

No. 05-1338

IN THE

Supreme Court of the State of Grace

KIT POLITTE and 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 PETITIONER

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QUESTIONS PRESENTED

1. Whether Respondents' attempt to regulate Petitioners' Internet speech created off-campus was a violation of Petitioners' First Amendment rights when the speech did not cause or reasonably forecast a substantial disruption of school activities, did not intrude on student's rights, and could not be interpreted as speech sponsored by the school.
2. Whether the Court of Appeals erred by holding that the Respondents were entitled to qualified immunity even though they violated Petitioner Towles' Fourth Amendment rights when they subjected him to a highly intrusive search without a reasonable belief that Mr. Towles possessed drugs on school grounds.

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CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that:

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

U.S. Const. amend. I.

The Fourth Amendment to the United States Constitution provides in pertinent part that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...

U.S. Const. amend. IV

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

No state shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. THE ONGOING DRUG PROBLEM AT HORTON HOPKINS HIGH SCHOOL.

Kit Politte, 18 years old, and Cory Towles, 16 years old, are students at Horton Hopkins High School, a public school in Hopkinsville, Grace. (R. 1). For the past five years, there has been a noticeable increase in drug use in Hopkinsville and at the high school. (R. 1). One student died of a cocaine overdose last year and there have been frequent suspensions of students caught with illegal drugs on campus. (R. 1).

In January 2007, the school district enacted a strict, zero-tolerance drug policy allowing for drug testing and searches of students and their lockers, desks, and personal property. (Appendix A). These searches may take place over the student's objection. (Appendix A). Pursuant to the policy, if a student is found possessing or under the influence of illegal drugs, the police may be contacted, the student will be suspended for at least three days, and the student will be banned from all extra-curricular activities for the remainder of the year. (Appendix A).

II. KIT POLITTE STARTS A SCHOOL-SPONSORED CLUB AND CREATES A PERSONAL WEBPAGE.

In September 2008, Ms. Politte, a senior at the high school, started a school-sponsored club called "Drug Use Damages Schools" (DUDS), which she hoped would discourage drug use among her fellow students. (R. 2). About 130 students joined the club. (R. 2). On September 10, 2007, after a DUDS assembly, the assembly speaker advised Ms. Politte that pointing out drug dealers and users to the whole community was the only way to stop the drug problem. (R. 2).

That night, on her home computer Ms. Politte created a webpage on the social networking site Friendkepedia, called "Fighting All Dealers" (FAD). (R. 2). The webpage called for residents of Hopkinsville to send in information about drug dealers, hopefully leading to arrests. (R. 2). All tips to the site were anonymous. (R. 2). 235 people joined the FAD network,

198 of which were Horton Hopkins students. (R. 2). Ms. Politte deemed herself the administrator and only worked on the website from home. (R. 2). On September 15, 2008, DUDS held a meeting after school in a Horton Hopkins classroom. (R. 2). Ms. Politte told those attending about her webpage. (R. 2). All 130 members of DUDS are a part of the FAD network. (R. 2).

III. HORTON HOPKINS STUDENT, JEFF TWEEGS, HOSTS A PARTY.

On October 3, 2008, Jeff Tweegs, the captain of the school's baseball team, hosted a party. (R. 2). Earlier in the year, Mr. Tweegs had been suspended after he was caught smoking marijuana. (R. 2). Prior to the party, there were rumors at school that some students would bring marijuana to the party. (R. 2). Mr. Towles, a sophomore who had just moved to Hopkinsville and was hoping to play for the school's baseball team, attended the party. (R. 2). He thought meeting some of the team members might help his chances of getting on the team. (R. 2).

Mr. Towles only stayed at the party for two hours. (R. 3). Although he saw a few students smoking cigarettes and drinking beer, he did not see anyone using drugs. (R. 3). About a half-hour after Mr. Towles left, neighbors called the police to complain about the noise coming from Mr. Tweeg's house. (R. 3). In the course of breaking up the party, the police cited five students for underage drinking and sophomore Frank Conrad for possession of a marijuana joint. (R. 3).

The day after the party, Ms. Politte posted a photograph, which had been anonymously emailed to her, on her FAD webpage. (R. 3). It depicted Mr. Towles at the party sitting with two students: Mr. Conrad, who was pictured smoking, and another sophomore, John Thompson. (R. 3). The photograph's caption read: "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" (R. 3).

IV. SCHOOL OFFICIALS SEARCH FOR DRUGS.

In response to the posting on the FAD webpage, several parents of Horton Hopkins

students called the principal, Keena Smalls, to express their concern about drug use. (R. 3). The police also notified the school about the students they had cited at the party. (R. 3).

After viewing the photograph on the FAD webpage, Principal Smalls called Mr. Towles, Mr. Conrad, Mr. Thompson, and Mr. Tweegs individually to her office for questioning. (R. 3). All four denied possessing drugs. (R. 3). Principal Smalls then searched each of their lockers and book bags. (R. 3). This search turned up a small baggie of marijuana in Mr. Conrad's locker. (R. 3). Principal Smalls then asked each of them to submit to a search of their persons in private and individually. (R. 3). Over their protests, each boy was searched by the gym teacher, Jim Waters, in a private room. (R. 3). They were each told to strip to their underwear and all of their pockets were searched. (R. 3). None of the boys were physically touched during the searches. (R. 3). Mr. Waters recovered a small amount of marijuana in Mr. Thompson's jeans pocket. (R. 3).

V. MR. TOWLES CREATES A PERSONAL WEBPAGE.

In response to the search and the posting on FAD, Mr. Towles created his own Friendkepedia network page called "Students Against Defamatory Statements" (SADS). (R. 3). The webpage, which he edited only at his home, contained the following statement:

By taking unauthorized photographs of me during a Friday night out with my friends, and then posting inaccurate captions, DUDS, a school organization under the guise of its website FAD, committed a gross invasion of my privacy and defamed me in front of my friends and peers. What we do on our own time for fun is our business. Horton Hopkins school officials committed a far worse injustice when they subjected my friends and me not only to an unreasonable search of our lockers, but also to strip searches. We need to fight this injustice. I call for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment. Let's speak out against Smalls and the rest of these Hopkins idiots. (R. 3-4).

VI. PRINCIPAL SMALLS DEMANDS THE WEBPAGES BE SHUT DOWN.

Some students who heard about Towles' webpage accessed both Ms. Politte's and Mr.

Towles' pages from their home and school computers. (R. 4). Students who accessed the webpages from the school computer labs and library did so during their free time throughout the school day and after school hours. (R. 4). Principal Smalls demanded that Ms. Politte and Mr. Towles shut down their network pages; when they refused, both were suspended. (R. 4).

Principal Smalls admitted being angry about Towles' criticism of the school. (R. 4). She maintained that she was mainly concerned with keeping order and discipline at the school and preventing what she viewed as the possibility of a student protest. (R. 4). She worried that the students' webpages were interrupting other students' education and causing too much of a disturbance. (R. 4).

VII. THE STATE OF GRACE COURT OF APPEALS AFFIRMS THE DISTRICT COURT'S RULING THAT THE SCHOOL'S REGULATION OF STUDENT SPEECH WAS CONSTITUTIONAL AND OVERRULES ITS HOLDING THAT THE SEARCH OF MR. TOWLES WAS CONSTITUTIONAL, BUT AFFIRMS THAT THE SCHOOL OFFICIALS WERE ENTITLED TO QUALIFIED IMMUNITY.

The Badger County District Court found that Principal Smalls' demand that Ms. Politte and Mr. Towles shutdown their webpages or face suspension did not violate their First Amendment rights. (R. 6). The District Court found that Principal Smalls sufficiently demonstrated that she and the school district could reasonably forecast a disruption as a result of the webpages. (R. 6). The District Court also held that the search of Mr. Towles' person was not a violation of his Fourth Amendment rights. (R. 6). The District Court found that the search was clearly justified at its inception due to the independent evidence Principal Smalls had that Mr. Towles may have possessed drugs and that the search was reasonable in scope since there was a strong government interest at stake and the methods used were not excessively intrusive. (R. 7). The State of Grace Court of Appeals subsequently affirmed the District Court's ruling on the First Amendment issue, finding that the students' off-campus web postings clearly reached the school and created a

risk of substantial disruption. (R. 10). The Court of Appeals overruled the District Court's finding that the search of Mr. Towles was constitutional, holding that the search was not justified at its inception as nothing in the record indicated a likelihood that Mr. Towles possessed drugs. (R. 10-11) However, they granted the Respondents qualified immunity as they found that the constitutionality of strip searches was not clearly established at the time the officials searched Mr. Towles. (R. 11-12).

SUMMARY OF THE ARGUMENT

This Court should reverse the State of Grace Court of Appeals' decision to grant the Respondents summary judgment and remand for further proceedings. Principal Smalls' decision to force Ms. Politte and Mr. Towles to shut down their personal webpages was an unwarranted attempt to regulate student speech and hence a violation of the First Amendment. Additionally, the school officials violated Mr. Towles' Fourth Amendment rights when they subjected him to a warrantless search of his person without reasonable suspicion that Mr. Towles was in possession of any drugs.

Ms. Politte's and Mr. Towles' webpages were protected student speech that did not cause or reasonably predict "substantial disruption or material interference with school activities." *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 514 (1969). No students viewed the webpages during class, and there was no evidence of a coming disruption or interference. Because webpages are precisely the type of media that have to be sought out rather than disseminated to an unwilling or captive audience, the speech did not invade the rights of others.

Additionally, the school district improperly suspended the students for speech they created off-campus with private resources. The webpages were not created under the auspices of the school and could not be confused for official school-sponsored speech. School officials do

not have the right to regulate the students' off campus speech unless the speech caused a substantial disruption or intrusion on the rights of others. Because this did not occur, the school violated Ms. Politte and Mr. Towles' First Amendment rights when they were suspended over the content of their webpages.

The Horton Hopkins school officials' violated Mr. Towles' Fourth Amendment right to be free from unreasonable searches by state officials. The search of Mr. Towles's person was unreasonable because it was not justified at its inception nor was it reasonable in scope. Principal Smalls did not have reasonable suspicion to believe Mr. Towles possessed illegal drugs. Rather, she relied on the logical fallacy of guilt-by-association to justify the search of Mr. Towles' person. Likewise, since the lack of reasonable suspicion was disproportionate to the highly invasive nature of the search, the search was not reasonable in scope.

Furthermore, the respondents should not be granted Qualified Immunity since the school officials should have known that an intrusive search of a student's person without reasonable suspicion was unlawful. The law was clear on this issue as neither the Supreme Court nor any Circuit Courts have upheld a targeted personal search of a student without concrete individualized suspicion that the student had or was violating the law or a school rule.

ARGUMENT

- I. RESPONDENTS VIOLATED MS. POLITTE'S AND MR. TOWLES' FIRST AMENDMENT RIGHTS WHEN THEY PUNISHED AND ATTEMPTED TO CONTROL PETITIONERS' SPEECH BECAUSE THE WEBPAGES NEITHER CAUSED NOR FORECASTED A SUBSTANTIAL DISTURBANCE, DID NOT INTRUDE ON OTHER STUDENTS' RIGHTS, AND COULD NOT BE INTERPRETED AS SCHOOL-SPONSORED.

The Court of Appeals erred when it affirmed the District Court's finding that Respondents, Horton Hopkins School District and Principal Smalls, did not violate the Petitioners', Ms. Politte and Mr. Towles, First Amendment rights when they attempted to restrict

their speech. Because Ms. Politte's and Mr. Towles' webpages did not cause or reasonably forecast a substantial disruption or material interference with school activities, did not interfere with other students' rights, and were not sponsored by the school, the regulation of their speech was unconstitutional. It is well established that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969), citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Generally, only when school authorities reasonably forecast that student speech will lead to "a substantial disruption or material interference with school activities," or "[seeks] to intrude in the school affairs or the lives of others," may the speech may be regulated. *Tinker*, 393 U.S. at 514. Absent a forecast of such a disruption or intrusion, speech that may be construed as school-sponsored may still be regulated as schools have a heightened interest in the content of speech attributed to them. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) However, when regulation stems from the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," it is a violation of the speaker's First Amendment rights. *Tinker*, 393 U.S. at 509. This Court will review the Court of Appeals' affirmation of the District Court's grant of summary judgment *de novo* under Fed. R. Civ. P. 56(c). See e.g., *Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004).

A. The Petitioners' internet speech did not cause or reasonably forecast a "substantial disruption or material interference" with school activities.

Ms. Politte and Mr. Towles' webpages did not cause or forecast a substantial disruption or material interference with school activities. In order to justify regulation of a student's speech, a school must show that a substantial disruption occurred or that a prediction of a disruption is reasonable, and that the disruption would be substantial and material. *Tinker*, 393 U.S. at 509. A vague or undifferentiated fear of a disturbance is not sufficient, as "[a]ny word

spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.” *Id.* at 508. It is only when student speech presents a real threat to the educational activities of the institution that the speech may be permissibly regulated by school officials. *Id.* at 513. Courts have generally considered two questions when analyzing student speech under the substantial disruption or material interference doctrine: first, whether the speech did actually cause a disruption and interference, and to what extent; second, absent an actual disruption, whether the intensity and content of the speech are such that they would likely cause a substantial disruption or material interference. *Doninger v. Niehoff*, 527 F.3d 41, 50-51 (2d Cir. 2008). Because the webpages created by Ms. Politte and Mr. Towles did not substantially disrupt or reasonably forecast a disruption of school activities, the school was not justified in suspending the students. The Court of Appeals erred when it concluded that Petitioners’ speech merely “reaching campus” was sufficient to subject it to school regulation. (R. 10).

A substantial disruption of or material interference with school activities occurs when students or school officials are substantially affected by speech. *Tinker*, 393 U.S. at 514. A disruption caused by student speech typically restricts the educational process or interferes materially with the function of the school. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 679 (1986). In *Bethel School District v. Fraser*, the Court held that a student’s speech filled with constant graphic sexual metaphors delivered at a school assembly was not protected because it created an actual interference, in that among other disturbances, a teacher had to cancel part of her planned lesson to discuss the speech with her class. 478 U.S. at 678. Off-campus speech can also substantially disrupt school activities, as in *Doninger v. Niehoff*, in which a student’s internet posting calling an administrator a “douchebag” and encouraging actions to “piss her off more”

created a disruption. 527 F.3d at 50. After the internet posting, “students were ‘all riled up’ and ... a sit-in was threatened.” *Doninger*, 527 F.3d at 51.

The only effect that Ms. Politte’s webpage had on the school day – causing parents to call Principal Smalls because they were concerned about student drug use – was not a substantial disruption of school activities. Drug use has obviously intruded onto school grounds (R. 1), however, parents’ concerns over drug use is not the same as a reaction to a webpage’s content in and of itself. Parents called Principal Smalls because they were “concerned about the use of drugs,” and not about the existence of Ms. Politte’s webpage. (R. 3). In fact, Principal Smalls spends a significant amount of time and energy combating the rising drug use among Horton Hopkins students (R. 1), and preventing student drug use is line with the school district’s stated goal of maintaining a drug-free school system. (Appendix A). Additionally, it is no doubt a regular part of her day to day responsibilities to communicate with parents concerned about the events at the school and the behavior of students. As Principal Smalls regularly addresses student drug use on campus and takes disciplinary action against drug users, parental contact regarding this important issue is not a significant disruption of the school’s activities.

Towles’ webpage had even less affect on the school. The record indicates that students accessed his webpage “during their free time” and after school. (R. 4). There is no evidence of any classes or activities disrupted, and no complaints about Mr. Towles’ webpage were filed. Niether the school’s functioning nor the education process were effected.

It was also not reasonable to believe that Ms. Politte’s and Mr. Towles’ webpages forecasted a substantial disturbance or material interference with school activities. Absent an actual disturbance, to justify regulation of student speech a school must prove that it reasonably forecasted a substantial disruption or material interference with the school’s activities. *Tinker*,

393 U.S. at 514. In making that determination, courts look at the “level of vulgarity that was present [in the speech], the effect that it did have on the school and the fact that the speech could have supported criminal charges against the plaintiff.” *J.S. v. Blue Mt. Sch. Dist.*, No. 3:07CV585, 2008 U.S. Dist. LEXIS 72685, at *25 (M.D. Pa. Sept. 11, 2008). Thus, unlike the webpages created by the Petitioners, most of the student speech that has been subject to permissible regulation under the potential disruption and interference doctrine was violent, threatening, or obscene. *See e.g. Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38-39 (2d Cir. 2007) (holding that a student’s internet creation of an instant message graphic of a violent, bloody drawing representing a teacher and labeled with the caption “Kill [Teacher’s name]” could reasonably forecast a substantial disruption); *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 990 (9th Cir. 2001) (holding that a student’s first-person poem graphically and systematically describing a school shooting from the shooter’s perspective reasonably forecasted a dangerous disruption to the school); *J.S. v. Blue Mt. Sch. Dist.*, 2008 U.S. Dist. LEXIS 72685 at *21 (M.D. Pa. Sept. 11, 2008) (holding that a student’s posting of a fake internet profile of her Principal which explicitly and obscenely stating that he was a pedophile and sex addict was not protected speech); *Boim v. Fulton County Sch. Dist.*, No. 1:05CV2836(MHS), 2006 U.S. Dist. LEXIS 53129, at *12-13 (N.D. Ga. Aug 1, 2006) (holding that a student’s short story about killing her teacher including her feelings about the act and referencing real life details such as the class subject and period could disrupt the school if it was read by others).

Even when students’ speech is graphic and violent, regulation still has to be based on a concrete reason to forecast a substantial disruption. *See Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998). For example, in *Emmett v. Kent Sch. Dist. No. 415*, a student

posted “mock obituaries” of his friends on a website, published jokingly as an extension of a school assignment. 92 F. Supp. 2d at 1089. Despite a news report calling the site a “hit list,” the court did not find the webpage to be a disturbance, because the defendant school did not provide “any evidence that any student actually felt threatened by the web site, although it stated at oral argument that it *believes* that some students did feel intimidated.” *Id.* at 1089 (emphasis added). Similarly, *Beussink v. Woodland R-IV School District* featured a webpage created by a student from his personal computer criticizing the school and its administration, using vulgar language, and inviting others to contact the school with their own opinions. 30 F. Supp. 2d at 1177. A fellow student accessed the page at school, showing it to a teacher, and other students viewed the page during class. *Id.* at 1178-79. However, the court overturned the suspension of the webpage’s author, ruling that the principal’s decision to suspend the student was not based on a fear of disruption, but on his personal feelings about the content of the webpage. *Id.* at 1180. The analysis of a reasonable forecast requires more than just a belief in a *possibility* of disruption or intimidation – school officials must prove that the speech would *likely* create a risk of a substantial disruption or material interference. The fact that outside speech reaches campus (as it did in *Emmett* and *Beussink*) is not sufficient to allow school regulation: the *Tinker* standard that requires a reasonable forecast of a substantial disturbance still applies.

Both Ms. Politte’s and Mr. Towles’ webpages are not the type of speech that reasonably forecasts a substantial disturbance. Petitioner Politte’s webpage, Fighting All Dealers (FAD), is obviously a far cry from the violent, threatening and obscene examples courts are often faced with. Petitioner Politte’s webpage was dedicated to a cause the Supreme Court has enthusiastically supported: “detering drug use by schoolchildren is an ‘important – indeed, perhaps compelling’ interest.” *Morse v. Frederick*, 127 S. Ct. 2618, 2628 (2007), (quoting

Veronia v. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)). These goals were honorable and in line with the school district's desire to eliminate drug use among students. (Appendix A.) Petitioner Politte encouraged visitors to her webpage to speak out against drug dealers and wished only to assist in ridding her school and community of dangerous drugs. (R. 2).

An examination of Mr. Towles' webpage also does not reveal a reasonable forecast of substantial disruption. Mr. Towles described the events of the past few days and expressed his concerns and feelings about what had happened. (R. 3-4). He criticized the school administration's actions as an unjustified violation of his rights, and he invited others to communicate their disappointment to the school as well. (R. 4). The most objectionable of Mr. Towles' comments was calling Principal Smalls and unspecified others "idiots," as opposed to issuing threats, depicting violent scenes or using obscene language. (R. 4). This can arguably be considered immature or disrespectful, but is not in the category of "incendiary" language found in *Doninger*, where a student's internet posting called an administrator a "douchebag" and encouraged actions to "piss her off more." 527 F.3d at 51. Mr. Towles' language was not entirely innocuous, but is a far cry from violent, obscene, or incendiary.

Ms. Politte's and Mr. Towles' webpages can be further distinguished from *Doninger*, in which punishment based on internet speech was upheld. First, the *Doninger* court justified its finding of a substantial disturbance by first noting that several students responded to the web posting, in at least one instance with vulgar language (calling the district superintendent a "dirty whore"). 527 F.3d at 51. Second, it was significant that the student's posting used information that was "at best misleading and at worst false" to elicit a stronger response. *Id.*, quoting *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 202 (D. Conn. 2007). Finally, the punishment consisted of the relatively lenient removal from extracurricular activities, as opposed to

suspension or expulsion.¹ *Doninger*, 527 F.3d at 52. Ms. Politte’s and Mr. Towles’ webpages did not provoke a vulgar disruption from students, did not provide false information, and resulted in their indefinite suspension from school as a result of their refusal to take the webpages down. (R. 4). The relatively inoffensive language and the lack of an actual disturbance demonstrate that the prophylactic regulation of Towles’ webpage was based on impermissible “undifferentiated fear or apprehension of disturbance.” *Tinker*, 393 U.S. at 508.

Because Ms. Politte’s and Mr. Towles’ webpages did not cause a substantial disruption of school activities and their content was not offensive or threatening so as to reasonably forecast such a disruption, their suspensions were a violation of their First Amendment rights.

B. The Petitioners’ internet speech did not invade or intrude upon the rights of other students in the school.

The Petitioners’ webpages were passive internet speech that did not intrude onto the rights of others at Horton Hopkins High School. Under *Tinker*, speech which “intrudes upon...the rights of other students” can also be regulated by a school. 393 U.S. at 508. Internet speech is generally subject to the same level of First Amendment scrutiny as other media. *Reno v. ACLU*, 521 U.S. 844, 897 (1997). However, one major difference applies, in that internet speech is much less likely to be thrust upon an unaware or unsuspecting viewer. *See Id.* at 870. The nature of the internet requires clicking on specific links or typing in a website’s address in order to view the content, as opposed to browsing or scanning for content as with a television or radio. *See Id.* at 854. Because the Petitioners’ webpages were only accessible to those that

¹It is well established that “the Supreme Court and other courts have been willing to accord great discretion to school officials in deciding whether students are eligible to participate in extracurricular activities.” *Doninger*, 514 F. Supp. 2d at 213. “Participation in voluntary, extracurricular activities is a ‘privilege’ that can be rescinded.” *Doninger*, 527 F.3d at 52. Thus, less deference should be shown to the decision to suspend Ms. Politte and Mr. Towles indefinitely than was shown to the decision in *Doninger*.

searched them out, they did not trample on the rights of innocent or unsuspecting parties.

Speech that enters a school setting must not “[collide] with the rights of other students to be secure and to be let alone.” *Tinker*, 393 U.S. at 508. During the school day, school administrators are obviously responsible for protecting the rights of minor students in their care. When speech is delivered to “a captive audience,” it may be examined particularly closely to ensure that it does not intrude upon the rights of its audience. *Bethel Sch. Dist. v. Fraser*, 478 U.S. at 684.

The effects of speech on the school and the student’s reaction to it will contribute to the determination of whether the speech was invasive. *See Fraser*, 478 U.S. 675, 683-84. In landmark cases decided on the same day (and cited multiple times in *Tinker* as instructive examples of different levels of intrusion that determined the constitutionality of student speech) (*See e.g.* 393 U.S. at 513) the Fifth Circuit Court of Appeals clearly demonstrated how speech that interferes with others’ rights can disqualify speech from First Amendment protection. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena Cnty. Bd. of Ed.n*, 363 F.2d 749 (5th Cir. 1966). “Freedom buttons” worn by students in two schools were analyzed for their impact on the student body. In one case, “only a showing of mild curiosity on the part of the other school children” was evident, and the facts did “*not* support a conclusion that there was a commotion or that the buttons tended to distract the minds of the students away from their teachers.” *Burnside*, 363 F.2d at 748. Conversely, a different school saw “students distribut[ing] buttons to students in the corridor of the school building and accost[ing] other students by pinning the buttons on them even though they did not ask for one. One of the students tried to put a button on a younger child who began crying.” *Blackwell*, 363 F.2d at 751. In addition to disrupting school activities, the offending students “disturbed other students who did not wish to

participate in the wearing of the buttons.” *Blackwell*, 363 F.2d at 753. This demonstrable invasion of student’s rights, and the aggressive intrusion by the speakers dissolved their First Amendment protections. *Id.* at 754.

Controversial, even antagonistic speech that students view in school is not a de facto interference with their rights. *See K.D. v. Fillmore Cent. Sch. Dist.*, 05-CV-0336(E), 2005 U.S. Dist. LEXIS 33871 at *20 (W.D.N.Y. Sept. 2, 2005) (a student’s anti-abortion T-shirt was not an interference, even if some students complained about the shirt’s language). Similarly, a student’s speech may stimulate the “‘mild curiosity’ of students, ‘discussion and comment’ between students, and even ‘hostile remarks’... [but does] not justify censorship.” *Gillman v. Sch. Bd. for Holmes County*, 567 F. Supp. 2d 1359, 1374 (N.D. Fla. 2008) (quoting *Holloman v. Harland*, 370 F.3d 1252, 1271-72 (2004)).

In the case at bar, the Ms. Politte’s and Mr. Towles’ webpages were analogous to the speech detailed in *Burnside*, in that those who viewed the webpages did so at their leisure, and did not have the speech thrust upon them in any way. The internet requires viewers to take proactive steps in seeking out the webpages; there was not a risk of students stumbling onto these pages and having controversial or disagreeable speech forced upon them against their will. *See Reno*, 521 U.S. 844, 854. Though Ms. Politte did promote her webpage at a meeting of the school-sponsored club DUDS, no students complained about her mentioning the webpage at the meeting. (R. 2). In fact, every member of DUDS joined the FAD network. (R. 2). The Petitioners did not aggressively advertise their speech or choose a medium for their speech that was unavoidable to those reluctant to view it, and no students were harassed into viewing or discussing the webpages. In fact, Principal Smalls did not receive any complaints from students about the webpages, demonstrating the lack of intrusion they presented. There is no evidence to

support Principal Smalls' contention that the situation was "out of control." (R. 4).

- C. The School District did not have the right to suspend students for their speech because it was created off campus with private resources and was not interpretable as school-sponsored.

When students create speech off campus using private resources and it is only *accessed* at school, the school does not have an increased right to regulate the speech beyond the *Tinker* standard. *See Kuhlmeier*, 484 U.S. at 270. Speech that is created with school resources that could be interpreted as endorsed by the school is subject to a higher degree of school regulation because "the public might reasonably perceive [it] to bear the imprimatur of the school." *Id.* at 271. A school's strong interest in controlling their resources and regulating speech that could be construed as endorsed by the school does not permit a heightened regulation of independent speech. *Id.* at 272. The independent nature of Ms. Politte and Mr. Tinker's webpages renders the *Kuhlmeier* standard inapplicable, as the school's heightened right to edit and control the speech is eliminated, and the speech is judged purely on the disruptiveness and intrusion tests of *Tinker*. *See Id.*

Even the use of some school resources does not allow for a heightened standard of control by the school. *See Thomas v. Bd. Of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979). In *Thomas v. Board of Education*, some school resources were used to create an underground newspaper without the consent of school administration, including school typewriters and storage at the school. 607 F.2d at 1050. However, the court considered that the general efforts of the students were to create the speech off-campus, and held that the involvement of school resources was *de minimis*. *Id.* at 1050. Though a school has a strong interest in regulating its academic curriculum and what content is taught, "[t]he corollary of this premise is that no similar content control is justified for communication among students which is not part of the

educational program.” *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988). In *Burch v. Baker*, an independent student newspaper critical of the administration was distributed at a school sponsored event and on school grounds. *Id.* at 1150. The school’s policy banned distribution of any material by students that had not been preapproved by the school. However, because no one could confuse the paper with school sponsored material (even though it appeared on campus), the court ruled that undifferentiated fear of a disruption was the primary reason for the regulation, and struck down the school’s policy. *Id.* at 1158.

In the Petitioners’ case, their webpages were not created under the auspices of an academic class, nor were they even created on school grounds. (R. 2, 3). While the FAD network was promoted on campus at a DUDS meeting, there is no evidence that the webpage claimed to be controlled or sponsored by the school. (R. 2). Ms. Politte’s mention of the webpage occurred after school, and students would still have to individually access the webpage at a later time in order to view it. Ms. Politte’s webpage was less connected to the school than the speech distributed on campus in *Burch* or partially created with school resources in *Thomas*. Additionally, it can be assumed that most students are familiar with the process of a social networking site such as Friendkepedia, particularly those who are members of the site and accessed Petitioners’ networks. The students would not confuse a student-created webpage referencing the school with official school-sponsored material.

Mr. Towles’ webpage, Students Against Defamatory Statements, had even less connection to the school. It was written from his point of view, addressing his personal experience, and was critical of the FAD network and the school administration. (R. 3-4). Clearly, a webpage that calls for changes to school policy and characterizes a school’s action as an “injustice” could never be confused for official school-sponsored speech. (R. 4). Created off-

campus and never claiming to be representative of school officials, the SADS webpage also cannot be held to the higher standard articulated in *Kuhlmeier*.

Because neither Ms. Politte nor Mr. Towles created their webpages on campus or used school resources to create their speech, and because no circumstances surrounding the speech would reasonably lead to the conclusion that it was school-sponsored, Horton Hopkins High School did not have the right to regulate Petitioners' webpages.

II. THE RESPONDENTS VIOLATED MR. TOWLES' FOURTH AMENDMENT RIGHTS WHEN THEY CONDUCTED A WARRANTLESS SEARCH OF MR. TOWLES' PERSON WITHOUT REASONABLE SUSPICION AND THEY SHOULD NOT HAVE BEEN GRANTED QUALIFIED IMMUNITY BECAUSE THE LAW WAS CLEAR THAT SUCH A SEARCH IS UNCONSTITUTIONAL.

The Court of Appeals was correct in ruling that the search of Mr. Towles' person was unreasonable and therefore a violation of Mr. Towles' Fourth Amendment rights. The Fourth Amendment, as applied to the States through the Fourteenth Amendment, protects individuals from unreasonable searches by state officials. *U.S. Const. amend. IV; Elkins v. United States*, 364 U.S. 206, 213 (1960). It is firmly established that public school officials are state actors to whom the Fourth Amendment applies. *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985). Likewise, a search of a student's person "no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337-38. The constitutionality of any search depends on "the context within which a search takes place." *Id.* at 337. Whether a specific class of searches is reasonable "requires 'balancing the need to search against the invasion which the search entails.'" *Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)). The search of Mr. Towles' person was incredibly invasive: his backpack was searched and he was required to strip to his underwear in front of a school official. (R. 3). For such a search to be deemed reasonable, more justification than the nebulous general

suspicion Principal Smalls used to justify this intrusion is needed. The Court of Appeals thus erred in holding that the Respondents are entitled to qualified immunity as the law was clear that such action was unreasonable.

A. The search of Mr. Towles' person was unreasonable even under the "special needs" analysis that is applied to school searches.

The search of Mr. Towles was unreasonable even when analyzed under the "special needs" doctrine. Generally, for a search to be reasonable, it must be executed pursuant to a judicial warrant. *T.L.O.* 469 U.S. at 340. For the warrant to be valid, it must be based on a showing of probable cause to believe a crime has taken place. *Id.* However, this requirement is set aside "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)). Because of the need for "swift and informal disciplinary procedures" in public school settings, such "special needs" excuse the warrant requirement for school searches. *T.L.O.* 469 U.S. at 340. Additionally, "strict adherence" to the probable cause requirement is not always needed when accommodating "the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools[.]" *Id.* at 341. As a result, the standard for determining the reasonableness of school searches is a two-pronged test, articulated in *New Jersey v. T.L.O.* *Id.* First, one must decide "whether the action was justified at its inception." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Second, one must consider "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 341. In imparting this test, the Court in *T.L.O.* noted that "this standard will...neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren." *Id.* at 342-43. As the

search of Mr. Towles was neither justified at its inception nor reasonable in scope, it was unreasonable and constituted an unrestrained intrusion on his privacy.

1. The search of Mr. Towles' person was not justified at its inception since Principal Smalls had no reasonable suspicion on which to believe Mr. Towles possessed drugs.

The school officials' search of Mr. Towles' person was not justified at its inception because the school officials did not have reasonable grounds to believe Mr. Towles possessed drugs. A search is generally 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." *T.L.O.*, 469 U.S. at 342. Although the Court in *T.L.O.* explained that they were not deciding whether individualized suspicion was an essential aspect of this reasonableness standard, they did emphasize that "[e]xceptions to the requirement of individualized suspicion are generally appropriate *only* where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Id.* at 342, n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979) (emphasis added)). The privacy interests implicated by an extensive search of a student's person are significant and there were no safeguards in place to prevent Mr. Towles from being subjected to the unbridled discretion of school officials.

The only school searches lacking individualized suspicion that the Supreme Court has upheld as reasonable have been the drug testing regimes of students participating in extracurricular activities. See *Bd. of Educ. of Ind. School Dist. No. 92 v. Earls*, 536 U.S. 822 (2002); *Veronia*, 515 U.S. 646. In these cases, the Court upheld mandatory drug testing for students who chose to participate in the designated extracurricular activities in large part because these schools had noticeable drug problems (*Earls*, 536 U.S. at 834-35; *Veronia*, 515 U.S. at 649, 664) and

participants in these activities are known to be subject to higher regulation and consequently have lowered expectations of privacy. 536 U.S. at 832; 515 U.S. at 657. In *Veronia*, the Court felt the mandatory drug testing of student athletes was particularly justified as drug use puts the students, “children for whom [the school] has undertaken a special responsibility of care and direction[,]” at a higher risk for physical harm. 515 U.S. at 662. Significantly, in both decisions the court took special note of the fact that the tests would not be turned over to law enforcement or result in disciplinary action. *Earls*, 536 U.S. at 833; *Veronia*, 515 U.S. at 658. Finally, the tests were administered in such a way so as to give the students privacy (in both cases, the students remained fully clothed at all times and in *Veronia*, the boys were only watched from behind, if at all, whereas the monitors stood outside the closed stalls for the girls; in *Earls*, the monitors stood outside closed stalls for both) and the test itself only revealed the presence of illegal substances and no other personal information. 536 U.S. at 832-33; 515 U.S. at 658.

The search of Mr. Towles’ person is distinguishable from *Earls* and *Veronia* in nearly every meaningful way. Mr. Towles was not searched as a condition of his voluntary participation in an extracurricular activity. He was new to the school and had not joined any extracurricular activities. (R. 2). Thus, he did not have a diminished expectation of privacy. Additionally, the full-fledged search of Mr. Towles’ bag, clothing, and person had the potential to reveal much more than just whether Mr. Towles possessed drugs, making the searches far more invasive than a drug test. *See T.L.O.*, 469 U.S. at 355, n. 1 (Brennan, J., dissenting) (“it could prove extremely embarrassing for a teacher or principal to rummage through [a bag’s] contents, which could include notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene.”) Moreover, had the school officials found any drugs during their search, that information might have been turned over to the police and Mr. Towles

would have been suspended for at least three days pursuant to the Horton Hopkins School District Drug and Alcohol Policy. (Appendix A). The potential criminal and academic consequences of the search contradict the goals of protection and deterrence that helped justify the exception to the reasonable suspicion requirement in *Earls* and *Veronia*. *Earls*, 536 U.S. at 823-24; *Veronia*, 515 U.S. at 658, n.2 (addressing the dissent’s concern that students will perceive the searches as “evidentiary” and “punishment” by pointing out that the searches in that case were “undertaken for prophylactic and *distinctly nonpunitive purposes*” (emphasis added)).

Likewise, among the Circuit Courts, none have deemed a school search reasonable unless there was concrete individualized suspicion that the student whose person was searched possessed contraband substances. *Cf. e.g. Hedges v. Musco*, 204 F.3d 109, 119 (3d Cir. 2000) (holding that a search of petitioner student’s belongings and a drug test of the student’s blood were reasonably based on a teacher’s observations of the student’s unusual appearance and behavior which were corroborated by a school nurse); *Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d 1146, 1149 (7th Cir. 1997) (holding that a teacher noticing petitioner student’s eyes were bloodshot and dilated, student giggling and acting unruly and inappropriately reasonably led to checking student’s blood pressure and pulse); *C.B. v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996) (holding that a named student’s tip that another student was going to make an on-campus sale of drugs hidden in his coat were reasonable grounds to search that student’s coat pockets); *Cornfield v. Cons. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993) (holding that several teachers noticing an unusual bulge in student’s crotch area was a reasonable basis on which to conduct a strip search of the student); *Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir. 1991) (holding that a student’s eye witness account of petitioner student handling a clear glass vial containing a white powder which she placed on her fingers and sniffed and a

teacher's observations that petitioner student's behavior that day was strange along with that teacher previously having found a note from petitioner student referencing drug use were reasonable grounds to strip search petitioner student).

Consequently, this case should be analyzed under *T.L.O.*, where the Supreme Court made its reasonableness determination by looking at whether there was individualized reasonable suspicion to justify the targeted student search at issue. *T.L.O.*, 469 U.S. at 346. Reasonable suspicion requires the official conducting the search to be "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. In *T.L.O.*, a public high school teacher discovered the respondent, T.L.O., smoking in the bathroom in violation of a school rule. 469 U.S. at 328. When the principal questioned T.L.O. about the violation, the respondent denied she had been smoking in the bathroom or that she smoked at all. *Id.* To prove that T.L.O. had been lying, the principal demanded to see T.L.O.'s purse. *Id.* The principal opened the purse and found a package of cigarettes which he held out to T.L.O. as proof that she had lied to him. *Id.* When the principal pulled out the package of cigarettes, he noticed a package of rolling papers, which in his experience suggested marijuana use. *Id.* This led him to search the purse more thoroughly, which resulted in him finding a small amount of marijuana. *Id.* The Court held that the teacher's report of T.L.O. smoking gave rise to a "sufficient probability" that T.L.O. was carrying cigarettes, which would likely be in her purse. *Id.* at 345-46. The search was further justified by the fact that the cigarettes, if found, would constitute evidence of the initial infraction that T.L.O. had denied. *Id.* at 345. Thus, the Court held that the facts alleged did rise to the level of at least reasonable suspicion and therefore the principal's actions were reasonable. *Id.* at 346.

The circumstances that led up to the Horton Hopkins officials searching Mr. Towles's

person did not amount to reasonable suspicion. There were no specific and articulable facts that would lead a reasonable person to believe Mr. Towles used or possessed drugs. First, and perhaps most importantly, no one ever singled out Mr. Towles as having used or possessed drugs or having the appearance or demeanor of someone who was using drugs. The most concrete source connecting Mr. Towles to any unlawful behavior was the photograph Ms. Politte posted on her website. (R. 3). The photograph merely showed Mr. Towles at a party sitting with two other students, John Thompson and Frank Conrad, who was pictured smoking. (R. 3). The caption Ms. Politte assigned to the picture read: “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. 3). Although having such a provocative question next to the photograph of the partygoers is perhaps misleading, the caption was not written in such a way to indicate that any of the pictured students was actually a drug dealer or user. To infer otherwise is certainly not a *reasonable* inference.

Additionally, the mere fact that Mr. Towles had associated with other students who have previous drug infractions did not reasonably lead to the conclusion that Mr. Towles possessed any drugs. To make that leap is to engage in the logical fallacy of guilt-by-association, which is a standard far afield of reasonable suspicion. See *United States v. McGinnis*, 247 Fed. Appx. 589, 595 (6th Cir. 2007) (“We agree...that guilt by association does not by itself suffice to establish...reasonable suspicion.”); *United States v. Frampton*, 34 Fed. Appx. 813, 814 (2d Cir. 2002) (“The factors relied upon by the government amount to little more than guilt by reputation and association, and do not amount to ‘a reasonable, particular suspicion that criminal activity is afoot.’” (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000))). At a school with a prevalent drug problem such as Horton Hopkins, if association with someone who has been known to use drugs were reasonable grounds to search a student’s person, then nearly the entire school would

be subject to invasive searches. Undoubtedly, no court would find such a course of action reasonable.

Moreover, several Circuit Courts maintain that as the intrusiveness of the search increases, so should the reasonableness standard. *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006) (“the reasonableness of the suspicion is informed by the very intrusive nature of a strip search, requiring for its justification a high level of suspicion”); *Cornfield*, 991 F.2d at 1321 (“as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness”); *M.M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979) (“We are also of the view that as the intrusiveness of the search intensifies, the standard of Fourth Amendment ‘reasonableness’ approaches probable cause, even in the school context.”) Because Principal Smalls did not even have sufficient individualized suspicion to constitute reasonable suspicion that Mr. Towles had drugs in his possession, the full-fledged search of Mr. Towles’ person was clearly not justified.

2. The search of Mr. Towles’ person was not reasonable in scope to the circumstances which justified the interference in the first place because the highly intrusive nature of the search was disproportionate to the lack of suspicion Principal Smalls had regarding Mr. Towles possessing drugs.

Although a negative response to the justification portion of the *T.L.O.* inquiry determines that a search is unreasonable (*T.L.O.*, 469 U.S. at 341), the search of Mr. Towles also fails the second prong. A search is only reasonable in scope “when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* at 342. The Court asserts that this standard should “ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.” *Id.* at 343. The search of Mr. Towles’ person was not reasonable in scope since the highly intrusive nature of the search was

disproportionate to the negligible level of suspicion the school officials had regarding Mr. Towles possessing drugs.

The significant privacy interest violated by conducting a search of Mr. Towles' person cannot be outweighed by the school's interest in preventing student drug use when Principal Smalls did not have reasonable suspicion to believe Mr. Towles possessed drugs. The scant information Principal Smalls had was, at best, enough to justify questioning Mr. Towles or perhaps his parents. Yet, Principal Smalls went well beyond questioning Mr. Towles. (R. 3). First, she searched Mr. Towles' locker and did not discover any evidence to suggest Mr. Towles ever used or possessed drugs. Then she took the investigation even further and searched his book bag. (R. 3). Again, this search turned up nothing incriminating. Then with absolutely no evidence to corroborate her unsubstantiated suspicions of Mr. Towles, Principal Smalls directed a male teacher to have Mr. Towles strip down to his underwear and all of his pockets searched. (R. 3).

Mr. Towles' privacy interests were substantially violated by this strip search. As mentioned *supra*, unlike the students in *Earl*. or *Veronia*, Mr. Towles' did not lower his expectation of privacy by voluntarily joining an extracurricular activity. Rather, as a sixteen-year-old boy in the throes of puberty, Mr. Towles likely has a heightened self-consciousness regarding his body. *See Cornfield*, 991 F.2d at 1321, n.1 (“As children go through puberty, they become more conscious of their bodies and self-conscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older.”) Even a search of one's outer clothing “constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.” *Terry*, 392 U.S. at 24-25. Nor is it that significant that the strip search

was conducted by a teacher of the same sex. *See Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) (“a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.”).

Horton Hopkins school officials did not have reasonable suspicion to believe Mr. Towles was carrying any drugs on him, yet they conducted an exhaustive and intrusive search of Mr. Towles’ person. (R. 3). Although the school’s interest in keeping illegal drugs out of the school is great (*Veronia*, 515 U.S. at 661), it can not outweigh a student’s legitimate expectations of privacy in their person and belongings when there is no reasonable suspicion to believe that the student has committed or is committing a drug-related infraction.

B. The Respondents are not entitled to qualified immunity since they should have known that an intrusive search of a student’s person without reasonable suspicion was unlawful.

The Court of Appeals of the State of Grace erred when it held that Horton Hopkins officials were entitled to qualified immunity. In determining whether qualified immunity should be granted, the Supreme Court holds that there are two possible questions to be answered. The first is whether “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled by Pearson v. Callahan*, No. 07-751, 2009 U.S. Lexis 591 (Jan. 21, 2009). The second question asks “whether the right was clearly established.” *Id.* If the answer to either of these questions is no, the analysis ends and qualified immunity is granted. *Pearson v. Callahan*, 2009 U.S. Lexis 591, at *8. The doctrine of qualified immunity is concerned with balancing “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Id.* at *14. Since the above discussion conclusively established that Mr. Towles’ Fourth Amendment rights were violated, only the second inquiry is relevant. Principal

Smalls, in her capacity as a Horton Hopkins school official, exercised her power irresponsibly when she directed a search of Mr. Towles' person on less than reasonable suspicion when the law had clearly established this as unlawful.

The respondents were on notice that a search of Mr. Towles's person in the particular circumstances they encountered would violate clearly established law. Whether the law has been clearly established is an objective, not a subjective inquiry; it looks to see whether the conduct in question violates "clearly established" statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The effectiveness of this test depends on the "level of generality" of the legal right at issue. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Hence, although the legal right does not have to be so specifically established such that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful[.]" it "must have been 'clearly established' in a more particularized, and hence more relevant, sense[.]" *Id.* at 640. The State of Grace Court of Appeals generalized the legal right too broadly and looked only to whether strip searches of students in public schools were held constitutional without considering the level of suspicion the searches were based on in those individual cases. (R. 12). Yet, as noted above, no Circuit Court has upheld a strip search in a school based on less than reasonable suspicion. Thus, even though Circuit Courts have been inconsistent in determining when to grant qualified immunity when they have found a strip search unconstitutional, the law could not be more clear that a strip search conducted without reasonable suspicion is unconstitutional.

Moreover, the *T.L.O.* Court was not just ruling on the specific facts of their case; it was establishing a standard to guide future school searches. *See* 469 U.S. at 342-43 ("By focusing attention on the question of reasonableness, the standard will spare teachers and school

administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense.”) Reason, common sense, and a plethora of Circuit Court decisions dictate that a search of a student’s person is unconstitutional if it is based on less than reasonable suspicion.

If the Respondents are granted qualified immunity, the Court’s expectation in *T.L.O.* that “...the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools” will be rendered impotent. *Id.* at 343. A grant of qualified immunity to the respondents would send the message to public school officials throughout the State of Grace that they have free reign to significantly impede students’ individual rights with scant justification so long as courts have not ruled consistently on the specific action taken. Students will quickly lose trust in their school’s administrators, leading to anything but order in schools. Furthermore, that school officials “are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *West Virginia State Bd. Of Ed. V. Barnette*, 319 US 624, 637 (1943).

CONCLUSION

For the aforementioned reasons, Ms. Politte and Mr. Towles respectfully ask that this Court reverse the State of Grace Court of Appeals' holdings that the Respondents did not violate Petitioners' First Amendment rights and that the Respondents were entitled to qualified immunity for their violation of Mr. Towles' Fourth Amendment rights and remand for further proceedings.

Respectfully Submitted,

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