disciplinary infractions or violent behavior. Kimberly Clark Aff. at ¶ 1; Franklin Aff. at ¶ 6.

During an intrasquad practice basketball game held at the school on November 2, 2015, Ms. Clark and Ms. Anderson engaged in a loud and disruptive verbal argument on the court. As a result, the referee ejected both players from the game. Later that night, Ms. Clark wrote a post on her Facebook page. Her post stated:

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

Franklin Aff., Ex. C.

On November 4, 2015, Taylor Anderson's parents, and the parents of Josie Cardona, another transgender Pleasantville High School student, came to the school with their children and

asked to see Principal Franklin. Franklin Aff. at ¶ 7. The parents met with Principal Franklin and gave him a copy of Ms. Clark's post. Franklin Aff., ¶ 8 & Ex. C. During the meeting, both the Andersons and the Cardonas expressed their concerns that Ms. Clark might resort to violence against their children because both Taylor and Josie have identified themselves as transgender students. Franklin Aff. at ¶ 6. Principal Franklin noted both that Ms. Anderson, and Ms. Cardona, were visibly upset by Ms. Clark's Facebook post. Franklin Aff. at ¶¶ 7-9. Both families expressed concerns about permitting their children to participate in girls' basketball and even allowing their children to come to school in light of the Facebook post. The Andersons kept their daughter home for two days following the incident at the game and the subsequent Facebook post. Franklin Aff. at ¶ 9.

Mr. Franklin called Ms. Clark's parents that evening and asked them to come to his office with their daughter the next morning to meet with him. The meeting took place on November 5, 2015. Franklin Aff. at ¶¶ 10, 12-14. In the course of the meeting, Mr. Franklin showed Ms. Clark and her parents a copy of Ms. Clark's Facebook posting, Franklin Aff., Ex. C, along with copies of the School District's Nondiscrimination in Athletics Policy, Franklin Aff., Ex. A, and School District of Washington County, New Columbia Anti-Harassment, Intimidation & Bullying Policy (hereafter "Bullying Policy"), Franklin Aff., Ex. B. Franklin Aff. at ¶ 4. Ms. Clark admitted she had authored the post. Franklin Aff. at ¶ 13. She stated generally that she felt having transfemales compete on girls' teams is unfair, dangerous and immoral. Franklin Aff. at ¶ 13. However, Ms. Clark says that she was simply joking when she said she would "take 'IT' out one way or another." Kimberly Clark Aff. at ¶ 7. Ms. Clark explained that she thought only her friends would see her post, and she is friends with neither Ms. Anderson nor any other transgender student on Facebook. Kimberly Clark Aff. at ¶ 6. However, Ms. Clark conceded that she knew that some of her friends might pass her post on to others and that she knew that some of those who viewed her message were likely to alert Taylor Anderson and other transgender students. Franklin Aff. at ¶ 14.

After the meeting with Ms. Clark and her parents, Mr. Franklin suspended Ms. Clark from school for three days pursuant to the School District's Bullying Policy. Franklin Aff. at ¶ 15 & Ex. B. On the same day, Mr. Clark filed an appeal with the Washington Country School Board, the governing body of the School District, contesting the suspension of his daughter. Affidavit of Alan Bartholomew Clark (hereafter "Alan Clark Aff.") at ¶ 14. After reviewing the relevant facts, the Washington County School Board upheld the prescribed punishment. Alan Clark Aff. at ¶ 15 & Ex. A. By letter of November 13, 2015, to Mr. Clark, the School District noted that the second portion of Ms. Clark's post beginning, "Taylor better watch out at school…," constituted a "true threat." The letter stated that Ms. Clark's suspension was appropriate because her post "has been materially disruptive of the high school" and that it "clearly collide[d] with the rights of other students to be secure in the school environment," which justified the suspension. Alan Clark Aff., Ex. A. On December 7, 2015, Ms. Clark's father filed a complaint in this Court seeking declaratory relief and alleging that the School District had violated her First Amendment right to freedom of speech.[1]

[1] Ms. Clark has not raised a due process claim with respect to the disciplinary actions, nor is there any question of qualified immunity here. Prior to the resolution of the School District's summary judgment motions, the parties stipulated that there were no Title IX issues to be addressed. The Court's consideration is therefore limited to the First Amendment issues presented. The plaintiff has not

II. Conclusions of Law

In accordance with the First Amendment and applicable case law, this Court holds that the School District did not violate Ms. Clark's First Amendment rights by disciplining her for her November 2, 2015 Facebook post. The Court bases this holding on two independent grounds. First, Ms. Clark made statements that constituted a "true threat," and were, therefore, not entitled to the protection of the First Amendment. *Virginia v. Black*, 538 U.S. 343, 359 (2003). Second, even if the statements did not constitute a "true threat," Ms. Clark's Facebook post was materially disruptive to her school environment and the right of other students to be secure in that environment. In light of the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), the School District's disciplinary action against Ms. Clark was constitutional.[2] In reaching these conclusions, the Court has had to address two questions of first impression in this circuit: (1) What standard should courts use to determine the existence of a "true threat" in light of *Virginia v. Black*; and (2) Does the Supreme Court's *Tinker* analysis apply to off-campus speech posted to the internet by a student using a personal computer in her own home?

A. Ms. Clark's Internet Speech Constituted a "True Threat."

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" *Texas v. Johnson*, 491 U.S. 397, 414 (1989). However, the First Amendment does not protect offensive language that rises to the level of a "true threat." *Black*, 538 U.S. at 344; *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 915-16 (1982); *Watts v. United States*, 394 U.S. 705, 708 (1969). The problem is that exactly what constitutes a "true threat" is not always clear. In *Watts v. United States*, a young man protesting the draft during the Vietnam War stated, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Watts*, 394 U.S. at 706. The Supreme Court ultimately held that the First Amendment protected this speech because it was not a "true threat." *Id.* at 708. In reaching its decision, the Court relied primarily on three factors: (1) that the statement was made as a part of a political debate; (2) that it was conditional in nature; and (3) that the full context of the speech indicated it was not a serious threat. *Id.* at 708.

The Court refined its "true threat" analysis in its 2003 decision in *Virginia v. Black*. *Black*, 538 U.S. at 343-45. That case involved two incidents of arrests of Ku Klux Klan members for violating a Virginia statute that criminalized cross burnings. The defendants

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challenged the constitutionality of either the Nondiscrimination in Athletics Policy or the Bullying Policy. This case is about the way the School District applied these policies.

[2] Mootness can be an issue for student free speech cases because plaintiffs sometimes graduate prior to the end of the litigation. *See*, *Harper v. Poway United School District*. 445 F.3d 1166 (9th Cir. 2006), cert. granted, judgment vacated sub nom. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007). There is no mootness issue in the present case. Ms. Clark is currently a sophomore at Pleasantville High School, and her complaint alleges significant concerns that her suspension remains on her permanent record and could negatively impact both her high school years and her college application process.

challenged their convictions on grounds that the statute violated their First Amendment right to freedom of expression. Although the Supreme Court struck down a statutory provision providing that burning a cross is in itself prima facie evidence of an intent to intimidate, the Court ruled that Virginia constitutionally could ban cross burning with an intent to intimidate. *Id.* at 367. "Intimidation in the constitutionally proscribable sense of the word, is a type of true threat." *Id.* at 359. Writing for the majority with respect to this issue, Justice O'Connor explained that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* It does not matter whether the speaker "actually intend[ed] to carry out the threat," the rationale behind prohibiting "true threats" is to protect people from the disruptions and fear that a "true threat" creates. *Id.* at 359-60. Although *Virginia v. Black* involved a criminal statute, subsequent lower court decisions have applied a similar "true threat" analysis in civil matters. *See*, *Porter v. Ascension School District,* 393 F.3d 608, 616 (5th Cir. 2004); *United States v. Cassel*, 408 F.3d 622, 630-31 (9th Cir. 2005).

Applying the *Watts* factors and *Black* analysis in the instant case, the Court concludes that Ms. Clark's Facebook post did constitute a "true threat." *Black*, 538 U.S. at 360; *Watts*, 394 U.S. at 708. First, Ms. Clark's statements were not political in nature. While the first portion of her Facebook post mentioned her disapproval of a school policy, the second, and principal, point was directed at Ms. Anderson and other transgender students at Pleasantville High School. Second, Ms. Clark's statement was not conditional. At most, it was predicated only on another meeting between Ms. Clark and Ms. Anderson and other Pleasantville High transgender students. In contrast to the situation in *Watts* where it was unlikely that the protestor would meet the President face-to-face while armed with a rifle supplied to him by the government, it was inevitable that Ms. Clark and Ms. Anderson would meet given that both girls attended the same school and played basketball on the same team. *Watts*, 394 U.S. at 706. Meetings between Ms. Clark and other transgender students were highly likely, too, because they attended the same school. Finally, given that a heated verbal argument preceded the Facebook post, the context indicates that Ms. Clark's statements constituted a "true threat." Unlike the situation in *Watts,* there is no indication that any reader considered the second part of her post to be a laughing matter, a reaction the *Watts* Court found important in considering when ruling whether the statement constituted a "true threat."[3] *Id.* at 707. In terms of the *Black* analysis, this language "communicate[d] a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359.

Other federal courts that have ruled on cases involving statements alleged to constitute "true threats" since the Supreme Court handed down its *Black* ruling have expanded the *Watts* and *Black* analyses in efforts to clarify the "true threat" standard. They have dealt with the "true threat" issues somewhat differently, and at least two circuits – the Ninth and the Fifth – have split on the proper approach to the question whether a speaker actually "communicate[d] a serious expression of an intent to commit an act of unlawful violence." *Id*. As Professor David Hudson has observed, "it is unclear what level of intent is necessary for a speaker's utterance to be considered a true threat. . . [M]ust a speaker subjectively intend to intimidate or threaten others? Or is it sufficient if the speaker makes a comment that a recipient reasonably believes is

[3] In *Watts*, "both petitioner and the crowd laughed after the statement was made." *Watts*, 394 U.S. at 707.

a threat?" David Hudson, *True Threats*, The First Amendment Center (May 12, 2008), http://www.firstamendmentcenter.org/true-threats.

In *United States v. Cassel*, the Ninth Circuit held that there must be a subjective intent *to intimidate* on the part of the speaker in order to give rise to a "true threat" under *Virginia v. Black*. *Cassel*, 408 F.3d at 632-33 (emphasis added). The *Cassel* court stated that it was "bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* at 633. In *Cassel,* the defendant was criminally charged with interfering with the sale of federal lands. *Id.* at 624-25. The defendant lived near the land, and he did not want neighbors. On two occasions when prospective buyers came to look at the land he met them with his "aggressive" dogs, proceeded to tell them how terrible the land was, and cautioned that they better not buy it. *Id.* One potential buyer stated that the defendant said "he would see to" it that anything built on the lot for sale would be burned down. *Id.* at 625. The Ninth Circuit ultimately upheld the defendant's conviction. The court concluded that the statute under which he was charged included the "intent to threaten" element required by *Virginia v. Black*, even though the mens rea element did not appear on its face, and that the facts of the case supported the conclusion that the defendant had made "true threats." *Id.* at 634-35.

In contrast, the Fifth Circuit, in *Porter v. Ascension School District*, instead concentrated on whether the speaker knowingly communicated his or her statement in a way that a recipient reasonably could find threatening. *Porter*, 393 F.3d at 616. At issue in *Porter* was the expulsion of a student for drawing a sketch of the violent destruction of his high school and various school administrators. The student had done the sketch when he was fourteen years old while he was in his home. *Id.* at 613. The sketch sat in a closet at the student's home for two years until his younger brother brought the sketchpad to school. *Id.* at 612. A friend of the younger brother saw the two-year-old sketch and showed it to a school bus driver who confiscated it and turned it over to school administrators. *Id.* The older brother who had done the sketch did not know it had been brought into the school until school officials notified him. *Id.* The older brother was expelled and held for four nights in jail "on charges of terrorizing the school and carrying an illegal weapon."[4] *Id.* The Fifth Circuit held that "[s]peech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'" *Id.* at 616. (citing *Doe v. Pulaski,* 306 F.3d 616, 622 (8th Cir. 2002)). After establishing this objective test, however, the Fifth Circuit did "not decide whether [the] drawing would constitute a true threat in the eyes of a reasonable and objective person because [the student] did not intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the First Amendment." *Id.* at 617.

In the context of the this student speech case, this Court is inclined to follow the objective approach of the Fifth Circuit in examining the "true threat" issue, rather than the Ninth Circuit's subjective analysis, particularly because *Cassel*, like *Black*, involved criminal proceedings rather

[4] School administrators found a box cutter in the student's wallet when they confronted him about the drawing. His expulsion was related to both the drawing and the box cutter. *Porter*, 393 F.3d at 613. Only the "true threat" analysis of the Fifth Circuit is considered in the case at hand.

than school discipline.[5] This leads our inquiry into whether a reasonable person would feel threatened by the language in Ms. Clark's post that "Taylor better watch out at school. I'll make sure IT gets more than just ejected. I'll take IT out one way or another. That goes for the other TGs crawling out of the woodwork lately too...." Franklin Aff., Ex. C. Ms. Clark's Facebook post specifically mentioned Ms. Anderson, as well as all transgender students in her school, as potential victims. This was a targeted attack. Ms. Clark's statements were significantly less specific than the letter in the *Pulaski* case, and she did not directly communicate those statements to Ms. Anderson or any other transgender student. Even so, given the tone of Ms. Clark's remarks, the fact that Ms. Clark had been involved in a loud and disruptive quarrel with Ms. Anderson earlier on the same day she posted the critical statements on Facebook, and her admission that she knew that Ms. Anderson and other transgender students might see her post, I conclude that "an objectively reasonable person would interpret [Ms. Clark's post] as a 'serious expression of an intent to cause a present or future harm'" on Ms. Anderson and other transgender students. *Porter*, 393 F.3d at 616 (citing *Doe*, 306 F.3d at 622). Consequently, Ms. Clark's statements constituted a "true threat" and therefore do not enjoy the protection of the First Amendment.

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[5] The Eighth Circuit addressed the "true threat" issue in two cases decided prior to *Virginia v. Black* that the Court finds helpful in coming to its conclusion in the present case. In *United States v. Dinwiddie,* 76 F.3d 913 (8th Cir. 1996), the Eighth Circuit held that "the court must decide whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *Dinwiddie,* 76 F.3d at 925. The court identified five factors to aid in this determination of whether a statement will be considered a "true threat":

> [T]he reaction of the recipient of the threat and of other listeners; whether the threat was conditional; whether the threat was communicated directly to its victim; whether the maker of the threat had made similar statements to the victim in the past; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

Here, both Ms. Anderson and Ms. Cardona reportedly were upset by the post when friends sent it to them, and, although there is no evidence of any past threats by Ms. Clark, both students were aware that Ms. Clark was at least capable of engaging in a verbal disagreement on the basketball court sufficient to result in her ejection from an intrasquad game. Although Ms. Clark did not communicate her statements directly to Ms. Anderson or other transgender students, she admitted she was aware that they might see them.

The facts of the Eighth Circuit's subsequent decision in *Doe v. Pulaski County Special School District,* 306 F.3d 616 (8th Cir. 2002), are particularly relevant here. In *Pulaski*, a student wrote a letter while at home that contained language about sexually assaulting and murdering a specific classmate. 306 F.3d 616, 619-20 (8th Cir. 2002). The potential victim was made aware of the letter and its contents by the author. Eventually, a copy of the letter made its way to the school principal, who, after conducting his own investigation into the letter, recommended expulsion of the letter's author. The student challenged his expulsion as a violation of his First Amendment rights. The Eighth Circuit, like the Fifth, applied an objective standard and analyzed "the nature of the alleged threat from the viewpoint of a reasonable recipient." *Id.* at 622. Viewed in this light, the court concluded that the letter was a "true threat" not protected by the First Amendment. *Id.* at 620.

B. The *Tinker* Framework Applies to Ms. Clark's Speech.

Even if Ms. Clark's Facebook post did not constitute a "true threat," however, her statements still would not enjoy the protections of the First Amendment. The United States Supreme Court has held that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students," *Tinker*, 393 U.S. at 506. but school officials have the authority to take actions that may constrain these rights in certain limited circumstances where necessary for the well being of their students. *Id.* However, none of the four principal school cases decided by the Supreme Court to date – *Tinker*, 393 U.S. at 503, *Bethel School District No. 403 v. Fraser,* 478 U.S. 675 (1986), *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), and *Morse v. Frederick,* 551 U.S. 393 (2007) – addresses the question of the authority of public school officials to discipline students for off-campus speech generally or internet speech in particular. While several other federal courts have considered related issues, the Court of Appeals for the Fourteenth Circuit has yet to do so.

The Supreme Court has emphasized that the rights of students at public schools are not "coextensive with the rights of adults in other settings." *Bethel,* 478 U.S. at 682. Here, as a threshold matter, the Court first must decide whether a school may attempt to regulate student speech consisting of internet postings using a personal computer written from an off-campus location. The expansion of the internet during the last few decades has resulted in many disparate opinions with respect to whether, and if so, how, off-campus student speech can be regulated. Ultimately, a review of relevant Supreme Court precedent set forth in *Tinker*, *Bethel*, and *Hazelwood*, along with relevant lower court decisions, leads this Court to conclude that the speech at issue here is subject to regulation by school authorities, even though it originated off campus.

At issue in *Tinker* was the enforcement of a school regulation that allowed for the punishment of students who wore armbands to protest the United States' involvement in the Vietnam War. *Tinker,* 393 U.S. at 505. In an effort to provide guidance on how courts should address the sensitive subject of speech regulation at school, the Supreme Court outlined specific criteria. A student's speech is not protected by the First Amendment if it either "materially disrupts classwork or involves social disorder," or amounts to a "collision with the rights of other students to be secure and to be let alone." *Id.* at 508-09. When speech falls into one of these two categories it is not protected by the First Amendment, and is, therefore, subject to regulation by public school authorities. Speech can fall into either of these categories, or both – e.g., when the expression affects a student's ability to "feel secure and let alone" in a school environment in turn "causes a material disruption" of that school environment. *Id.* Ultimately in *Tinker,* the Supreme Court declined to uphold the suspension because there was "no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* at 508. The Court therefore held that the school could not sanction the students for engaging in this form of speech. *Id.*

Subsequent lower court decisions have considered how schools can maintain an environment conducive to learning for all students through the application of the *Tinker* framework to the regulation of speech originating off campus. The Fifth Circuit has concluded

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 v. Itawamba County Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015). Similarly, the Ninth Circuit has held that "schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*." *Wynar v. Douglas County School District,* 728 F.3d 1062, 1069 (9th Cir. 2013). The Fourth and Eighth Circuits also have justified extending the scope of *Tinker* to cover off-campus speech through the use of a "nexus" requirement or an element of "reasonable foreseeability," both of which link the off-campus speech to the school environment. *Kowalski v. Berkeley County Schools,* 652 F.3d 565, 577 (4th Cir. 2011); *S.J.W. v. Lee's Summit R-7 School District,* 696 F.3d 771, 777 (8th Cir. 2012). Although five judges of the Third Circuit, as well as three Fifth Circuit judges, have argued that *Tinker* should not be extended to off-campus speech. *See*, *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915, 936 (3d Cir. 2011) (en banc) (Smith, J. concurring); *Bell,* 799 F.3d at 405 (en banc) (Dennis, J. dissenting), their views are decidedly in the minority.

Based on the case law supporting the application of *Tinker* in cases involving off-campus speech, including internet speech, it is my view that the School District does have the ability to regulate such speech when it creates the kind of material disruption or collision with the rights of other students described in *Tinker*.[6]

1. Ms. Clark's Facebook Post Materially Disrupted School Activity within the meaning of *Tinker.*

As noted above, in *Tinker* the Supreme Court held that speech that "materially disrupts classwork or involves social disorder" at school is not protected by the First Amendment. *Tinker*, 393 U.S. at 508-09 (emphasis added). Since the creation of the *Tinker* framework, lower courts are determining whether schools may limit particular kinds of speech in order to maintain an environment conducive to learning have principally relied on this portion of the *Tinker* analysis. After a thorough review of the undisputed facts in the record and the relevant case law, I find that School District authorities were justified in concluding that Ms. Clark's off-campus statements materially disrupted her school's learning environment.

The Eighth Circuit in *S.J.W. v. Lee's Summit R-7 School District* held the *Tinker* analysis applicable if it is "*reasonably foreseeable*" that the speech in question would reach the school community. *S.J.W.*, 696 F.3d at 777 (emphasis added). In that case, students who were twin brothers created a website hosted on a Dutch domain. *Id.* at 773. They posted racist and sexually explicit comments pertaining to other students at their school on the website. *Id.* The District Court enjoined the school district from disciplining the boys, but the Eighth Circuit applied *Tinker* and concluded that the website created a material disruption. *Id.* at 774. The court therefore upheld the disciplinary actions originally imposed by the school. *Id*. at 778.

[6] It is worth noting that the Supreme Court has identified "vulgar and offensive" speech, as well as school-sponsored speech, as areas of speech that school authorities constitutionally can regulate in addition to speech that falls within the realm of *Tinker*. *Bethel,* 478 U.S. at 685; *Hazelwood*, 484 U.S. at 272-73. Because Ms. Clark's speech does not fall into either of these categories it can be assessed only according to the *Tinker* analysis outlined below.

The Fourth Circuit in *Kowalski v. Berkeley County Schools* held that school authorities may sanction off-campus speech if a "*sufficient nexus*" to the school exists. *Kowalski*, 652 F.3d at 577. In this case a student created a website dedicated to ridiculing and gossiping about another student with comments including, among others, remarks about "sluts with herpes." *Id.* at 567. Concluding that the student "knew" that a negative dialogue would and did take place among students who accessed the online forum, the Fourth Circuit characterized her conduct as a "targeted attack." *Id.* at 574. The court upheld the school district's action on grounds that the student's off-campus speech materially and substantially interfered with appropriate discipline in her school. *Id*.

In *Wynar*, the Ninth Circuit upheld the expulsion of a student who posted on the internet a string of increasingly severe and specific threats to shoot and assault students at his school on the anniversary of the Columbine shootings and described how he would kill two specific, named classmates. 728 F.3d at 1071. Although the student claimed he was only joking, *id.*, the Ninth Circuit held that the student's off-campus postings authorized the school district to discipline him under the *Tinker* standard because the internet posts materially disrupted the overall school environment. *Id.* at 1064-65.

In analyzing Ms. Clark's statements, the Court finds that they share many of the same characteristics with the unprotected statements in the cases discussed above. There is no need to determine whether either a reasonable foreseeability or nexus element is required, because Ms. Clark's Facebook post would meet both tests. Her statements were overtly offensive and thoroughly degrading to the entire transgender community. They also constituted a "targeted attack" on her fellow schoolmate Ms. Anderson in particular and transgender students in general. Language that attacks individual students and school communities can substantially impact classwork and lead to social disorder. *See*, *S.J.W.*, 696 F.3d at 777; *Kowalski*, 652 F.3d at 574. As the facts demonstrate, Ms. Clark's post prompted Ms. Anderson to remain home from school for two days and caused both Ms. Anderson and Ms. Cardona to be visibly distressed. Speech that makes another student too upset to attend school certainly can constitute a material disruption of the school environment. *Kowalski*, 652 F.3d at 573-74.

Finally, the posting of these comments on a publically accessible forum, as well as Ms. Clark's own admission, Kimberly Clark Aff. at ¶ 6; Franklin Aff. at ¶ 14, further establishes that Ms. Clark knew, or at least should have known, that her offensive statements would be seen by her fellow students and thereby cause a material disturbance of the school environment. When a student should reasonably foresee that his or her patently offensive remarks would be substantially disruptive, schools should have the constitutional authority to punish the student for those remarks. *S.J.W.*, 696 F.3d at 777. The fact that the disruption originated while the student was away from school grounds does nothing to stem the real world disruption that otherwise occurs as a result of those online remarks. *Wynar*, 728 F.3d at 1071; *S.J.W.*, 696 F.3d at 777; *Kowalski*, 652 F.3d at 574. To the extent that a nexus may be required, the fact that the remarks pertained to an event that had just taken place at a Pleasantville High School basketball game held on campus suffices. *Kowalski*, 652 F.3d at 573.

2. Ms. Clark's Facebook Post Collided with the Rights of Other Students to Be Secure.

The *Tinker* analysis also allows for the regulation of a student's speech if that speech "colli[des] with the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 513. Since the creation of the *Tinker* framework, courts have relied on this facet of the holding far less often than the material disruption analysis discussed above. Despite the relatively limited case law addressing what it means to collide with the rights of others, however, this Court finds that there is more than adequate legal support to hold that Ms. Clark's off-campus statements collided with the rights of her fellow students to feel secure in their school environment, further satisfying the *Tinker* standard. *Tinker*, 393 U.S. at 513; *Wynar*, 728 F.3d at 1072; *Harper v. Poway United School District*, 445 F.3d 1166, 1177 (9th Cir. 2006), cert. granted, judgment vacated sub nom. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (holding the case was moot because the plaintiff had graduated).

The Ninth Circuit in *Wynar* as mentioned earlier, addressed the application of this aspect of the *Tinker* analysis. As mentioned, in *Wynar* a student posted both general and specific threats of violence on the internet. A few of the postings specifically named certain students as potential victims. The *Wynar* court's discussion of "collision with others" was relatively short, but it concluded that specific threats of violence against the school body and specific individuals "represent[s] the quintessential harm to the rights of other students to be secure." *Wynar*, 728 F.3d at 1072. A more detailed analysis of this portion of the *Tinker* holding can be found in another Ninth Circuit case, *Harper v. Poway United School District*. *Harper*, 445 F.3d at 1177. In *Harper*, a student wore a shirt that stated, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED. HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27,'" and refused to change his shirt after administrators asked him to do so. *Id.* at 1172. School authorities required the student to spend the day in the school office rather than in class because of his refusal to change, but no other disciplinary action was taken. The student claimed that this action violated his First Amendment rights. *Id.* at 1172-73. The Ninth Circuit disagreed, finding that the student's "wearing of his T-shirt 'colli[ded] with the rights of other students' in the most fundamental way." *Id.* at 1177-78. In reliance on the *Tinker* analysis, the *Wynar* court concluded, "public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development." *Id.* at 1178. After granting certiorari, the Supreme Court ultimately vacated the Ninth Circuit's decision as moot because the student had graduated. *Harper*, 549 U.S. at 1262. Nevertheless, the Ninth Circuit's analysis of the *Tinker* precedent is helpful for the current case.

In the pending matter, Ms. Clark's statements were extremely derogatory, and the second portion of the post contained threats against Ms. Anderson and other transgender students. While the first part of Ms. Clark's post discussed opinions about transgender students and God's law, as discussed earlier, in the second part of her post she called Ms. Anderson an "IT," said that she would "make sure that 'IT' would get more than ejected," and said she would "take 'IT' out one way or another." Franklin Aff., Ex. C. She then continued, by saying "that goes for the other TGs crawling out of the woodwork lately too." Franklin Aff., Ex. C.

As the Ninth Circuit outlined in *Wynar*, threats of violence surely collide with the rights of other students to feel secure at school, especially when those threats of violence specify the

potential victim. *Wynar*, 728 F.3d at 1072. The analysis in *Harper* bolsters this conclusion in that the language at issue attacked a class of people based on a defining trait they shared. *Harper*, 445 F.3d at 1177-78. While as noted earlier in the "true threat" analysis, Ms. Clark's post was less detailed and less patently violent, Ms. Clark's statements contained the same kind of targeted attack on a particular transgender student and on the transgender community at her school. As demonstrated by the complaints received from parents, there were students who did not feel secure at school as a result of the second part of Ms. Clark's statements. Therefore, the Court holds that the School District did not infringe on Ms. Clark's First Amendment rights in suspending her.

III. Conclusion

The First Amendment does not protect Ms. Clark's statements, because they constituted a "true threat." Even if the statements did not rise to the level of a "true threat," however, Ms. Clark's post created a material disruption at Pleasantville High School and caused other students to feel unsafe and insecure in their school environment. Accordingly, the Court hereby GRANTS Washington County School District's Motion for Summary Judgment and DENIES Ms. Clark's Motion for Summary Judgment.

SO ORDERED.

/s/ Warren Kellogg
District Court Judge
April 14, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW COLUMBIA

KIMBERLY CLARK, a minor, by and through her father ALAN CLARK, Plaintiff, v. WASHINGTON COUNTY SCHOOL DISTRICT, Defendant,	)	C.A. No. 16-9999

Affidavit of Thomas James Franklin

I, the undersigned, respectfully submit that:

1. I am the Principal of Pleasantville High School in Pleasantville, New Columbia, in the School District of Washington County.

2. I have held the position of Principal of Pleasantville High School since July 1, 2012.

3. I am responsible for applying and enforcing the rules, regulations, and policies of the School District of Washington County, New Columbia.

4. Among the policies I am responsible for applying and enforcing are the "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students" [attached hereto as **EXHIBIT A**] and the "School District of Washington County Anti-Harassment, Intimidation & Bullying Policy" [attached hereto as **EXHIBIT B**].

5. My responsibilities also include addressing student discipline issues as they arise.

6. At the time of the incident that gave rise to this litigation Kimberly Clark and Josie Cardona were freshmen students, and Taylor Anderson was a sophomore student at Pleasantville High School. Ms. Clark was born a female and has identified herself as female throughout her life. Ms. Anderson was born male but identifies herself as a member of the female gender. None of these students has any prior record of disciplinary infractions.

7. On November 4, 2015, Ms. Anderson's parents and the parents of Josie Cardona, another student who was born male but identifies herself as a member of the female gender ("the Andersons" and "the Cardonas") respectively, came to my office with Ms. Anderson and Ms. Cardona. Both students were visibly distressed.

8. At that time, the Andersons and the Cardonas gave me a print-out of a Facebook post written by Ms. Clark [attached hereto as **EXHIBIT C**].

9. During our meeting on November 4, 2015, both the Andersons and the Cardonas expressed their concerns that Ms. Clark might resort to violence against their children because both Taylor and Josie have identified themselves as transgender students. Both expressed concerns about allowing their students to participate in girls' basketball and even allowing their children to come to school in light of the Facebook post. The Andersons had kept Ms. Anderson home for the two school days since the incident at the game and Ms. Clark's subsequent Facebook post.

10. At the November 4th meeting, I assured the Andersons and Cardonas that I would talk to Ms. Clark and her parents, and, if appropriate, take disciplinary action. That evening I called Mr. and Mrs. Clark and asked them to come with their daughter to my office the next morning. They agreed to do so.

11. Later on the same day, other students complained about the post, and I observed that at least a few of these students were visibly upset.

12. On November 5, 2015, I met with Ms. Clark and her parents in my office.

13. During the meeting Ms. Clark admitted to authoring the Facebook post.

14. During the meeting Ms. Clark explained that, although she thought only her friends would see her post, she knew that at least some of her friends might pass her post on to others. She also conceded that she knew that some of those who viewed her message were likely to alert Taylor Anderson or other transgender students to her post.

15. Following the meeting with the Clarks, I concluded that the second part of Ms. Clark's post pertaining to Ms. Anderson and other transgender students was materially disruptive of our high school learning environment and collided with the rights of Ms. Anderson, Ms. Cardona, and other transgender students to feel safe at school. Consequently, I suspended Ms. Clark for 3 days.

16. Ms. Clark's suspension will remain as a disciplinary sanction on her permanent high school record.

Thomas James Franklin 12/21/2015
Signature of Affidavit Petitioner Date

Sworn to and subscribed before me this 21 day of December, 2015.

John Dickinson 12/21/2015
Signature of Notary Public Date

EXHIBIT A TO THE THOMAS JAMES FRANKLIN AFFIDAVIT

WASHINGTON COUNTY SCHOOL DISTRICT, NEW COLUMBIA

Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students

Approved by: *Soojin Son* Date: August 1, 2015
Soojin Son, Superintendent

The purpose of this policy is to advise staff on issues relating to transgender and gender nonconforming students, in order to create a safe, inclusive learning environment for all students and to ensure that all students have equal access to each component of their educational programs. This policy offers suggested approaches to specific instances in which the protection or safety of transgender and gender nonconforming students may be threatened, it does not anticipate every situation that might occur.

Any questions regarding the application of this policy should be directed to the Supervisor of Student Health Outreach Programs.

SUMMARY

This policy requires all athletics programs and activities be conducted without discrimination based on sex, sexual orientation, gender expression, or gender identity in the following areas:

- Official Records
- Names and Pronouns
- Restroom Accessibility
- Locker Room Accessibility
- Physical Education, Club Sports, and Interscholastic Athletics

GUIDELINES

Official Records:

The District must maintain a permanent student education record which includes the legal name and the gender of the student. A student's gender may be changed on the educational record upon request from the parent/guardian or eligible student by completion of an enrollment form at the Admissions Center.

The District should use the name and gender by which the student identifies.

Names and Pronouns:

Students have the right to be addressed by a name and pronoun that corresponds with the gender identity that they assert at school. Students are not required to change their legal name or gender on their educational record to be addressed by the name and pronoun that corresponds to their gender identity.

Restroom Accessibility:
All schools within the District must allow students to use the restroom that is consistent with the gender identity that they assert at school. All students, transgender or not, who desire additional privacy should also be provided with access to an alternative restroom. The decision to provide an alternative facility for any student should be made on a case-by-case basis. No student is required to use an alternative restroom because they are transgender or nonconforming.

Any legitimate concerns about the safety or privacy of students related to a transgender student's use of the restroom or locker room should be brought to the Supervisor of Student Health Outreach Programs.

Locker Room Accessibility:
All students must have access to the locker room that corresponds with the gender identity they consistently assert at school. If any student has a desire for increased privacy and safety, they should be provided with access to an alternative locker room. Reasonable alternatives include, but are not limited to:

- Use of a private area, such as: a nearby restroom stall with a door, an area separated by a curtain, an office, or a nearby health office restroom
- A separate changing schedule

For transgender students, alternative arrangements should protect the student's ability to keep his or her transgender status private. No student should be required to use a locker room that conflicts with his or her gender identity.

Physical Education, Club Sports, and Interscholastic Athletics:
Students shall be allowed to participate in physical education, club sports, and interscholastic athletics consistent with the gender identity they consistently assert at school.

Activities that may implicate student privacy concerns, and thereby require the need for accommodations, should be addressed on a case-by-case basis. The District staff shall make reasonable efforts to provide accommodations that addresses such concerns.

Approved by School Board of Washington County on August 1, 2015

Effective Date: August 1, 2015

EXHIBIT B TO THE THOMAS JAMES FRANKLIN AFFIDAVIT

WASHINGTON COUNTY SCHOOL DISTRICT, NEW COLUMBIA

Approved by: *Soojin Son* Date: August 1, 2015
Soojin Son, Superintendent

SCHOOL DISTRICT OF WASHINGTON COUNTY, NEW COLUMBIA
ANTI-HARASMENT, INTIMIDATION & BULLYING POLICY

Harassment, intimidation, bullying and threats are inappropriate in public school environments. It is the policy of the Washington County School District to prohibit harassment, intimidation, bullying and threats communicated by any means, including but not limited to electronic, oral, written, or physical acts, contacts, messages, or other communications that constitute any and all of these practices (hereafter referred to as "prohibited practices") whenever the prohibited practices actually or reasonably could be expected to (1) harm a student, teacher, administrator or staff member, (2) substantially interfere with a student's education, (3) threaten the overall educational environment, and/or (4) substantially disrupt the operation of the school.

Prohibited practices include, but are not limited to, all forms of harassment, intimidation, and/or bullying based on race, national origin, skin color, physical appearance, ancestry, gender, sexual orientation, gender identity, pregnancy, marital status, economic status or physical, mental or sensory disability.

This policy applies to all School District employees, students, parents/guardians and family members of students, and volunteers with respect to conduct and contact of any kind between or among adults and minors. Violators will be sanctioned pursuant to applicable school district disciplinary policies.

Approved by School Board of Washington County on August 1, 2015

Effective Date: August 1, 2015

Exhibit C to the Thomas James Franklin Affidavit

Kimberly Clark

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...

Like · Comment · 22 hours ago ·

2 people like this.

Write a comment ...

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW COLUMBIA

KIMBERLY CLARK, a minor, by and through her father ALAN CLARK, Plaintiff, v. WASHINGTON COUNTY SCHOOL DISTRICT, Defendant,	)	C.A. No. 16-9999

Affidavit of Alan Bartholomew Clark

I, the undersigned, respectfully submit that:

1. I am Kimberly Logan Clark's father.

2. My daughter is a sophomore student at Pleasantville High School, in the city of Pleasantville, Washington County, New Columbia; in the fall of 2015 she was a freshman student at Pleasantville High School.

3. I am concerned that the Washington County School District's policy permitting transfemales and gender non-conforming biological male students to play on girls' sports teams is dangerous, unfair and contrary to my religious beliefs.

4. On November 5, 2015, my wife Carrie Clark, my daughter Kimberly, and I met with Thomas Franklin, Principal of Pleasantville High School in his office at his request.

5. Principal Franklin confronted my daughter about a post she made on her Facebook page on November 2, 2015.

6. During the meeting, my daughter admitted that she had authored the Facebook post, and that she intended her friends to see it because it stated her views on an important school policy.

7. My daughter expressed her view that the school board's policy regarding transgender and gender nonconforming students is unfair, immoral, and dangerous.

8. Following the meeting, Principal Franklin suspended my daughter for 3 days, and it is my understanding that this suspension will remain a part of her permanent academic record.

9. I disagree with the disciplinary action taken by Principal Franklin, and I find it completely inappropriate.

10. My daughter should not be punished for expressing her discomfort with the idea of allowing transfemales to play on girls' sports teams.

11. I further believe that my daughter should not be punished for exercising her first Amendment right to freedom of speech by exposing the lack of fairness, danger and immorality of Washington School District policy with respect to transgender and gender non-conforming students.

12. Principal Franklin's suspension of Kimberly inappropriately deprived her of educational opportunities and unfairly shamed her before the entire school community.

13. The record of the disciplinary action on my daughter's permanent record will negatively impact her future, including college admissions and employment opportunities.

14. As soon as Principal Franklin suspended Kimberly, I asked him to reconsider. When he refused to do so, I appealed her suspension to the Washington County School Board.

15. The School District subsequently rejected my appeal and upheld Kimberly's suspension [letter attached hereto as **EXHIBIT A**].

Alan Bartholomew Clark 12/7/2015
Signature of Affidavit Petitioner Date

Sworn to and subscribed before me this 7 day of December, 2015.

Doris Rodney 12/7/2015
Signature of Notary Public Date

EXHIBIT A TO THE ALAN BARTHOLOMEW CLARK AFFIDAVIT

WASHINGTON COUNTY SCHOOL DISTRICT, NEW COLUMBIA

November 13, 2015

Alan Clark
402 Orchard Road
Pleasantville, New Columbia 99999

Re: Suspension of Kimberly Clark

Dear Mr. Clark:

Thank you for your letter appealing the disciplinary action taken by Pleasantville High School Principal Thomas Franklin against your daughter Kimberly Clark as a result of her November 2nd Facebook post pertaining to transgender students.

One of the greatest problems school administrators currently face is how to maintain a safe and healthy learning environment in the internet age. As you are aware, today a large portion of inter-student communication takes place in off-campus digital fora. In particular, the advent of cyber bullying has led to a dramatic shift in the interactions of students and can have a devastating effect on students in the classroom and at home. This District approaches all bullying seriously and makes it a priority to enable all students to feel safe in their learning environment.

It was this consideration that led to the adoption of the School District's Anti-Harassment, Intimidation & Bullying Policy. In order to insure that students are not taking school-related bullying off school grounds to avoid punishments or repercussion, our administrators need the ability to address any bullying concerns brought before them involving the school or school events, even if their origin is off campus. Recently, there has been an unfortunate trend of students bullying other students based on their gender identity. This is completely unacceptable, just as it is inexcusable for a student to bully another due to differences in race or sex. Of particular relevance here, transgender and gender nonconforming students are entitled to play on sports teams consistent with their gender identity as confirmed by our policy on "Nondiscrimination in Athletics: Transgender and Gender Nonconforming Students."

The Board has conducted a thorough review of the facts related to your daughter's suspension. Her post was offensive and threatening, and she admits that she knew students other than her Facebook friends might see it and that some were likely to pass on her remarks to transgender students. The second portion of the post – "Taylor better watch out. I'll make sure IT gets more than just ejected. I'll take IT our one way or another. That goes for the other TGs crawling out of the woodwork lately, too. . . "-- constituted a true threat. In addition, as you are aware, many Pleasantville High School students have now seen the post. Ms. Taylor Anderson, who was named in the post, and Ms. Josie Cardona, another transgender student, were visibly distressed following the post, in fact Ms. Anderson's parents kept her home from school following the incident. There is no question that the post, specifically the second portion, has been materially disruptive of the high school learning environment and that the second portion quoted above clearly collides with the rights of other students to be secure in the school environment. The fact that parents of other students brought this post to the attention of the

school administration and that one student was kept at home because of parental concerns following the post demonstrates the negative impact Kimberly's post has had on other students. It is this kind of bullying the District's two above-mentioned policies seek to prevent.

In conclusion we find that the 3-day suspension prescribed by Principal Franklin is within the bounds of the relevant school policies, and was an appropriate response to the Facebook post of Kimberly Clark.

Sincerely,

/s/ *James Jones*

Chair of the District Disciplinary
Review Board

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW COLUMBIA

KIMBERLY CLARK, a minor, by and through her father ALAN CLARK, Plaintiff, v. WASHINGTON COUNTY SCHOOL DISTRICT, Defendant,	)	C.A. No. 16-9999

Affidavit of Kimberly Logan Clark

I, the undersigned, respectfully submit that:

1. I am a student at Pleasantville High School in Pleasantville, New Columbia. I have never been subject to any school disciplinary action, nor do I have any history of violent behavior.

2. I am a member of the Pleasantville High School Girls' Basketball team.

3. I participated in an intrasquad practice basketball game on November 2, 2015.

4. During the game, following an adverse call by the referee, Taylor Anderson, who was playing on the other team, engaged me in a verbal argument on the court, and the referee then ejected us both from the game.

5. On the night of November 2, 2015, I wrote a Facebook post from my own personal computer in my bedroom. I stated my issues with Taylor Anderson playing on the girls' team and my concern that allowing transfemale students born biological males to play on a girls' basketball team is unfair and dangerous, as well as my belief that it is immoral and against God's law for people to try to change their God-given gender [**EXHIBIT C** to the Affidavit of Thomas James Franklin].

6. I am not friends with Taylor Anderson or any other transgender student on Facebook. Although I was aware that Facebook posts sometimes go beyond one's own friends, I meant only for my own friends to see my Facebook post.

7. My remarks about "IT" and other "TGs" "getting it" were intended merely as jokes.

8. I strongly believe that allowing boys to be girls, and vice versa, is against God's law.

9. I strongly believe that is it wrong, as well as dangerous and unfair, for the Washington County School District to allow transfemales or gender nonconforming biological male students play on girls' sports teams.

10. I believe it is my First Amendment right as an American to say what I think, particularly about important public policy matters such as sexual orientation and rules governing high school athletics.

Kimberly Logan Clark 12/7/2015
Signature of Affidavit Petitioner Date

Sworn to and subscribed before me this 7 day of December, 2015.

Doris Rodney 12/7/2015
Signature of Notary Public Date

United States Court of Appeals

FOR THE FOURTEENTH CIRCUIT

Argued November 14, 2016 Decided January 5, 2017

No. 17-307

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

v.

SCHOOL DISTRICT OF WASHINGTON COUNTY, NEW COLUMBIA,
APPELLEE

Appeal from the United States District Court
for the District of New Columbia
(No. 16-999)

Alberto Cardona, Hernandez & Osakwe, LLP for Appellant;
Sven Lindblom, Baker & Reilly, LLP for Appellee.

Before: PATEL, LEE and WONG, *Circuit Judges*

OPINION OF THE COURT

EUGENIA WONG, *Circuit Judge*:

This case arises out of a Facebook post by a fourteen-year-old high school student and raises the question whether her speech constituted a "true threat" beyond the protection of the First Amendment. The case also poses an issue of first impression in this circuit: May a school district constitutionally discipline a student for an off-campus internet post originating from her personal computer in her own home? We answer both questions in the negative and reverse the District Court's ruling.

I. BACKGROUND

The events that gave rise to this litigation began with an intrasquad basketball game on November 2, 2015, at Pleasantville High School in Pleasantville, New Columbia. Affidavit of Kimberly Logan Clark ("Kimberly Clark Aff.") at ¶ 3. Appellant Kimberly Clark, then a fourteen-year-old freshman, was playing in an intrasquad scrimmage with other members of the Pleasantville Girls' Basketball Team. *Id.* During the course of the game, Ms. Clark and Taylor Anderson, a sophomore playing on the opposing team, disagreed over a call by the referee. Kimberly Clark Aff. at ¶ 4. A verbal argument between the two players prompted the referee to eject both girls from the game. *Id.* Ms. Clark is a female by birth, who identifies as a member of the female gender. Affidavit of Thomas James Franklin ("Franklin Aff.") at ¶ 6. Ms. Anderson was born male, but she identifies as female. *Id.* Pursuant to the School District's Non-Discrimination in Athletics: Transgender and Gender Nonconforming Students Policy (hereafter "Non-Discrimination in Athletics Policy"), Ms. Anderson, as well as all transgender and gender nonconforming students, is permitted to play on athletic teams that coincide with her chosen gender identity rather than her biological gender at birth. Franklin Aff., Ex. A. at ¶ 4. These facts are relevant because they pertain to the subject of the quarrel between the two players as well as subsequent events.

After her ejection from the basketball game, Ms. Clark used her home computer in her bedroom to post complaints about Ms. Anderson and the game on her Facebook page. Kimberly Clark Aff. at ¶ 5. In relevant part, Ms. Clark's post stated:

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

Franklin Aff., Ex. C.

Ms. Clark is not "friends" with Ms. Anderson or any other transgender student on Facebook. Kimberly Clark Aff. at ¶ 6. Although she intended her friends to see the post, she "was aware that Facebook posts sometimes go beyond one's own friends." *Id.*

On November 4, two days after Ms. Clark posted her comments, Ms. Anderson and Josie Cardona, another transgender student at Pleasantville High School, accompanied their parents to see Principal Thomas Franklin. Franklin Aff. at ¶ 7. They met with Mr. Franklin and showed him a hard copy of a screenshot of Ms. Clark's Facebook post. *Id.* at ¶ 8. The parents told Mr. Franklin that they feared for the safety of their own children and other transgender students. Franklin Aff. at ¶ 8-9. That evening, Principal Franklin called Ms. Clark's parents and asked them to come with Ms. Clark to his office. Franklin Aff. at ¶ 10. The Clarks agreed to do so and met with Mr. Franklin on the morning of November 5th. *Id.* at ¶¶ 10 & 11. During this meeting, Ms. Clark admitted that she knew that her remarks could reach people other than her Facebook friends, including Taylor Anderson and other transgender students. Franklin Aff. at ¶ 14. Ms.

Clark also stated her belief that allowing transfemales to compete on girls' teams is unfair, dangerous, and immoral. Affidavit of Alan Bartholomew Clark ("Alan Clark Aff.") at ¶ 7.

At the conclusion of the meeting with the Clarks, Mr. Franklin suspended Ms. Clark for three days on grounds that she had violated the school's Anti-Harassment, Intimidation & Bullying Policy ("Bullying Policy"). Franklin Aff. at ¶ 15 & Ex. B; Alan Clark Aff. at ¶ 8. The suspension will remain on Ms. Clark's permanent high school record. Franklin Aff. at ¶ 16. Alan Clark appealed his daughter's suspension to the Washington County School Board, the School District's governing body. Alan Clark Aff. at ¶ 14. The School Board viewed the second portion of Ms. Clark's Facebook post beginning "Taylor better watch out…" as a "true threat." Alan Clark Aff., Ex. A. The Board agreed with Mr. Franklin that the post materially disrupted the learning environment and collided with the rights of other students to be secure in their school. Alan Clark Aff., Ex. A. Mr. Clark filed an action on behalf of his daughter against the School District in the United States District Court for the District of New Columbia. *Id*.

In the District Court the parties filed cross motions for summary judgment. The material facts were never in dispute. Ms. Clark contended that the sanction imposed by Mr. Franklin and upheld by the Washington County School Board violated her First Amendment right to freedom of speech. The School District argued that her suspension was constitutional and appropriate because: (1) Ms. Clark's Facebook post was a "true threat" as defined by the United States Supreme Court in *Virginia v. Black*, 538 U.S. 343 (2003), and (2) as materially disruptive speech that collided with the rights of other students, the post was subject to regulation pursuant to *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506-08 (1969).[1]

The District Court ruled in favor of the School District. The court agreed that the second portion of Ms. Clark's Facebook post constituted a true threat beyond the protection of the First Amendment. Citing *Tinker*, The court further held that, even if it did not rise to the level of a true threat, the post was subject to regulation by school authorities because it was materially disruptive and collided with the rights of other students.

II. STANDARD OF REVIEW

We review the District Court's grant of summary judgment *de novo*. *E.g., Feist v. La., Dep't of Justice, Office of the Att'y Gen.*, 730 F.3d 450, 452 (5th Cir. 2013); *Speer v. City of Wynne*, 276 F.3d 980, 984-85 (8th Cir. 2002). Summary judgment is properly granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). All inferences must be viewed in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89, 89 L. Ed. 2d 538 (1986). In the event of cross-motions for summary judgment, "the court construes facts and draws inferences 'in favor of the party against whom the motion under consideration is made." *Pichler v. Unite*, 542 F.3d 380 (3d Cir. 2008) (quoting *Samuelson v. LaPorte Cmty. Sch. Corp.*, 526 F.3d 1046, 1051 (7th Cir. 2008)).

[1] The parties have not raised procedural due process or qualified immunity issues. Nor has Ms. Clark contested the constitutionality of the School District's Anti-Discrimination or Bullying policies. She challenges only the application of these policies to her in the circumstances of this case.

III. ANALYSIS

We recognize the heavy responsibility that school administrators and teachers bear to create a school environment conducive to learning for all students. Maintaining appropriate discipline and good order is critical to the educational mission of our schools. But so is respect for our Constitution. The First Amendment and its guarantee of free speech are at the core of the freedoms we enjoy as Americans. The District Court ruled that Ms. Clark's Facebook post was not entitled to those protections. We disagree. Our analysis begins with an examination of the true threat issue and then turns to the applicability of the Supreme Court's *Tinker* decision to off-campus internet speech originating on a personal computer in a student's home.

A. The True Threat Standard

Even though the freedom of speech is central to our democracy, the Constitution does not shield all speech from government regulation. The First Amendment's guarantee of freedom of speech is subject to a few narrow exceptions carved out for very limited types of speech such as defamation, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), obscenity, *Miller v. California*, 413 U.S. 15 (1973), and child pornography, *United States v. Williams*, 553 U.S. 285 (2008). Speech constituting a "true threat" is one of these narrow exceptions. Consequently, true threats are not entitled to the protection of the First Amendment. *Virginia v. Black, supra.*

The Supreme Court first recognized the "true threat" exception in *Watts v. United States*, 394 U.S. 705, 707 (1968) (per curiam). In *Watts*, a war protestor was convicted of violating 18 U.S.C. §871(a)[2] after exclaiming in the course of a peace rally: "[I]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court noted that the statute was constitutional on its face, because the Nation has "a valid, even an overwhelming, interest in protecting the safety of its Chief Executive." *Id.* However, because the statute "makes criminal a form of pure speech, the speech "must be interpreted with the commands of the First Amendment clearly in mind," and the threat aspect of the speech "must be distinguished from what is constitutionally protected speech." *Id*. at 708. The Court held that the conviction could withstand constitutional scrutiny only if the underlying act constituted a "true threat." *Id*. at 708. In analyzing that question, the *Watts* Court looked to the context of the speech. The Court emphasized that the protestor's statement was made in the course of a political protest, that it was conditional in nature, and that it elicited laughter from the crowd who heard it. *Id*. The Court therefore concluded that the speech was merely a "crude offensive method of stating a political opposition to the President" rather than a threat and reversed the speaker's conviction. *Id*.

The Supreme Court provided additional guidance as to the nature of a "true threat" in addressing a challenge to the constitutionality of a state statute prohibiting cross burnings in *Virginia v. Black*. Justice O'Connor's opinion for the Court characterized a true threat as

[2] This statute criminalizes threats against "the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect." §871(a).

expression by a "speaker [who] means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or groups of individuals." 538 U.S. 343, 359 (2003). Although *Virginia v. Black* involved a criminal statute, subsequent lower court decisions have applied similar "true threat" analyses in civil matters. *See*, *Porter v. Ascension School District,* 393 F.3d 608, 616 (5th Cir. 2004); *United States v. Cassel*, 408 F.3d 622, 628 (9th Cir. 2005).

1. Subjective Intent vs. Objective Intent

In its true threat analysis, the *Watts* Court, as noted above, considered the context of the speech at issue in that case and emphasized the fact that the language in question elicited laughter from the crowd who heard it as evidence that the speech was not a true threat. *Watts* at 708. This emphasis on context suggests that the perception of the recipients matters when evaluating whether speech constitutes a true threat or mere hyperbole. *Virginia v. Black*, however, subsequently "confirm[ed] that proof of a specific intent (aim) must be proved also in threat cases." Roger C. Hartley, *infra note 3*, 54 CATH. U. L. REV. 1, 33 (2004).

However, as the District Court noted, since the Court's 2003 decision in *Black*, at least two of our sister courts of appeals have disagreed on the precise method for characterizing a true threat. The Fifth Circuit in *Porter v. Ascension Parish Sch. Bd.* employed an objective analysis to evaluate the constitutionality of a disciplinary action taken by school authorities against a student on the basis of a drawing depicting a militaristic siege of his school and administrators. 393 F.3d 608, 614 (5th Cir. 2004). The court ruled: "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 cause a present or future harm.'" *Id.* at 616. The court identified the question whether the speaker intended to *communicate* the speech in question as a threshold issue, stating: "The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather . . . the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person." *Id.* at 616 (emphasis in original). The court never determined whether a reasonable person would have interpreted the drawing as intended to cause serious harm, however, because the student artist did not knowingly communicate the drawing to anyone. Rather, the artist's little brother took the drawing to school without his knowledge. *Id*. at 617. Consequently, there was no intent on the part of the student artist to communicate any threat contained in the drawing. *Id*. at 618.

One year later, the Ninth Circuit questioned the *Porter* court's objective recipient analysis and opted for a different approach. In *United States v. Cassel,* the Ninth Circuit construed *Virginia v. Black* unambiguously to require a subjective intent element to establish a "true threat." 408 F.3d 622, 631 (9th Cir. 2005). In *Cassel*, the defendant made a number of statements to prospective purchasers of lots of land neighboring his home about to be sold by the United States Bureau of Land Management. *Cassel* at 624-25. One prospective buyer testified that Cassel told him "that if I tried to build anything on Lot 107, that it would definitely burn. He would see to that." *Id*. at 625. "Anything left on the lot "would be stolen [or] vandalized." *Id.* at 625. Cassel was subsequently prosecuted on two counts of interfering with a federal land sale in violation of 18 U.S.C. § 1860. *Id*. Cassel challenged his conviction on grounds that the

statute was unconstitutional. He argued that without language requiring subjective intent of the part of the speaker, the statute could punish speech that did not constitute a true threat in violation of the First Amendment. *Id*. at 627.

Emphasizing that "no one now contends that the Constitution requires proof that the defendant intends to *carry out* the threat – that is, actually to inflict the harm that he has threatened," *Id*. at 627-628, the *Cassel* court identified "the disputed question [as] whether the government must prove that the defendant *intended* his words or conduct to be understood by the victim as a threat." *Id.* (emphasis added). Reiterating the Supreme Court's admonition that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death," *id.* quoting *Virginia v. Black*, 538 U.S. at 359-60 (plurality opn.), and noting that "eight Justices agreed that intent to intimidate is necessary," 408 F.3d 632, the *Cassel* court held that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* at 633. The *Cassel* court specifically rejected the "objectively reasonable person" approach employed by the *Porter* court. *Id.* at note 10.

As a number of commentators have noted, it is difficult to determine the precise meaning of *Virginia v. Black* with respect to the nature of the intent needed to satisfy the "true threat" requirement.[3] There remains at least some room to debate whether that intent pertains to the speaker's intent to communicate speech that a recipient could reasonably interpret as a threat or whether it requires intent on the part of the speaker to intimidate the recipient. *See* Hudson, *supra* note 3, at ¶ 18.[4] However, we believe that the better view is that a subjective intent to intimidate is required, even where the conduct at issue triggers civil, rather than criminal sanctions. Consequently, we disagree with the District Court that the "objective" approach articulated by the Ninth Circuit in P*orter* is the appropriate standard for determining whether speech constitutes a true threat. The Fifth Circuit's subjective approach seems to us to be more faithful to *Virginia v. Black*, and that is the standard we apply in the case before us.

2. Analysis of Ms. Clark's post

We believe that Ms. Clark's Facebook post fails to constitute a "true threat," because the record reflects a lack of evidence of subjective that she had a subjective intent to intimidate

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[3] *See, e.g.*, Paul T. Crane, *True Threats and the Issue of Intent*, 92 VA. L. REV. 1225, 1226 (2006) ("in providing a definition, the Court created more confusion than elucidation"); Steven Gey, *A Few Questions About Cross Burning, Intimidation and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1287-88 (2005) (noting the difficulty of following Justice O'Conner's opinion); David Hudson, *True Threats*, FIRST AMENDMENT CENTER (May 12, 2008), http://www.firstamendmentcenter.org/true-threats ("[m]any lower courts have struggled with the Court's decision in *Black* because it is unclear what level of intent is necessary for a speaker's utterance to be considered a true threat").

[4] Nor did the Supreme Court's 2015 decision in *Elonis v. United States,* 135 S. Ct. 2001 (2015) clarify the issue. *Elonis* raised the question of the constitutionality of an objective-recipient standard with regard to 18 U.S.C. § 875(c), criminalizing interstate transmission of communication containing any threat … to injure the person of another." *Id*. at 2004. The Court rejected that objective standard and overturned the defendant's conviction on mens rea grounds without reaching the First Amendment issue. *Id*. at 2013.

either Ms. Anderson or other transgender students. On one hand, as the District Court pointed out, Ms. Anderson and her parents were apparently quite upset by the post, and it was not conditional in the same sense as the statement at issue in *Watts*. Nevertheless, Ms. Clark did not knowingly communicate the post directly to Ms. Anderson or any other transgender student, and there is no evidence in the record that Ms. Clark had made any threats to Ms. Anderson or other transgender students in the past. It is true that Ms. Clark and Ms. Anderson had quarreled during a basketball game on the day of Ms. Clark's offensive Facebook post, but there is nothing to suggest that their quarrel was anything other than a verbal disagreement. Ms. Clark had no prior record whatsoever of violence or any disciplinary actions.

Context is critical here, as is common sense. Ms. Clark was a fourteen-year-old girl addressing her Facebook friends about an incident she found upsetting. The initial portion of her post was a protest against the School District's policy of permitting transfemale students to play on girls' teams. Ms. Clark had every right to voice her objections to that policy or to any other School District rule or regulation. The first portion of her post can be characterized as a political statement, or at least a speech on a matter of public concern. Consequently, it was certainly entitled to the protection of the First Amendment.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989). In *Snyder,* the Court overturned a judgment in a tort case awarding damages against Westboro Baptist Church members who picketed near the funeral of a fallen soldier carrying signs with egregiously offensive messages including "Thank God for Dead Soldiers." *Id.* at 448.[5] Like the members of the Westboro Baptist church whose First Amendment right to picket military funerals carrying upsetting messages about God's view of our nation, Ms. Clark is entitled to disseminate her opinion as to matters she believes are against God's law.

The language that arguably makes the post into a "true threat" is located in the second portion of Ms. Clark's post. Her statements were reprehensible, but it is not clear that they were intended to portend violence. She said only 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"; and
- "That goes for the other TGs crawling out of the woodwork lately too..."

While ugly, this language is not comparable to the specific threats of physical harm or property damage found in a number of other cases.[6] To "get more than just ejected" or to be

[5] For an excellent discussion of the relevance of *Snyder* to cases such as the one before us, *see Bell v. Itawamba Sch. Bd.*, 799 F.3d 379, 407-08 (5th Cir. 2015) (Dennis, J., dissenting).

[6] *See, e.g., Watts v. United States*, 394 U.S. 705, 706 (1969) ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."); *United States v. Cassel*, 408 F.3d 622, 625 (9th Cir. 2005) ("if I tried to build anything on lot 107, it would definitely burn. . . if I left anything there, it would be stolen, vandalized. He would see to that"); *Lovell by & Through Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367,

"taken . . . out one way or another" could as readily imply social ostracism as violence, particularly when one considers that they were posted by a fourteen-year-old-girl with no known propensity to violence. In any event, even if an objective person reasonably might come to the conclusion that these statements might portend violence, the record contains no evidence that Ms. Clark subjectively intended to threaten Ms. Anderson or other transgender students in any constitutionally cognizable fashion. Ms. Clark denied any such intent and there is no evidence that her statements that "Taylor better watch out at school" or "I'll take IT one way or another" referred to physical violence of any kind. The Constitution protects even offensive, mean-spirited words unless they constitute true threats or fall within some other exception to the First Amendment.

Ms. Clark's comments were reprehensible and offensive, but the First Amendment protects her ability to make those comments. In our view, the District Court applied the wrong standard and erred in concluding that Ms. Clark's Facebook post constituted a "true threat."

B. The Tinker Standard

"Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker at* 506, but given "the special characteristics of the school environment," speech that would be protected by the First Amendment in other circumstances sometimes may be subject to regulation by school authorities. *Id.* Given the "important, delicate, and highly discretionary functions" of educators, courts have recognized that school administrators have "comprehensive authority, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507. However, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id*. at 508. In order for a school to justify restricting a student's speech, the 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.

Tinker specifically authorizes restrictions of student speech that "materially disrupts classwork" or "involves substantial disorder or invasion of the rights of others." *Id.* at 513. In *Tinker*, a school district suspended two students for wearing black armbands in school to protest the Vietnam War. *Id.* at 504. Although the armbands generated some discussion outside the classroom, the Supreme Court emphasized that the record failed to "demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." *Id.* at 514. The students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others." *Id*. The First Amendment therefore protected their speech.

Since handing down *Tinker*, the Supreme Court has issued three other significant decisions pertaining to school speech. In *Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675, 685

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369 (9th Cir. 1996) ("I'm so angry, I could shoot someone," and "If you don't give me this schedule change, I'm going to shoot you!")

(1986), the Court held that the First Amendment does not protect lewd and vulgar speech at school. The speaker in *Fraser* was a student who made a speech to classmates at a school assembly. His speech was laced with sexual innuendo and suggestive metaphors the Court characterized as "offensively lewd and indecent." *Id.* at 686. The *Fraser* Court held that the First Amendment did not protect the speech, because it was disruptive and contrary to the "fundamental values of public school education." *Id.* at 685-86.

Shortly thereafter, the Court again upheld a school's decision to restrict student speech on grounds that the restriction was "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). In *Hazelwood*, a high school principal deleted two pages from a school newspaper that contained stories on teenage pregnancy and divorce. *Id.* at 264. The principal believed that the publication of the pages would jeopardize the anonymity of the students who were the subjects of the pregnancy article, and he was concerned that the divorce article named a particular student. *Id.* at 263. He also worried that reference to sexual activity and birth control were inappropriate for younger students. *Id.* The Court agreed, holding that the "editorial control over the style and content of school-sponsored expressive activities" was justified and did not infringe on the students' First Amendment rights. *Id* at 273.

Most recently, in *Morse v. Frederick*, 551 U.S. 393 (2007), the Court clarified the parameters of "school speech" in litigation filed by a student who had been disciplined for unfurling a banner reading "BONG HiTS 4 JESUS" during a school-sponsored assembly held across the street from his high school to allow students to cheer on the Olympic Torch as it was carried through Juneau on its way to the 2002 Winter Olympics. 551 U.S. at 399. The Court rejected the student's argument that his speech was not "school" speech because the banner was not on school grounds. The Court held that school authorities acted within their constitutional authority in sanctioning the student for refusing to take down the banner because it promoted then illegal drug use. *Morse*, 551 U.S. at 403.

The critical question in the case before us is whether the *Tinker* standard should be applied to speech that was generated neither on campus nor at a school-sponsored event. The District Court concluded that the *Tinker* standard does apply to off-campus speech. While the court's reasoning finds support in decisions of several of our sister circuits, we believe that these decisions unduly limit student speech in a manner inconsistent with the First Amendment.

1. Material Disruption

Several of our sister circuits have upheld regulation of off-campus speech where material disruption actually occurs or school authorities reasonably forecast that it will take place as a result of the speech or "speech-connected activities." *Tinker* at 513-514. The Seventh Circuit applied this standard in *Boucher v. School Bd.*, 134 F.3d 821, 829 (7th Cir. 1999). *Boucher* upheld the constitutionality of a school's action in disciplining its students for an off-campus newspaper with articles detailing procedures on how to "hack" school computers on grounds that the articles justified a "reasonable forecast" that the articles would cause disruption in the classroom. *Id*. at 828.

The Second Circuit, too, has applied *Tinker* in cases involving discipline of students for off-campus speech. Like the Seventh Circuit, the Second Circuit utilized a "reasonable foreseeability" approach when reviewing a school's disciplining of students for their speech. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007). In *Wisniewski*, a student drawing depicted a pistol firing a bullet at a person's head. *Wisniewski* 494 F.3d at 36. He captioned the drawing "Kill Mr. VanderMolen." *Id.* (Mr. VanderMolen was the student artist's English teacher. *Id.*) The *Wisniewski* court held that "off-campus conduct can create a foreseeable risk of substantial disruption within a school," *id.,* citing an earlier decision upholding disciplinary action against a student for the "foreseeable risk of substantial disruption" caused by an "underground newspaper distributed off-campus." *Id*. at 39 (citing *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1075-77 (5th Cir. 1973)). The *Wisniewski* court therefore upheld sanctions against the student artist. *Id*. at 40.

The Eighth Circuit utilizes a related approach by applying the *Tinker* standard to off-campus speech in circumstances where it is reasonably foreseeable that the speech will reach the school community. *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012). In *Lee's Summit*, two brothers who were students in the same public high school created a website where the brothers would post updates "contain[ing] a variety of offensive and racist comments as well as sexually explicit and degrading comments" *Lee's Summit* 696 F.3d 771, at 773. Although the boys initially revealed the existence of the site and its contents only to a small group of friends, the "student body at large" soon knew of and used the site. *Id*. at 774. When the brothers challenged disciplinary actions taken against them by the school, the Eighth Circuit ruled in favor of the school district. The court ruled that the posts "caused considerable disturbance and disruption." *Id*. at 778. The court upheld the sanctions against the boys on grounds that speech that "cause[s] a substantial disruption to the educational environment is not protected by the First Amendment." *Id*.

The Fourth Circuit, too, has applied *Tinker* to off-campus speech. In *Kowalski v. Berkeley County Sch*., 652 F.3d 565 (4th Cir. 2011), the court reviewed a disciplinary action against a student who created a personal website entitled, "Students against Sluts Herpes." The website, hosted by MySpace, was dedicated to ridiculing a fellow student. Instead of focusing on foreseeability, the court inquired whether there was a sufficient *nexus* between the off-campus speech and the school community. *Id*. at 565. Concluding that there was such a nexus, the Kowalski court upheld the disciplinary action against the student. *Id.* at 575.

Some circuits are more agnostic with respect to the differentiation between on-campus and off-campus speech. The en banc Fifth Circuit recently applied *Tinker* to off-campus speech, but only after acknowledging the absence of a specific rule as to speech that originates outside school grounds. *Bell v. Itawamba County Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015) (en banc), *cert. denied*, 136 S.Ct. 1166 (2016). In *Bell*, a school disciplined a student for uploading a rap video to the internet. The lyrics of the rap music described alleged misconduct by coaches at the school toward female students and directed violent threats specifically against those coaches. *Bell*, 799 F.3d at 383-84. Once on the internet, the video quickly acquired notoriety. One of the coaches who was the subject of the rap learned of it from his wife one day after the recording

was posted. She, in turn, had learned of the video from a friend. *Id*. at 385. The *Bell* court noted that "[t]he pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction." *Id.* at 395. The court held that a student may be disciplined when he or she "intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources." *Id*. at 396.

Several of the Fifth Circuit's judges disagreed with the *Bell* majority. In his dissent, Judge Dennis specifically objected to the *Bell* majority's extension of *Tinker* to speech generated beyond school grounds and school activities as completely and devoid of grounding in "'the special characteristics of the school environment.'" *Id.* at 422 (quoting *Tinker*, 393 U.S. at 506). He suggested that "the majority opinion allows schools to police their students' Internet expression anytime and anywhere – an unprecedented and unnecessary intrusion on students' rights." *Id* at 405.

The judges of the Third Circuit are also divided with respect to the applicability of *Tinker* to off-campus speech. In *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 931, 933 (3d Cir. 2011) (en banc), the court struggled with the applicability of *Tinker* where school authorities disciplined a student who created a MySpace page to parody a school administrator. The speech originated in the student's home using a personal computer; access was restricted to those who had the specific URL address; and the public could not readily access the page. *Id* at 921. Applying *Tinker*, the majority held that the speech did not create a "material and substantial disruption." *Blue Mountain Sch. Dist.*, 650 F.3d 915 at 924. In contrast with the web page at issue in *Lee's Summit*, this MySpace page did not become common knowledge. It was not readily accessible to the "student body at large," and school officials learned of it only through a comment made by a student in passing. *Id*. Observing that "[n]either the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school," the court ruled in favor of the student. *Id*. at 933.

As in *Bell v. Itawamba County School Board, supra,* however, there was disagreement in *Blue Mountain School District* as to the applicability of *Tinker* to off-campus speech. Judge Smith, in a concurring opinion joined by four of his colleagues, emphasized that the waters become murky when courts attempt to apply *Tinker* to off-campus speech. *Blue Mt. Sch. Dist.*, 650 F.3d at 938. Judge Smith noted that Justice Alito, in his concurring opinion in *Morse v. Frederick*, opined that *Tinker* permits regulation of "*in-school* student speech … in a way that would not be constitutional in other settings." *Id.* at 938 (citing *Accord Sypniewski v. Warren Hills Reg'l Bd. Of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002) (emphasis added). Judge Smith opined "that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* at 936.

2. Intrusion Upon the Rights of Others

Tinker also allows schools to restrict speech that "intrudes upon … the rights of others" or "collides with the rights of other students to be secure and to be let alone." *Tinker* at 508.

Harper v. Poway United School District. 445 F.3d 1166 (9th Cir. 2006), cert. granted, judgment vacated sub nom. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007). offers an example of this kind of speech. In *Harper*, a student wore a shirt to school reading "Homosexuality is Shameful" on the same day the school's chapter of the Gay-Straight Alliance chose to hold a "Day of Silence" in an effort to "teach tolerance of others, particularly those of a different sexual orientation." *Harper* 445 F.3d at 1171-72. The *Harper* court construed *Tinker's* articulation of the right to be "secure and let alone" to mean that students have a right to be free from "verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation." *Id*. at 1178. The court therefore concluded that the shirt's message "collide[d] with the rights of other students in the most fundamental way," because being secure involves "not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society." *Id*. at 1178.

Another Ninth Circuit decision, *Wynar v. Douglas Cnty. Sch. Dist.*, also involved speech that intruded on the rights of others. 728 F.3d 1062 (9th Cir. 2013). In *Wynar*, a student posted to social media a "string of increasingly violent and threatening instant messages from home to his friends bragging about his weapons, threatening to shoot specific classmates, intimating that he would "take out" other people at a school on a specific date and invoking the image of the Virginia Tech massacre." *Wynar* at 1065-66. The *Wynar* court held that "without a doubt the threat of a school shooting impinges on those [other students'] rights." *Id*. at 1072.

3. Applying *Tinker* to Ms. Clark's Facebook Post

In the instant case, the District Court held that Ms. Clark's post caused a material disruption at Pleasantville High School and that her post created a "collision" with the rights of other students in a fundamental, confrontational manner as in *Porter*. While the District Court's opinion is well reasoned, we have serious reservations about these conclusions. Offensive and mean-spirited as it was, we do not believe that the post met either aspect of *Tinker*. Although Ms. Clark's speech arguably has a nexus to a school-sponsored event because it was prompted by a quarrel at a school basketball game, there is insufficient evidence in the record of an actual or foreseeable disruption of the school environment to justify her suspension. There is no clear indication that this post resulted in substantial interference with school activities. Although we sympathize with the distress the post caused Ms. Anderson and Ms. Cardona, a nebulous fear of potential, ambiguous disruption to the school environment falls squarely within the definition of "undifferentiated fear" cautioned against by the *Tinker* Court. *Tinker* at 508.

Nor is it clear that Ms. Clark's speech intruded upon the rights of others within the meaning of *Tinker*. In contrast with the shirt worn by the student in *Porter* in open defiance of administrators at school during the school day, Ms. Clark posted her comments from her home using her own personal computer after the school day had ended. Moreover, although her post specifically named Ms. Anderson and transgender students as a group, as noted earlier, Ms. Clark's post did not refer to violence, nor did it reflect the kind of specificity in time and manner likely to create the air of apprehension that the *Wynar* court found sufficient to invoke *Tinker*.

This conclusion is consistent with that of the District of Oregon in *Burge v. Colton School District*, 100 F. Supp. 3d 1057 (2015), another recent case with similar facts. In *Burge*, a fourteen-year-old middle school student made a series of posts on his personal Facebook page about one of his teachers. He wrote that he "wanted to 'start a petition to get [her] fired, she's the worst teacher ever"; used an expletive to describe the teacher; and stated, "Yah aha she needs to be shot." *Id.* at 1060. The teacher received a hard copy of the post several weeks after the initial posting. Despite the student's offensive language and reference to shooting, the *Burge* court held that he "did not intend to threaten or communicate with [the teacher] and did not seriously believe that [the teacher] should be shot." *Id.* at 1061. The teacher was reportedly nervous and upset, and she protested the student's return to her classroom. *Id.* The *Burge* court noted, however, that the student had never been disciplined before, and that there was no evidence that the school took "any actions upon which a rational juror could find that it reasonably foresaw a threat to appropriate school discipline." *Id*. Accordingly, the court held that "the school [could] not turn about and argue that [the student's] comments presented a material and substantial interference with school discipline." *Id.* at 1064.

The circumstances of the present case are analogous. Although Ms. Anderson, Ms. Cardona and their parents, and perhaps a few other students were upset about the post, nothing in the record suggests that anyone else considered Ms. Clark dangerous. As noted earlier, Ms. Clark had never been disciplined before; she had no known propensity to violence; and she made no specifically violent remarks. As in *Burge*, there is no record that the principal who suspended Ms. Clark did anything else to address the purported threat and the concerns expressed by the Andersons and Cardonas other than talk with Ms. Clark and her parents. This is 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.

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, especially given that Ms. Anderson stayed at home for two days after learning of the Facebook post. Even so, we question whether *Tinker* supports the disciplinary action taken against Ms. Clark in this case.

We need not resolve this question, however, because we decline to apply the *Tinker* standard to off-campus speech originating on a personal computer in a student's home. In taking this route we realize that we are departing from the path followed by other circuits, but we believe that it is necessary to uphold the bedrock principle underlying the First Amendment that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

4. *Tinker* Does Not Apply to Internet Speech Originating Off Campus from a Personal Computer

Tinker sets the standard for speech on campus and at school-sponsored events, but to extend *Tinker* to off-campus speech, particularly internet speech, would be to give school authorities virtually limitless authority to control the speech of their students at all times and in

all places. We do not believe that investing school authorities with such far-reaching power is consistent with the First Amendment's guarantee of freedom of speech.

We find support for our position in Judge Smith's concurring opinion in *Blue Mountain* and Judge Dennis's dissent in *Bell*. We, like our Third Circuit colleagues, are concerned that applying *Tinker* to off-campus speech has "ominous implications," *Id.* at 939 (Smith, J., concurring). Like our Fifth Circuit colleagues we believe that students' speech outside school should not be limited "because they are coincidentally enrolled in public school," *Bell*, 799 F.3d 379, 415 (2015), "so long as that speech does not rise to the level of a true threat," *id.,* or fall within some other narrow exception to the First Amendment.[7] *Id*.

The pivotal argument for extending the *Tinker* standard to off-campus speech rests on the reality that technology has fundamentally altered the way virtually all people – especially teenagers – communicate. The internet and related technological developments affords students access to their peers and the wider community in ways never even dreamed of when *Tinker* was decided. The enhanced ability of students to tap into mass communication methods gives today's students power that their grandparents, and even their parents, never had. Those who favor extending *Tinker's* reach argue that this power fundamentally alters the boundaries of the "campus" and even the nature of "school events." They argue that maintaining good order and discipline on campus requires school authorities to have concomitant power to regulate students' internet speech. We find this argument unpersuasive.

The means and channels through which we communicate have changed as the internet and digital media have become ubiquitous in our society, but the essential nature of speech has not changed. In the pre-internet world of *Tinker*, children gathered and gossiped about school in one another's homes, on playgrounds, in shopping malls, at parties, and in a myriad of other off-campus venues. Undoubtedly, they sometimes said offensive, even vicious and cruel, things about their teachers, their schools, and one another. Yet, no one supposed that school authorities could regulate this speech or discipline the student speakers. Is the speech of contemporary students qualitatively different simply because of the digital means so often used to transmit it? We do not believe so, nor do we believe that the United States Supreme Court designed the

[7] Prior to its *Blue Mountain* decision, the Third Circuit, too, acknowledged specifically that *Tinker* applies primarily to in-school environments, noting that "a broader area of speech can be regulated at school than outside of school" pursuant to the *Tinker* standard. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002). Two circuit courts have specifically declined to apply *Tinker* to off-campus speech that did not involve electronic media. The Second Circuit did so in *Thomas v. Bd. of Educ., Gransville Central Sch. Dist.,* 607 F.2d 1043, 1050, 1053 n. 18 (2d Cir. 1979), a case involving an "underground" student newspaper containing offensive satire and sexually explicit speech where the paper was published and distributed off campus after school hours. More recently, in *Porter v. Ascension Parish Sch. Bd.,* 393 F.3d 608, 625, 620 (5th Cir. 2004), a case discussed earlier with respect to "true threats," the Fifth Circuit held that school authorities acted unconstitutionally when they expelled a student after his younger brother inadvertently brought a drawing he had made at home to school. The drawing showed the school "under a state of siege by a gasoline tanker truck, missile launcher, helicopter, and various armed persons." *Id.* at 611. The court held that *Tinker* did not apply to speech that was composed and stored off campus, displayed only to members of the artist's family, and brought to school unwittingly by the artist's sibling. *Id.* at 620.

Tinker standard to censor children for speech uttered outside school grounds. While we abhor the kind of speech at issue in this case, extending *Tinker* to speech outside school grounds sets a dangerous precedent with the very real risk of chilling *all* off-campus speech – an "ominous implication" indeed. We decline to do so.

As Judge Smith points out,

> "[I]f *Tinker* were applied to off-campus speech, there would be little reason to prevent school officials from regulating adult speech uttered in the community. Adults often say things that give rise to disruptions in public schools. Those who championed desegregation in the 1950s and 60s caused more than a minor disturbance in the southern schools. Of course, the prospect of using *Tinker* to silence such speakers is absurd. But the absurdity stems not from applying *Tinker* to off-campus speech uttered by adults and students alike, but from the antecedent step of extending Tinker beyond the public-school setting to which it is so firmly moored."

Blue Mountain, 650 F.3d at 940 (Smith, J., concurring).

Of course, as Judge Smith also points out, defining the boundaries of a school campus can be difficult. A message directed to teachers or administrators, whether oral, handwritten or electronic, could well be considered to be on-campus speech because of the intended recipients. That is not the case here. We find Ms. Clark's speech reprehensible, but, as Judge Smith makes clear, "[w]e must tolerate thoughtless speech . . . in order to provide breathing room for valuable, robust speech – the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination." *Id.* at 941.

Applying *Tinker* to off-campus student speech undermines the core principles of the First Amendment. Therefore, we hold that *Tinker* does not apply to student speech that takes place neither at school nor at school-sponsored events, and we decline to apply *Tinker* in this case.

In light of our holding that Ms. Clark's speech was not a true threat, and that *Tinker* did not authorize the Washington County School District to discipline Ms. Clark for her Facebook post concerning Taylor Anderson and other transgender students, we remand this case to the District Court with instructions to enter summary judgment in favor of Ms. Clark.

SO ORDERED.

SUPREME COURT OF THE UNITED STATES

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

v.

WASHINGTON COUNTY SCHOOL DISTRICT,
Respondent.

No. 16-9999

Petition of Certiorari to the United States Court of Appeals for the Fourteenth Circuit is **GRANTED.**

Parties should brief the following issues:

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

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