

IN THE

Supreme Court of the State of Grace

MS. KIT POLITTE and MR. CORY TOWLES,
Petitioners,

v.

HORTON HOPKINS SCHOOL DISTRICT and KEENA SMALLS,
Respondents.

**On Writ of Certiorari to
the Court of Appeals of the State of Grace**

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a public school administrator may permissibly, under the First Amendment, regulate students' Internet webpages created off-campus when the content of the webpages implicates the school's growing drug problems and the webpages were being accessed at school, during school hours.
2. Whether a public school administrator at a school facing a drug epidemic may permissibly, under the Fourth Amendment, order a non-nude search of a student who was photographed at a party where illegal drugs were present and associated with persons who used, possessed, and potentially dealt illegal drugs, or, alternatively, whether the school district and school administrator are entitled to qualified immunity.

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CONSTITUTIONAL PROVISIONS

This case involves the First and Fourth Amendments to the United States Constitution as applied to schools by the Fourteenth Amendment. They read in relevant portion:

U.S. CONST. amend. I

Congress shall make no law . . . abridging the freedom of speech.

U.S. CONST. amend. IV

The right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.

U.S. CONST. amend. XIV

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The Defendants. Horton Hopkins High School (“Horton Hopkins”) is a public high school located in the City of Hopkinsville in the State of Grace. (R. 1). Keena Smalls has served as principal of Horton Hopkins for twenty years. (R. 1). Over the last five years, Principal Smalls has observed a steady increase in illegal drug use within Hopkinsville and on the high school campus itself. (R. 1). Twenty-five students were suspended for drug use on school grounds in the 2006-2007 academic year and fifteen students have already been caught smoking marijuana on school grounds within the first two months of the fall semester alone. (R. 1). This increase persists despite the community’s continued grieving over the tragic death of 17-year-old Kelly Smith, who died from a drug overdose in December 2007. (R. 1).

The Zero-Tolerance Policy. Determined to reverse this trend, Principal Smalls responded to the tragedy by requesting that the school district enact a zero-tolerance drug policy. (R. 1, 15). The seriousness of the problem was addressed in no uncertain terms by the first line of the policy: “Horton Hopkins School District recognizes that the illegal use of alcohol and drugs is unacceptable and poses a significant threat to our school community and society in general.” (R. 15). The policy allows the District to “conduct personal searches” when “drug use or possession is suspected on school property.” (R. 15). In determining whether to search a student, the policy directs school administrators to “balance the likelihood that the student possesses drugs against the risk of infringing the student’s individual rights.” (R. 15). Once the school administrator deems a search necessary, she must request consent but may still search if refused. Finally, a faculty member of the same gender conducts the search. (R. 15).

Plaintiff Politte. Kit Politte is an 18-year-old senior at Horton Hopkins. Politte decided to create a club to combat drug use at school in September 2008. (R. 2). The school assisted

Politte by sponsoring the new club, called Drug Use Damages Schools (DUDS), which Politte hoped would decrease drug use at Horton Hopkins. (R. 2). Around 130 members joined the club, which organizes school assemblies and posts flyers at the school to promote a drug-free lifestyle and warn of the dangers of drug use. (R. 2). On September 10, after the completion of a DUDS assembly, speaker Jeffie Zarling had a conversation with Politte in which he told her that “the only way to stop the drug problem is to point out drug dealers and users to the entire community.” (R. 2).

After this conversation, Politte created an internet webpage to encourage Hopkinsville community members to submit information about potential drug dealers. (R. 2). Called “Fighting All Dealers” (FAD), the site was created as a network webpage on Friendkepeidea, a social networking webpage. (R. 2). The webpage generated 235 members, 198 of whom are Horton Hopkins students, including all 130 DUDS club members. Hoping that tips acquired through the webpage would lead to dealer arrests, Politte named herself the site administrator and moderator and posted what she believed to be the “strongest” tips. (R. 2). Though created at home on her personal computer, Politte promoted the page at the September 15 DUDS meeting, which occurred after school in a Horton Hopkins classroom. (R. 2).

Plaintiff Towles. Corey Towles is a 16-year-old sophomore at Horton Hopkins. (R. 2). On October 3, he attended a house party hosted by Jeff Tweegs. (R. 2). Tweegs had been recently caught smoking marijuana at school. (R. 2). While at the party, Towles was photographed sitting with two Horton Hopkins students, Frank Conrad and John Thompson. After Towles left the party, the police cited Conrad for possession of marijuana. (R. 3).

The Photograph and Subsequent Search. On October 4, Politte received an e-mail attachment containing a photograph of Towles outside Tweegs’ house during the party. (R. 3).

Politte decided to post the photograph on her webpage, including a caption reading: “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. 3).

The following morning, several school parents who had viewed the photograph on the webpage called Principal Smalls expressing concern about student drug use. (R. 3). Principal Smalls also viewed the webpage and photograph, after which she called all students in the photograph (Conrad, Thompson, and Towles), along with the party’s host, Tweegs, into her office for questioning. (R. 3). Smalls conducted a search of all four students’ lockers and book bags, which produced a small baggie of marijuana in Conrad’s locker. (R. 3). Next, she asked each boy to submit to a personal search in private. (R. 3). Despite their refusals, the gym teacher, Jim Walters, conducted a strip search of each boy to his undergarments in a private room, at no time touching any of the boys. (R. 3). Although the search produced marijuana on Thompson, no illegal drugs were found in Towles’ possession. (R. 3).

Towles’ Webpage. Towles, responding to Politte’s posting and the resulting actions taken by the school, created his own webpage called “Students Against Defamatory Statements” (SADS). (R. 3). On the page, he expressed his views that the posting of the “unauthorized photographs” taken at the party by “DUDS, a school organization under the guise of its webpage FAD” was an invasion of privacy. (R. 3–4). The webpage posting further stated his view that “what [students] do on [their] own time for fun is [their own] business,” and that all students should “fight” the school’s actions and “speak out against Smalls and the rest of these Hopkins idiots.” (R. 4). When students heard about Towles’ new webpage, they began accessing both students’ webpages from the school computer labs and library during free time throughout the school day and after school. (R. 4).

In response, Principal Smalls demanded that both webpages be shut down. Both students were suspended until they complied. While stating that she was angry about Towles' criticism of the administration's actions relating to the drug problems at school, Principal Smalls' primary objective was keeping discipline and order within the school. Smalls was concerned that the webpages were causing a disturbance and interrupting the students' education. (R. 4). Plaintiffs Politte and Towles sued the school district and Principal Smalls for violations of their First Amendment free speech rights when their webpages were shut down, and Plaintiff Towles sued for a violation of his Fourth Amendment rights against unreasonable searches stemming from his strip search. (R. 4).

District Court. The Badger County District Court found that the school district's demand that Politte's and Towles' webpages be shut down did not violate the students' First Amendment rights to freedom of expression. (R. 8). The District Court granted the school district and Principal Smalls' motion for summary judgment, finding that the content of both webpages sufficiently prompted Principal Smalls to reasonably forecast a school disruption under the *Tinker* standard. The District Court also found that the school officials' search of Towles did not constitute an unreasonable search under the Fourth Amendment. (R. 8). The District Court held that the search satisfied the *T.L.O.* standard because it was justified at its inception and the scope of the search was permissible. (R. 8).

Court of Appeals. The Court of Appeals for the State of Grace affirmed the District Court's grants of summary judgment, but reversed the District Court's holding on the constitutionality of the search of Towles, finding that it was not justified at its inception. (R. 11). However, the Court of Appeals upheld the grant of summary judgment, finding that the school officials were entitled to qualified immunity. (R. 12). Politte and Towles appeal.

SUMMARY OF THE ARGUMENT

This Court should affirm the granting of summary judgment in favor of Horton Hopkins and Principal Smalls. All actions taken by Principal Smalls were constitutional under the First and Fourth Amendments to the United States Constitution. First, Principal Smalls permissibly shut down both webpages within the framework of the *Tinker* standard and its progeny. Second, the search of Towles did not violate his Fourth Amendment rights. Even if the search was not fully consistent with the protections of the Fourth Amendment, Horton Hopkins and Principal Smalls are entitled to qualified immunity.

Principal Smalls' decision to shutdown Politte's and Towles' webpages did not violate the students' First Amendment freedoms of expression. Because students began accessing both webpages at school, during school hours, Principal Smalls could reasonably forecast a substantial disruption within the school environment, consistent with the Supreme Court's standard in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Further, Politte's webpage's significant connection to a school-sponsored organization allows Horton Hopkins to shut down the page in order to avoid a possible association with the webpage. Also, Towles webpage was purposely designed to incite protest against Horton Hopkins policies and could reasonably be perceived as advocating or defending student drug use, providing further evidence for Principal Smalls to forecast a substantial disruption within the school environment.

Principal Smalls' decision to search Towles did not violate the Fourth Amendment. First, the search was justified at its inception. Towles was: photographed at a drug party, linked with potential drug dealing by the caption on the photograph, linked with a student found to have been possessing drugs both at the party and on campus, and part of a student body undergoing a district wide drug epidemic. The cumulation of this evidence gave Principal Smalls a sufficient

nexus between Towles and illegal drugs to justify ordering a search. Second, the search was reasonable in scope. The strip search to Towles undergarments was likely to find any hidden illegal drugs, had he possessed them, and the search was conducted in a private room by a male gym teacher such that it would not be excessively intrusive in light of Towles' age and gender. Consequently, the search was reasonable under the Fourth Amendment.

Alternatively, if this Court were to find the search of Towles violated the Fourth Amendment, Horton Hopkins and Principals Smalls should be granted qualified immunity. Principal Smalls' mistake as to what the law was is reasonable because neither existing case law nor the Horton Hopkins zero-tolerance policy clearly established Towles' rights in the situation. If there is a Fourth Amendment violation, this Court should affirm the Court of Appeals grant of qualified immunity.

ARGUMENT

I. PRINCIPAL SMALLS' DECISION TO SHUT DOWN BOTH WEBPAGES IS PERMISSIBLE UNDER THE FIRST AMENDMENT.

The Court of Appeals correctly affirmed the District Court's granting of summary judgment in favor of Horton Hopkins and Principal Smalls. Both Politte's and Towles' webpages constituted a reasonably foreseeable, substantial disruption within the school environment, and Principal Smalls acted appropriately under the circumstances to preserve school order and safety. The Court reviews *de novo* a District Court's grant of summary judgment rendered under FED. R. CIV. P. 56(c). *See, e.g., Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004).

The First Amendment prohibits the abridging of the "freedom of speech." U.S. CONST. amend. I. The Fourteenth Amendment applies the First Amendment to public school officials.

U.S. CONST. amend. XIV. The scope of protection for student speech created on the Internet has not yet been fully addressed by the Supreme Court. However, student speech has been afforded specific treatment through *Tinker v. Des Moines Independent Community School District* and its progeny. It is now well-established that the First Amendment rights, “applied in light of the special characteristics of the school environment, are available to teachers and students.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Where there is no “true threat”¹ of violence, the First Amendment protects student expression, and students entering the school environment do not “shed their constitutional rights to freedom of speech at the school house gate.” *Id.*

Schools, however, are not powerless to regulate potentially harmful or disruptive student speech. While school regulation of speech may not rely on “undifferentiated fear or apprehension of disturbance,” or the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” conduct or speech by the student in class or out of class that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others” does not enjoy full First Amendment protection. *Id.* at 508–13.

Since *Tinker*, the Supreme Court has occasionally revisited the unique balancing that must occur within America’s public schools. The courts recognize that “school principals have a difficult job, and a vitally important one.” *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007). Public school students have the “undoubted freedom to advocate unpopular and controversial views in schools and classrooms,” but this freedom “must be balanced against the society’s

¹ A true threat is a “serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 358 (2003). No true threats exist within either of the online expressions at issue in this case, making the *Tinker* standard the appropriate line of cases for this analysis.

countervailing interest in teaching students the boundaries of socially appropriate behavior.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). Schools now may permissibly regulate “offensively lewd and indecent speech” that undermines basic educational missions. *Id.* at 685. Further, the courts also recognize that school drug problems “remain serious today,” and administrators may also take reasonable steps to regulate speech “reasonably viewed as promoting illegal drug use.” *Morse*, 127 S. Ct. at 2628–29. Finally, where speech may reasonably be perceived as bearing the “imprimatur of the school,” administrators may exercise control over the content so long as the action is “reasonably related to pedagogical concerns.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–73 (1988).

Horton Hopkins School District and Principal Smalls acted within the framework of the *Tinker* standard and subsequent cases when regulating both student webpages in this case. Because the District Court correctly dismissed the First Amendment claims, this Court should affirm the decisions of the District Court and Court of Appeals.

A. Principal Smalls justifiably shut down Politte’s webpage because of the reasonable potential for a substantial disruption or, alternatively, because of the webpage’s association to a Horton Hopkins school organization.

1. The off-campus expression reached campus, allowing school administrators to reasonably forecast a disruption.

Politte’s webpage was accessed by students during the school day and inspired student response such that it was reasonably foreseeable that the page would cause a material or substantial disruption in school. School authorities may act to regulate speech where they “have reason to believe that such expression will ‘substantially interfere with the work of the school or impinge upon the rights of other students.’” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 513). Courts have recognized that even off-campus

conduct “can create a foreseeable risk of substantial disruption within a school.” *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007). In all cases, facts must exist that reasonably permit school authorities to “forecast substantial disruption of or material interference with school activities.” *Tinker*, 393 U.S. at 514.

In *Wisniewski*, an 8th grade student’s instant messaging icon depicted a crude drawing of a person being shot with a caption urging to kill a particular teacher. 494 F.3d at 36. When another student saw the icon and informed the teacher, the school suspended the student. *Id.* The Second Circuit affirmed summary judgment for the school, stating that the fact that the “creation and transmission” of the expression occurred off-campus “does not necessarily insulate [students] from school discipline.” *Id.* at 39. Because it was “at least foreseeable to a reasonable person, if not inevitable” that the icon would become known to administrators, the court held that the icon “would foreseeably create a risk of substantial disruption within the school.” *Id.* at 40.

In *J.S. v. Bethlehem Area School District*, the court held that school officials could expel a student for a webpage created off-campus that included violent threats and other vulgarities. *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 422 (Pa. Commw. Ct. 2000). The court agreed with findings from the expulsion hearings that stated the webpage had a “demoralizing impact on the school community” and deeply affected the health of the threatened teacher. *Id.* at 417.

Contrastingly, in *Emmett v. Kent School District No. 415*, a student’s webpage containing mock obituaries of other students was held to be speech “entirely outside of the school’s supervision.” *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089–1090 (W.D. Wash. 2000). Though the intended audience was Kentlake High School students, because the expression was not deemed threatening and was not part of a school-sponsored work or created at school, school administrators were enjoined from suspending the student. *Id.*

Like in *Wisniewski*, it was at least foreseeable, and indeed, inevitable, that Politte's webpage created a risk of substantial disruption at Horton Hopkins High School. Despite the fact that Politte created and worked on the webpage off-campus at her home on her personal computer, the content of the page, including a photograph of identifiable students engaged in possible drug use and an editorialized, accusatory caption, inspired controversy and disruption within the school environment. Students accessed Politte's page from school computers both during and after school hours. Thus, the originally off-campus conduct had now reached the school and was being viewed during the school day. When the content reaches school and directly involves possible student drug use, it cannot be argued, as in *Emmett*, that the off-campus expression is entirely outside of a school's supervision.

Further, as in *J.S. v. Bethlehem Area School District*, Politte's webpage, even though created off-campus, could quickly affect student morale at Horton Hopkins. Drug use has permeated the student body, even causing the recent death of a student, creating high emotions among students—most notably within Politte herself, who was inspired to create the webpage to point out possible dealers. Principal Smalls acted swiftly to stem further possible disruption and to prevent other photographs and accusations from being posted while the situation was still under investigation. This webpage was not merely harmless entertainment. Rather, Politte's expressions had the effect of implicating students with possibly criminal conduct. While this may seem a noble effort, the consequences for the school environment of students using public webpages to accuse fellow students of drug dealing could lead to significant morale problems as well as problems with discipline, order, and safety. Indeed, the webpage already provoked Towles to create his own webpage, which further escalated the situation. With these realities, Principal Smalls could more than reasonably forecast that such speech would cause a substantial

disruption within the school environment, and shutting down the site was warranted under the *Tinker* standard.

2. Even if there is no substantial disruption, Principal Smalls has the right to disassociate Horton Hopkins from the webpage.

Beyond the *Tinker* standard, which requires schools to tolerate certain non-disruptive student speech, *Kuhlmeier* dictates that schools are not bound to “affirmatively . . . promote particular student speech.” 484 U.S. at 570. Schools have some authority over “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Id.* A school is entitled to “disassociate itself” from the content to ensure that “views of the individual speaker are not erroneously attributed to the school.” *Id.* Administrators do not violate the First Amendment when exercising control over these activities “so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 571.

In *Kuhlmeier*, administrators deleted two pages of articles from a school-sponsored newspaper where the content of the articles involved teenage pregnancy and sexual activity. 484 U.S. at 566. Administrators expressed concern about the content not being appropriate for younger students, but also noted that the articles risked identifying specific students, among other privacy concerns. *Id.* The court held that the student paper was a “supervised learning experience” and that schools may exercise editorial control over expressions the public “might reasonably perceive to bear the imprimatur of the school.” *Id.* at 569–70.

Contrastingly, in *Burch v. Barker*, the Ninth Circuit held that a student newspaper published off school property without the knowledge of administrators could not be banned as part of the school’s pre-distribution review policy. *Burch v. Barker*, 861 F.2d 1149, 1159 (9th

Cir. 1988). The court stated that “[i]nterstudent communication does not interfere” with school teachings. *Id.* The paper was “in no sense” school sponsored and, therefore, it could not be regulated without showing a substantial disruption. *Id.*

Similarly, in *Thomas v. Board of Education*, the Second Circuit stated that a school has “a substantial educational interest in avoiding the impression that it has authorized a specific expression,” but held that a student-created, sexual satire publication could not be regulated by administrators. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1049–50 (2d Cir. 1979). The court held that, although stored in a teacher’s closet during the day, the paper was “deliberately designed to take place” off-campus and that any contact with the school itself was “De minimis.” *Id.*

Like in *Kuhlmeier*, Horton Hopkins must be able to shut down Politte’s webpage in order to ensure that her expressions will not “associate the school with any position other than neutrality” during sensitive drug investigations involving students. 484 U.S. at 570. While Politte might claim that the webpage is not school-sponsored per se, this did not stop Towles and, perhaps, other students and parents who viewed the page from equating the webpage to the school itself through DUDS, which is a school-sponsored organization. Politte already publicized the page at DUDS meetings that were held in school classrooms, and all 130 DUDS members have also joined Politte’s webpage. Thus, although the webpage could not be considered a formal publication of the school, students and parents could reasonably connect the webpage to the “imprimatur” of the school. Also, because of the sensitive nature of the content Politte posted, including photographs with identifiable subjects and accusations of student drug use, the school must be allowed to disassociate itself from the content to ensure that Politte’s views are not falsely attributed to the school through the connections to DUDS.

These facts make this case distinguishable from *Burch v. Barker* in that it cannot be said categorically that there is no connection to school-sponsored associations. Further, the inter-student communications here are not benign; they involve serious accusations of drug use of photographed individuals, making it very likely to interfere with school teachings. The webpage is distinguishable from *Thomas* as well, because the content in this case was deliberately designed to have an effect on campus life by pointing out suspected student dealers. Again, like in *Kuhlmeier*, Principal Smalls' exercise of control over the page was not arbitrary, but was for legitimate pedagogical concerns, to ensure that the situation did not get further out of hand. Such actions are legitimate exercises of editorial control under *Tinker* and *Kuhlmeier*.

B. Principal Smalls justifiably shut down Towles' webpage because it was purposely designed to cause a substantial disruption and could be perceived as advocating illegal drug use.

Towles' webpage was purposely designed to disrupt the work of the administration and could be perceived as advocating illegal drug use. First Amendment rights of students "are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Thus, school administrators may prohibit student expression that can be forecasted to "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513. Further, schools may take steps to safeguard against "speech that can reasonably be regarded as encouraging illegal drug use." *Morse*, 127 S. Ct. at 2622. Schools may also prohibit "the use of vulgar and offensive terms" *Fraser*, 478 U.S. at 683. Students may be disciplined even for conduct occurring off-campus if it would foreseeably create a risk of substantial disruption within the school environment, especially when it is "similarly foreseeable that the off-campus expression might also reach campus." *Doninger, P.P.A. v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008).

In *Doninger, P.P.A. v. Niehoff*, the Second Circuit held that the school principal did not violate the First Amendment after shutting down a student's blog posting that referred to school administrators as "douchebags" and encouraged other students to contact the principal to "piss her off" in reference to protesting the alleged cancelling of a rock-band festival. *Id.* at 45, 53. Despite being created off-campus, the court agreed that the blog used vulgar language and was "purposely designed" to reach campus as it directly addressed school events and encouraged and generated a response. *Id.* at 50. The posting also disseminated misleading information, and was "potentially disruptive of efforts to resolve the ongoing controversy." *Id.* at 51.

Contrastingly, in *Beussink v. Woodland R-IV School District*, the court held that a student's webpage created at his home that used vulgar language to convey his opinion regarding his teachers and school, and encouraged readers to contact the principal, did not substantially disrupt classes. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998). The court stated that, because only one student accessed the page at school, and no disturbance occurred, the principal's decision to discipline the webpage creator was motivated by the principal's own upset feelings about the content of the webpage. *Id.* at 1178–80.

In *Morse v. Frederick*, the Supreme Court held that, in light of the special characteristics of the school environment and the "governmental interest in stopping student drug abuse," schools may permissibly restrict student expression they reasonably regard as promoting illegal drug use. 127 S. Ct. at 2629. A student unfurled a banner during a school field trip containing a drug-related slogan. 127 S. Ct. at 2622. The principal's removal of the banner and resulting student suspension was not a First Amendment violation. *Id.* at 2629. As recognized in *Morse*, "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use." *Morse*, 127 S. Ct. at 2628.

As in *Doninger*, Towles' webpage was purposely designed to elicit a student disruption at campus, specifically, to spark a protest of Horton Hopkins' drug policies and recent searches of students. While referring to Principal Smalls and other officials as "idiots" likely does not rise to the level of vulgarity found in *Fraser* or *Doninger*, it does add to the disruptive feel and intent of Towles' posting. Further, Towles' posting disseminated misleading information about the nature of Politte's FAD webpage and attributed it to a school-sponsored organization. These misstatements and calls for student protest not only present a reasonably foreseeable disruption of the classroom environment, but they also constitute a present disruption of the ongoing administrative efforts to resolve the controversies involving Horton Hopkins serious drug problem. As with Politte's webpage, students had already begun accessing Towles' page during school hours. Principal Smalls did not need to wait for further disruption to act. She saw the real dangers of escalation, which was reasonable enough to move beyond undifferentiated fear to a reasonable forecast of disruption under the *Tinker* standard.

This case is distinguishable from *Beussink* in that, even though Principal Smalls admitted feeling angry about Towles' criticism, the potential disruption and the school's drug problem overshadowed personal feelings. Towles called for all students to speak out against the administration during a time when tensions were already high from Politte's webpage and the prevalence of student drug use on campus. More than one student accessed the page during school hours, making a forecast of a substantial disruption far more reasonable than in *Beussink* where the entire incident was largely isolated.

Finally, as in *Morse*, Towles posting could reasonably be perceived as advocating student drug use. Considering the context of the situation, Towles' statement claiming what students "do on our own time for fun is our business" can reasonably be seen as defending students who have

been caught using or possessing illegal drugs. This could only further incite protest from both sides of the argument. While the language used may not be as obvious as in *Morse*, the policy remains the same. The particular concern to prevent student drug abuse “extends well beyond an abstract desire to avoid controversy.” *Morse*, 127 S. Ct. at 2629. Principal Smalls, facing a growing drug problem, could permissibly act in order to prevent Towles’ posting from undercutting the school’s policy against student drug use.

II. PRINCIPAL SMALLS’ DECISION TO HAVE TOWLES SEARCHED IS PERMISSIBLE UNDER THE FOURTH AMENDMENT.

The Fourth Amendment provides that, “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.” U.S. CONST. amend. IV. The Fourteenth Amendment applies the Fourth Amendment to public school officials. U.S. CONST. amend. XIV. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the United States Supreme Court recognized the need of public schools to maintain order does not require them to obtain a warrant or adhere to the strict probable cause standard of the Fourth Amendment. Rather, schools must comply with the underlying command of the Fourth Amendment, that any searches or seizures be reasonable as judged by the totality of the circumstances. *Id.*

Due to the totality of the circumstances in this case, the search of Towles was reasonable and this Court should adopt the District Court’s decision granting summary judgment to Horton Hopkins and Principal Smalls. Alternatively, if the search was not reasonable, Horton Hopkins and Principal Smalls are nevertheless entitled to qualified immunity, and this Court should affirm the Court of Appeals’ decision granting summary judgment based on qualified immunity.

A. The totality of the circumstances warranted a search of Towles because the search was justified at its inception and reasonable in its scope.

The leading Supreme Court case on school searches is *New Jersey v. T.L.O.*, which devised a two-prong test for school searches. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The search is constitutional under the Fourth Amendment if it is: (1) “justified at its inception,” and (2) “reasonably related in scope to the circumstances which justified the inference in the first place.” *Id.* Searches such as that of Towles, which meet the two-prong test, are reasonable and thus constitutional under the Fourth Amendment.

1. The evidence before Principal Smalls justified a search of Towles at its inception.

The first prong of the *T.L.O.* test requires that any search of a student by a teacher or school official be “justified at its inception.” 469 U.S. at 341–42. A search is “justified at its inception” when “there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *Id.* The *T.L.O.* test ensures the Fourth Amendment is not violated when a school administrator orders a search. The administrator here, a principal who has five years of experience dealing with a drug epidemic, ordered a search based on the totality of the evidence before her, even if no piece of evidence could individually justify the search.

According to Chief Justice Rehnquist, a simple fact of evidentiary life is that “individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it.” *Bourjaily v. U.S.*, 483 U.S. 171 (1987). The cumulation of the evidence before Principal Smalls supplied a sufficient nexus between Towles and illegal drugs. First, Principal Smalls was given a reliable photographic “tip” that Towles had attended a “drug party,” which was hosted by Jeff Tweegs, who had just been caught smoking marijuana. The party was also attended by Frank

Conrad, who was also found to have been possessing illegal drugs. Principal Smalls now had evidence that both illegal drugs and Towles were at Tweegs' party. Next, the caption on the photograph, written by Politte, read "Are Horton Hopkins students becoming drug dealers?" (R. 3). The caption suggests someone in the photograph was potentially a drug dealer. Common sense dictates that for a drug transaction to take place there must be at least two parties, a buyer and a seller, in a close enough vicinity to each other to exchange the illegal drugs. Next, the illegal drugs found in Conrad's locker show that the drugs at the party have now reached campus. Finally, this evidence can be combined with the school wide, five-year, battle with illegal drugs, the recent increase in drug related activity, and the tragic death of Kelly Smith. The cumulation of this evidence was sufficient for Principal Smalls to constitutionally order a search.

The Tip. "We do not treat all informants' tips as equal in their reliability." *Adams v. Williams*, 407 U.S. 143, 147 (1972). For Principal Smalls to use the tip from Politte as evidence to justify a search, the informant and tip must both be reliable. *Id.*

In *Redding*, the Ninth Circuit found the student tip linking the plaintiff to the possession of illegal ibuprofen pills was a "self-serving statement which shifted the culpability for bringing the pills to school from Marissa (the tipster) to Savana (the plaintiff)." *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1083 (9th Cir. 2008). "For good reason, we are most suspicious of those self-exculpatory tips that might unload potential punishment on a third party." *Id.* at 1084.

Further, in *Phaneuf v. Fraikin*, the Second Circuit found that a "tip from a disinterested student" was a "tenuous connection" and not sufficient to establish justification for a search for drugs. *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006). "Because the tip lacks reliability,

school officials would be required to further investigate the matter before a search or seizure would be warranted.” *Id.* at 599.

Unlike the tipster in *Redding*, Politte’s goal in posting the photograph was not to shift any culpability anyway from herself as she was not suspected of possessing illegal drugs. Rather, posting the photograph is consistent with her goal of helping the police “arrest local drug dealers,” which gives no reason for Principal Smalls to be suspicious of her veracity. (R. 2). Unlike the tip in *Phaneuf*, Politte had photographic evidence of a connection between Towles and other students at the drug party, which gives Principal Smalls no foundation to question her basis of knowledge. In sum, Politte and her tip had the combination of reliability not found in either *Redding* or *Phaneuf* which allows a search order based, at least in part, on the “tip.” Assuming that the search could not be justified solely based upon Towles’ presence at a drug party, there was additional evidence to consider.

The Association. Having established that Politte was a reliable informant with a reliable tip, we next must consider the caption she wrote below the tip: “Are Horton Hopkins students becoming drug dealers?” (R. 3). The caption suggests to a reasonable person that one or all of the students in the picture is involved in trading illegal drugs. The Court of Appeals found that “the District Court erred in assuming that that Towles’ friendship or association with Frank Conrad and John Thompson makes Towles himself more likely to possess a prohibited substance.” (R. 11). However, the court never defines the contours of the “association” or “friendship” between Towles and the other students as gleaned from the caption. This association differs greatly from that in *Redding*.

In *Redding*, the link between the plaintiff and illegal drugs was a planner, on loan from the plaintiff to another student, which contained illegal contraband but not illegal drugs. 531

F.3d at 1084. The court rejected the idea that the plaintiff's friendly relationship with another student makes the involvement in pill distribution more likely. The court found that this was only "guilt-by-association," which is "too thin of a reed for such a substantial intrusion into expectations of privacy." *Id.*

Redding is distinguished by the nature of the relationship between the plaintiff and another student. The caption on the photograph gave Principal Smalls reason to believe the relationship between Towles and Conrad was one of buyer-seller. There was no reason to believe this about the students in *Redding*. Further distinguishing *Redding*, Principal Smalls' perception of Towles' relationship to Conrad is based on evidence involving the use of illegal drugs, whereas the relationship centered on unrelated illegal contraband in *Redding*. By calling in Tweegs, Conrad, Thompson, and Towles for questioning, Principal Smalls was efficiently identifying all the characters from a feasible story: the host, the seller and the buyers. Even assuming the illegal drug centered association between the four students cannot justify a search by itself, the connection, at the very least, justifies increased suspicion of Towles and is a major piece of evidence which justified the search.

The Drugs in Conrad's Locker. "A reasonableness inquiry must only consider facts the school officials knew prior to the start of the search." *Phaneuf*, 448 F.3d at 597. The Court of Appeals found the District Court's consideration of the illegal drugs found in Conrad's locker to be in error. However, Principal Smalls first ordered a search of their lockers and book bags and only then, after the drugs were found in Conrad's locker, ordered the personal searches. Thus, the searches were separate and the illegal drugs found in Conrad's locker can serve as evidence to conduct the personal search, which Towles challenges. This evidence is important because Conrad, who was near Towles in the picture, was most likely, due to his prior offenses, to be the

drug dealer if there was one. A suspected drug dealer with illegal drugs on campus has a tendency to increase the probability that someone in his close vicinity at the party and currently at school with him might now possess drugs on campus as well. Even assuming this does not individually justify a search, this is valuable evidence for Principal Smalls to consider when ordering a search, especially when considering what was happening throughout the school district.

The Drug Epidemic. Principal Smalls has witnessed increased drug use throughout the school district over the past five-years, including multiple incidents over the past two months of the current semester and the tragic drug related death of Kelly Smith. This evidence differs from the three previously cited items due to its lack of any link to Towles as an individual. The Court in *T.L.O.* did not decide whether individualized suspicion is a requirement for school searches. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). However, ten years after *T.L.O.* the Court found that urinalysis searches of athletes without any individual suspicion were constitutional. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). This holding was affirmed and extended to urinalysis testing for all students participating in extracurricular activities seven years later. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

Both schools faced drug epidemics similar to Horton Hopkins' problem. In *Acton*, the Court saw the interest in deterring drug use as "compelling." 515 U.S. at 656. In *Earls*, the Court thought it important to note that "the School District in this case has presented specific evidence of drug use at Tecumseh schools" in support for upholding random urinalysis drug testing. 536 U.S. at 831. The Court concluded that "given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular policy." *Id.*

While the facts may differ between the Supreme Court cases and the present case to individually justify the search of Towles, the Supreme Court’s deference to school administrators who face drug epidemics applies to the similarly situated Principal Smalls. In sum, the school wide drug epidemic justifies increased suspicion of Towles.

The previously listed pieces of evidence before Principal Smalls all had a “tendency” to make her believe it was “more probable” that Towles possessed illegal drugs on campus. FED. R. EVID. 401. Principal Smalls’ decision to search was then a “common sense conclusion about human behavior upon which practical people—including government officials—are entitled to rely.” *T.L.O.*, 469 U.S. at 346. The cumulative weight of the evidence justified a verdict of “search,” satisfying the first prong of the *T.L.O.* test.

2. The search was likely to find illegal drugs, if Towles possessed them, without being excessively intrusive.

The second prong of the *T.L.O.* test requires that the measures by which the search is conducted be “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.” 469 U.S. at 342.

The result in *T.L.O.* is . . . puzzling in light of the Court’s admonition that ‘age and sex of the student and the nature of the infraction’ be included in the balancing calculus. The Court in fact never considered these factors in its *T.L.O.* balancing calculus nor explained how or why they are relevant.

Martin R. Gardner, *Student Privacy in the Wake of T.L.O.: An Appeal for Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897 (1988) (quoting *T.L.O.*, 469 U.S. at 342).

Although *T.L.O.* offers no guidance on age, sex, or scope of a strip search, various circuit courts have attempted to glean a standard from the precedent. According to these precedents, the non-nude strip search of Towles was reasonably related to the objectives of the search and was not excessively intrusive in light of Towles’ age and sex or the nature of the infraction.

In *Cornfield*, a sixteen-year-old male suspected of possessing illegal drugs endured a nude strip search by a school administrator of the same gender. *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993). The Seventh Circuit found this reasonable in scope. Further, in *Williams*, a minor suspected of possessing illegal drugs was asked to remove her shirt, pull her pants down to her knees, and pull on the elastic of her underwear by a school administrator of the same gender. *Williams ex rel. Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991). The Sixth Circuit found this reasonable in scope.

Contrastingly, in *Redding*, a thirteen-year-old girl suspected of possessing illegal drugs was stripped to her undergarments and asked to “pull out the band of her bra” and “stretch out the elastic on her underwear” by a nurse of the same gender. 531 F.3d at 1078. The Ninth Circuit found this unreasonable in scope, citing the plaintiff’s age.

Both *Cornfield* and *Towles* are the same age and gender. Both were searched by someone of their same gender. Neither were touched or threatened in any way by the person performing the search. The major difference between *Cornfield* and the present case is the intrusiveness of the search; *Cornfield* was subjected to a nude search whereas *Towles* was not. This difference cuts in favor of Horton Hopkins and Principal Smalls considering the Seventh Circuit found the more intrusive search reasonable in light of all the other factors similar to the present case.

Towles is three years older than the plaintiff in *Redding* and is also the opposite gender. Furthermore, *Towles* was not asked to stretch out his undergarments, a very intrusive procedure. The differences in age, sex, and scope between the current case and *Redding* make it of little precedential value. Furthermore, the search of the plaintiff in *Williams*, similar in scope to the search in *Redding*, was found to be reasonable.

In sum, Principal Smalls, would not have had to know that a non-nude strip search of another student in the photograph, Thompson, produced a small amount of marijuana to know that this method of searching is a highly effective way to find illegal drugs if the student possesses them. In terms of age, the search was cognizant of Towles' justifiable expectations of privacy as a sixteen-year-old by conducting the search in a private room instead of a more public place. In terms of gender, Principal Smalls called in a gym teacher of the same gender to conduct the search as opposed to doing it herself as a member of the opposite gender. Overall, the measures adopted by Principal Smalls were reasonably related to finding illegal drugs and not excessively intrusive in light of Towles' age and sex. The second and final prong of the *T.L.O.* test is met. The search of Towles is reasonable and does not violate the Fourth Amendment.

B. In the event the search is unconstitutional, Horton Hopkins and Principal Smalls are entitled to qualified immunity because the rights of Towles were not clearly established.

Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Assuming Towles has suffered a constitutional violation, qualified immunity will be granted to the defendants unless the right sought to be vindicated is “clearly established.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001).² Two mutually dependant rationales have been cited by the Supreme Court for the “clearly established” standard:

(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; and

² The Supreme Court in *Pearson v. Callahan*, 129 S. Ct. 808 (2009) made the *Saucier* protocol optional. This means that a court might choose to discuss qualified immunity before the constitutionality of the search. However, whether the “rigid order” of *Saucier* is adopted or rejected by the court, qualified immunity must be addressed. *Id.*

(2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

Penalizing Horton Hopkins and Principal Smalls for what the evidence indicates was a good faith decision by Principal Smalls would be unjust and deter appropriate decisiveness in the future. Towles' rights against a non-nude strip search after being seen in a photograph at a drug party next to Conrad, who the evidence indicated might be a drug dealer, and who was later found to be possessing illegal drugs on school grounds, in a school district plagued by a five-year long drug epidemic, were not clearly established. Neither of the two main sources available to Principal Smalls, case law and Horton Hopkins policy, dictated the result that a search of Towles would be unconstitutional. Principal Smalls' "mistake as to what the law requires was reasonable," and both she and Horton Hopkins should be granted qualified immunity. *Saucier*, 533 U.S. at 194.

1. The case law is not clear on the circumstances surrounding the search.

The Sixth Circuit in *Williams* expressed concern about the *T.L.O.* test, stating that "the reasonableness standard . . . has left courts later confronted with the issue reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 cause of action." *Williams*, 936 F.2d at 886. *T.L.O.* involved two fourteen-year-old freshman girls whose purses were searched after they were caught smoking cigarettes in the bathroom. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The factual differences concerning the level of individualized suspicion at the time of the search, the nature of the offense, the age and gender of the plaintiffs, and extent of the search are simply too great for *T.L.O.* to be of any value to Principal Smalls.

Principal Smalls may have looked to *Redding* and *Phaneuf* and seen the factual differences between those cases and the present case in terms of the tip she received and the association between the students. She could have looked to *Acton* or *Earls* for guidance on the level of deference the Supreme Court gives to school administrators who are facing a drug epidemic. Once concluding that the search of Towles was justified, she could have looked to the aforementioned *Cornfield* or *Williams* as on point cases for age, gender, and scope. These tasks all seem more appropriate for a scholar of constitutional law than for a school administrator.

Three circuit court cases granted qualified immunity for strip searches of students suspected of much less serious offenses than possession of illegal drugs. This reflects the minuscule level of case knowledge courts expect from school administrators. *See, e.g., Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 822 (11th Cir. 1997) (The court granted qualified immunity without considering the constitutionality of the strip search of eight-year-old students to find seven dollars missing from a student's purse); *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 954 (11th Cir. 2003) (*Thomas II*) (The court held the strip search of an entire fifth grade class to find twenty-six dollars was unconstitutional yet the defendants were entitled to qualified immunity because *T.L.O.* did not give the defendants "fair warning" that a strip search of an elementary school class for missing money would be unconstitutional); and *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (The court held the strip search of twenty boys and five girls to find missing prom money to be unconstitutional yet granted the defendants qualified immunity because "the *T.L.O.* Court did little to explain *how* the factors should be applied in the wide variety of factual circumstances facing school officials today").

Justice Brennan's prediction in his *T.L.O.* dissent has come true, as teachers and administrators are "hopelessly adrift" by the Court's "amorphous" reasonableness standard. *T.L.O.*, 469 U.S. at 365–66, (Brennan, J. dissenting). All cases could be factually distinguished with the present case and Principal Smalls had no way of knowing what facts are constitutionally significant to uphold a search of Towles. With case law no help, Principal Smalls may have looked to Horton Hopkins' zero tolerance anti-drug policy.

2. Principal Smalls made a good faith decision based on Horton Hopkins' zero-tolerance drug policy.

"Horton Hopkins School District recognizes that the illegal use of alcohol and drugs is unacceptable and that the problems associated with it pose a significant threat to our school community and to society in general." (R. 15). The very first sentence of Horton Hopkins' zero-tolerance policy alerts a school administrator like Principal Smalls to the seriousness of the threat that illegal drugs poses while making no distinction between one potentially more dangerous illegal drug from one less potentially dangerous. Unlike any previously existing case law, the zero-tolerance policy gave Principal Smalls specific, step-by-step instructions for when and how to conduct a search of a student.

The first portion of the policy states that "[w]hen drug use or possession is suspected on school property, the District reserves the right to conduct personal searches of students." (R. 15). In total compliance with the policy, Principal Smalls suspected Towles possessed drugs and ordered a search. Next, the District must "request consent before beginning a search," however, the school can still conduct a search "if the student refuses to give consent." (R. 15). Again, in total compliance with the policy, Principal Smalls requested consent from Towles and exercised her right to proceed with the search after consent was refused. Next, the policy states that the

District “will balance the likelihood the student possesses drugs against the risk of infringing the student’s individual rights.” (R. 15). The word “will” gave Smalls no discretion on the method of determining whether a search of Towles was justified. Principal Smalls was in total compliance with this balancing test when she ordered the search of Towles. Finally, the policy provides that “a faculty member of the same gender as the student” is responsible for conducting the search. (R. 15). In total compliance with the policy, Principal Smalls ordered a gym teacher of the same gender to conduct the search of Towles.

No facts on record suggest that Principal Smalls did anything other than make a good faith determination, based on evidence before her and in total compliance with the zero-tolerance policy, that Towles possessed illegal drugs, and a search to his undergarments conducted by a teacher of the same gender in a private room was warranted. The only thing that was truly “clearly established” was Principal Smalls’ total compliance with Horton Hopkins’ policy. Horton Hopkins and Principal Smalls should be granted qualified immunity so they can continue their good faith efforts to keep Horton Hopkins one step ahead in the battle against student drug use.

CONCLUSION

For the aforementioned reasons Horton Hopkins and Principal Smalls respectfully request this Court affirm the granting of summary judgment.

Respectfully Submitted,

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Counsel for the Respondents

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