

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 Respondents
Horton Hopkins School District and Keena Smalls**

**Team 12
*Attorneys for Respondents***

Oral Argument Requested

QUESTIONS PRESENTED

- I. Whether schools can regulate students' Internet speech created-off campus when that speech leads a school administrator to reasonably conclude that the speech is interrupting other students' education because the school has become out of control.

- II. Whether school administrators with good reason to believe a student might possess drugs at school, consistent with the Fourth Amendment, have the student remove his outer clothing, in a private place, so a teacher of the same sex can examine his pockets for drugs, or, at the very least, whether school administrators are entitled to qualified immunity, along with the school district which has a policy allowing such searches.

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CONSTITUTIONAL PROVISIONS OR STATUTES INVOLVED

This case involves the right to freedom of speech as guaranteed by the First Amendment to the United States Constitution. Further, this case involves the right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the United States Constitution. Both of these amendments have been applied to the States through incorporation by the Due Process Clause of the Fourteenth Amendment. The relevant provisions of the United States Constitution are reproduced in the Appendix at page A-1.

STATEMENT OF THE CASE

Respondents, Horton Hopkins School District and Keena Smalls, respectfully request this Court to affirm the Court of Appeals' decision finding that the Respondents did not violate the Petitioners' First Amendment Rights. Respondents also request this Court to reverse the Court of Appeals' decision finding the Respondents' search unconstitutional. However, if this Court does find the search to be unconstitutional, the Respondents request this Court to affirm the Court of Appeals' holding. The District Court granted the Respondents' motion for summary judgment because the Petitioners' failed to establish a genuine issue of material fact. (R. 1-8). On appeal, the Court of Appeals affirmed the District Court's decision. (R. 9-13).

Horton Hopkins High School (the "School") is a public school located in Hopkinsville, Grace. (R. 1). Over the last five years, the School has been suffering from an increase in drug usage on campus, which matches the increase in the community at large. (R. 1). In 2007, the School's Principal, Keena Smalls ("Principal Smalls"), suspended a total of twenty-five students for using drugs on school grounds. (R. 1). However, the biggest blow that year was the death of 17-year-old Kelly Smith. In December 2007, Kelly Smith, who was the captain of the volleyball team, unfortunately overdosed on cocaine at a party. (R. 1). Adding to the School's frustration, in just the first two months of the 2008 fall semester, Principal Smalls and other school staff members caught fifteen students smoking marijuana on campus. (R. 1). Hoping to diffuse the ever-increasing drug usage on campus, the school district, at the request of Principal Smalls, enacted a strict, zero-tolerance drug policy. (R. 1). This policy allows school officials to search students' lockers, desks, and personal property, such as book bags and clothing. (R. 1). The searches can be conducted when drug use or possession is suspected on school property. (R. 15).

In September 2008, Kit Politte (“Politte”), a senior at the School, created Drug Use Damages Schools (DUDS). (R. 2). Politte hoped that DUDS, a school-sponsored club, would help curb the use of drugs within the School. (R. 2). There are 130 School students that have joined DUDS. (R. 2). DUDS’ members post flyers throughout the school and organize assemblies in order to promote a drug-free lifestyle. (R. 2). After a DUDS’ assembly on September 10, 2008, Politte decided to create a webpage on Friendkepeidaia to combat drug dealers. (R. 2). Politte created the webpage, Fighting All Dealers (FAD), at her home, on her personal computer, and directed it at all community members. (R. 2). Politte wanted all community members to submit information about drug dealers, which she hoped would lead to arrests. (R. 2). Politte named herself the administrator of FAD and told the members to email her with tips. (R. 2). After receiving the tips, Politte reviewed them and posted what she considered to be the strongest. (R. 2). Further, Politte promoted FAD at a DUDS meeting, which took place in a School classroom. (R. 2). Currently, FAD has 235 members, 198 of which are School students, including all 130 DUDS’ members. (R. 2).

Corey Towles (“Towles”), a sophomore at the School, just transferred to the School for the 2008-2009 school year. (R. 2). At Towles’ former school, he was an honor student and junior varsity baseball player. (R. 2). On October 3, 2008, Towles attended a party at Jeff Tweegs’ (“Tweegs”) house; Tweegs also attends the School. (R. 2). Tweegs, who had been suspended in September 2008 for smoking marijuana at School, was captain of the baseball team and Towles hoped that by going to the party it would improve his chances of making the School team. (R. 2). Towles was at the party from 9 p.m. until 11 p.m. and claims that he saw no drug use. (R. 3). However, while Towles was outside, tossing a football, he did see students drinking beer and smoking cigarettes. (R. 3).

Around 11:30 p.m. that night, police arrived at the party and cited five students for underage drinking. (R. 3). Police also cited Frank Conrad (“Conrad”), a sophomore at School, for marijuana possession after he was found holding a joint. (R. 3). The next day, October 4, 2008, Politte received an email with an attachment. (R. 3). The attachment was a photograph of Towles sitting with Conrad and John Thomson (“Thomson”), outside of Tweegs’ house. (R. 3). More importantly, in the photo, Conrad was smoking, something. (R. 3). Immediately, Politte posted the photo to her FAD webpage with the caption: “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. 3).

The next morning, October 5, 2008, Principal Smalls received phone calls from the police (alerting her about the students they cited at Tweegs’ party) and concerned parents who saw the photo on Politte’s webpage. (R. 3). After viewing Politte’s webpage, Principal Smalls called Towles, Conrad, Thomson, and Tweegs individually into her office. (R. 3). Each student denied possessing drugs; so, Principal Smalls conducted a search of lockers and book bags, pursuant to school policy. (R. 3). She found a bag of marijuana in Conrad’s locker and then asked the students to consent to a search of their persons, individually and in private. (R. 3). Even though each student, including Towles, refused to be searched, the gym teacher, Jim Waters, conducted a search of each boy in a private room. (R. 3). At no time did Mr. Waters touch any of the boys; he asked them to strip to their underwear and then hand him their clothes, so he could search the pockets. (R. 3). Mr. Waters found marijuana in Thomson’s jeans. (R. 3).

In response to Politte’s webpage and his subsequent search, Towles, at home and on his personal computer, created his own Friendkepedia webpage called Students Against Defamatory Statements (SADS). (R. 3). On the website, he accused DUDS and the FAD website of a gross invasion of privacy and of defaming him. (R. 3-4). Towles also claimed that School officials

committed a "far worse injustice" when they searched his locker and conducted a so-called "strip search." (R. 4). He wrote, "[w]e need to fight this injustice," called on fellow students to "let our school administrators know that we will not tolerate this kind of treatment," and ended with the sentence, "Let's speak out against Smalls and the rest of these Hopkins idiots." (R. 4).

After hearing about Towles' webpage, School students began accessing both Politte's and Towles' webpages from their homes, the School computer labs, and the library during and after school hours. (R. 4). Principal Smalls, realizing the situation was out of control, demanded both webpages be shut down. (R. 4). Unfortunately, both students were suspended until they agreed to shut down their webpages. (R. 4). Principal Smalls said her main concern was keeping discipline and order at school, and preventing a potential for student protest. (R. 4). Further, Principal Smalls felt that the webpages were causing too much of a disturbance and interrupting other high school students' education. (R. 4).

The Petitioners appealed to the Supreme Court of the State of Grace, which granted writ of certiorari. (R. 14). Respondents now ask this Court to affirm the Court of Appeals' decision finding that the Respondents did not violate the Petitioners' First Amendment Rights. Respondents also request this Court to reverse the Court of Appeals' decision finding that the Respondents' search was unconstitutional. However, if this Court does find the search to be unconstitutional, the Respondents request this Court to affirm the Court of Appeals' holding.

SUMMARY OF THE ARGUMENT

The Respondents respectfully request this Court to affirm the Court of Appeals' decision finding that the Respondents did not violate the Petitioners' First Amendment rights. The Court of Appeals was correct for two reasons. First, the special characteristics of the school environment require deference to school authorities. Schools have been granted great deference to determine what kind of speech will undermine its basic educational mission. Further, the only time judicial intervention is needed to protect a students' constitutional rights is when the decision to censor student expression has no valid educational purpose. Second, the Petitioners' web pages caused substantial disruption and led the Respondents to reasonably forecast more disruption and interference within the school. Thus, the Petitioners failed to raise a genuine issue of material fact. Upon a de novo review, for the aforementioned reasons, this Court should affirm the Court of Appeals' decision.

The Respondents also respectfully request this Court to reverse the Court of Appeals' decision finding that the Respondents' search was unconstitutional. However, if this Court does find the search to be unconstitutional, the Respondents request this Court to affirm the Court of Appeals' holding. The Court of Appeals was incorrect for two reasons when it found the Respondents' search to be unconstitutional. First, Principal Smalls' search of Petitioner Towles was justified at its inception because it was based on a strong reasonable suspicion. Second, the search was reasonable in scope because it was reasonably related to the objectives and minimally intrusive. Thus, the Respondents' search of Towles was not unconstitutional. However, even if this Court finds the Respondents' search to be unconstitutional, the Respondents are entitled to qualified immunity because no clearly established rights were violated.

ARGUMENT

I. THE HORTON HOPKINS SCHOOL DISTRICT AND KEENA SMALLS DID NOT VIOLATE THE PETITIONERS' FIRST AMENDMENT RIGHTS WHEN THEY FORCED THE PETITIONERS TO SHUT DOWN THEIR WEBPAGES.

The Respondents respectfully request this Court to affirm the Court of Appeals' decision. The Supreme Court has never ruled on whether a school can regulate students' Internet speech created off-campus, however, Supreme Court precedent and lower court interpretations demonstrate that a school does have this power. The Court of Appeals was correct for two reasons when it decided that the Respondents did not violate the Petitioners' First Amendment rights. First, the special characteristics of the school environment require deference to school authorities. Second, the Petitioners' web pages caused substantial disruption and led the Respondents to reasonably forecast more disruption and interference within the school. Thus, upon a de novo review, this Court should affirm the Court of Appeals' decision. *See Rechsteiner v. Hazelden*, 753 N.W.2d 496, 504 (Wis. 2008) ("We review . . . summary judgment de novo.").

a. The Special Characteristics of the School Environment Require Deference to School Authorities

For many years, the Supreme Court has recognized that First Amendment rights are available to students. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969); *see* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (demonstrating that the First Amendment has been applied to the States by incorporation through the Due Process Clause of the Fourteenth Amendment). However, students' First Amendment rights are limited because they must be "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. Here, Principal Smalls demanded the Petitioners' websites be shut down because the situation within the School "had gotten out of control," and the websites were

“interrupting other high school students’ education.” (R. at 4). Thus, based on the special characteristics of the school environment, the Petitioners’ rights were not violated.

A school environment is special because education has been considered the “most important function of state and local governments.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Not only is education the most important function of state and local governments, it is also the “very foundation of good citizenship,” and it is a “principal instrument in awakening the child to cultural values.” *Id.* To handle this enormous responsibility, schools have been given the “comprehensive authority . . . to prescribe and control conduct in the schools.” *Tinker*, 393 U.S. at 507. This authority allows school officials to regulate speech “even though the government could not censor similar speech outside the school.” *Morse v. Frederick*, 127 S. Ct. 2618, 2627 (2007) (“[W]hile children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ . . . the nature of those rights is what is appropriate for children in school.”).

Further, the Supreme Court has expressed numerous times that the “education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and *not of federal judges.*” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (emphasis added). The only time judicial intervention is needed to protect a students’ constitutional rights is when “the decision to censor . . . student expression has no valid educational purpose.” *Id.*

i. Justice Black’s *Tinker* dissent guides the *Fraser*, *Hazelwood*, and *Morse* Courts to give increased deference to schools’ decisions.

In *Tinker*, three students were suspended from school for wearing black armbands, which were silent symbols of their objection to the Vietnam War. 393 U.S. at 504. The *Tinker* Court saw the case as a conflict between the free speech rights of students and the need for school authorities to control conduct within their schools. *Id.* at 507. The Court, ruling in favor

of the students, established what is now known as the *Tinker* test: in order to limit a student's freedom of speech, a school must demonstrate that the student's conduct will "substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509. This test reinforced the principle that students do not "shed their constitutional rights to freedom of speech at the schoolhouse gate," *id.* at 506, however, "the constitutional rights of students in public school 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); *see Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) ("[T]he First Amendment gives a high school student the classroom right to wear *Tinker*'s armband, but not *Cohen*'s jacket."); *see also Cohen v. California*, 403 U.S. 15, 16 (1971) ("[Cohen] was observed . . . wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible.").

Justice Black, in his *Tinker* dissent, blasted the majority for the protection it provided students' free speech rights. Justice Black stated that "[i]t is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases." *Tinker*, 393 U.S. at 522. He went on to declare that "[o]ne does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students . . . will be ready, able, and willing to defy their teachers on practically all orders." *Id.* at 525. Justice Black's strongest argument came at the conclusion when he stated, "I wish . . . to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Id.* at 526.

Since *Tinker*, the Supreme Court has dealt with three other student speech cases. Based on the decisions in these cases, one can see that Justice Black's *Tinker* dissent has been adopted because the Supreme Court has "retreated from its broad protection of student speech rights in . . .

. *Tinker* and has instead become increasingly deferential to school officials” Mary-Rose Papandrea, *Dunwoody Distinguished Lecture in Law: Article: Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1045 (2008). In the first student speech case after *Tinker*, the *Fraser* Court dealt with a student who was suspended after giving a lewd speech during a school assembly. 478 U.S. at 677. During the student’s speech, he constantly used “elaborate, graphic, and explicit sexual metaphor[s].” *Id.* at 678. The Court held that the school district “acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.” *Id.* at 685. Further, the school was given great deference when the Court permitted the school to determine what kind of speech will “undermine the school’s basic educational mission.” *Id.*; *see also id.* at 686 (demonstrating that the *Fraser* Court directly relied on Justice Black’s *Tinker* dissent); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 753 (5th Cir. 1966) (“It is always within the province of school authorities to provide by regulation the prohibition and punishment of acts calculated to undermine the school routine. This is not only proper in our opinion but is necessary.”).

After *Fraser*, the Supreme Court continued to build upon the increased deference given to school authorities when it decided *Hazelwood*. In *Hazelwood*, staff members of a high school newspaper sued because the school principal did not allow them to publish two articles pertaining to teenage pregnancy and divorce. *Id.* at 263. Finding in favor of the school, the *Hazelwood* Court held that schools have broad authority to regulate “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Id.* at 271. Further, officials can restrict “school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273.

Finally, in *Morse*, the Court upheld *Tinker*, *Fraser*, and *Hazelwood*, and it also created a new area of unprotected student expression. 127 S. Ct. at 2627. Nearly forty years after *Tinker*, the Supreme Court once again emphasized that “First Amendment rights [are applied] in light of the special characteristics of the school environment.” *Id.* at 2626-27. Further, the Court held that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.” *Id.* at 2622.

Thus, it is true that Petitioners do have First Amendment rights, but these rights must be “applied in light of the special characteristics of the school environment.” *Tinker*, 393 U.S. at 506. Further, based on this Court’s precedent, a school is given great deference to restrict speech that will “undermine the school’s basic educational mission.” *Fraser*, 478 U.S. at 685. Moreover, the only time judicial intervention is needed to protect a students’ constitutional rights is when “the decision to censor . . . student expression has no valid educational purpose.” *Hazelwood*, 484 U.S. at 273. Here, the stipulated facts demonstrate that Principal Smalls demanded the websites be shut down because “the situation had gotten out of control” and they “were causing too much of a disturbance and interrupting other high school students’ education.” (R. 4). Therefore, the Petitioners’ First Amendment rights were not violated because Principal Smalls had a valid educational purpose when she demanded that the websites be shut down.

b. The Petitioners’ Web Pages Caused Substantial Disruption and Led the Respondents to Reasonably Forecast More Disruption and Interference Within the School.

In *Tinker*, the Court established what is now known as the *Tinker* test: in order to limit a student’s freedom of speech, a school must demonstrate that the student’s conduct would “*substantially interfere with the work of the school or impinge upon the rights of other students.*” 393 U.S. at 509 (emphasis added). This test reinforced the principle that students do not “shed

their constitutional rights to freedom of speech at the schoolhouse gate,” *id.* at 506, however, “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Fraser*, 478 U.S. at 682.

The *Tinker* Court stated that the school “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S. at 509. However, the Court went on to state that the school only needs to show that the conduct “might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities” *Id.* at 514; *see LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (“*Tinker* does not require school officials to wait until disruption actually occurs before they may act.”); *see also Karp v. Becken*, 477 F.2d 171, 175 (9th Cir. 1973) (“[School officials] have a duty to prevent the occurrence of disturbances.”).

Whether a school can use the *Tinker* test to regulate a student’s off-campus Internet speech has never been ruled on by the Supreme Court. However, “nearly all lower courts apply the *Tinker* standard of substantial and material disruption to determine if a school district may punish off-campus student speech.” Justin P. Markey, *Enough Tinkering with Students’ Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U.L. REV. 129, 139 (2007); *see Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

In *Bystrom v. Fridley*, the student plaintiffs were punished for distributing an unofficial newspaper on school grounds. 686 F. Supp. 1387, 1389 (D. Minn. 1987). The court noted that disruptions were made during class, but none of the plaintiffs were involved in the disruptions.

Id. at 1390. Even though the plaintiffs did not intend to cause the disruption nor were they involved in the disruption, the court allowed “school officials [to] impose reasonable punishment even where pure speech by students leads to a substantial disruption of school activities.” *Id.* at 1392. Here, Politte created and updated her website at home on her personal computer. (R. 2). However, the record stipulates that Politte “promoted her webpage . . . in a Horton Hopkins classroom,” at a school-sponsored club meeting. (R. 2). In response to a photo of Towles, posted by Politte on her website, Towles created his own website, which he created and edited at home on his personal computer. (R. 3). Moreover, Towles’ website encouraged other students to “speak out against Smalls and the rest of these Hopkins idiots.” (R. 4). The record stipulates that after hearing about Politte and Towles’ websites, School students began accessing the websites at the School. (R. 4). Principal Smalls demanded that the websites be taken down only after the “situation had gotten out of control” and the “websites were causing too much of a disturbance and interrupting other high school students’ education.” (R. 4).

Similar to *Bystrom*, it is immaterial whether the Petitioners intended to cause the disruption or whether the Petitioners were even involved in the disruption. The only question that matters is whether a substantial disruption of school activities occurred. Here, it is undisputed that the “situation had gotten out of control,” (R. 4), and an out of control situation, within the school building, is the perfect example of a substantial disruption. Further, the argument against the Petitioners is even stronger because the Petitioners arguably intended to cause the disruption. Politte recklessly posted a picture on her website, which impinged upon the rights of other students, especially Towles, within the School. Moreover, on Towles’ website, he encouraged other students to speak out against the School. Thus, the *Bystrom* court would find both Petitioners’ actions to be in violation of *Tinker*.

The Seventh Circuit also applied the *Tinker* test to off-campus speech when it decided *Boucher v. Greenfield*. 134 F.3d 821, 827 (7th Cir. 1998). The expelled student, who claimed the First Amendment violation, wrote an article about hacking the school's computers in an underground newspaper. *Id.* at 822-23. The student "did not use school facilities to publish the article, nor did he participate in the on-campus distribution of the article." Markey, *supra*, at 140. However, since the article was distributed on campus and advocated on-campus activity, all the school had to show was a reasonable forecast of disruption. The Seventh Circuit found a reasonable forecast of disruption because the article encouraged hacking and it was a "call to action detrimental to the . . . interests of the school." *Boucher*, 134 F.3d at 828.

As stated earlier, the record stipulates that Politte "promoted her webpage . . . in a Horton Hopkins classroom," at a School-sponsored club meeting. (R. 2). Also, Towles' website encouraged students to fight for justice and to "speak out against Smalls and the rest of these Hopkins idiots." (R. 4). Further, School students began accessing both websites within the School. (R. 4). The Seventh Circuit, relying on *Boucher*, does not consider where the speech was created or how the speech got to the School campus to be determinative factors. Instead, the Seventh Circuit looks for simple on-campus distribution and a reasonable forecast of disruption. As in *Boucher*, both websites were created off-campus and both were accessed on campus. However, the facts here are stronger than *Boucher*, because the "situation had [already] gotten out of control," on campus. (R. 4). The Seventh Circuit, only requiring a reasonable forecast of disruption, would find this out-of-control situation to be in violation of *Tinker*.

In *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, the Second Circuit dealt with an eighth-grade student who was suspended for sharing a small drawing that clearly suggested a named teacher should be shot and killed, via the Internet. 494 F.3d 34, 35 (2d Cir.

2007). The Second Circuit declared that “off-campus conduct can create a foreseeable risk of substantial disruption within a school.” *Id.* at 39; *see also Thomas*, 607 F.2d at 1052 n.17 (“We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.”). The court found no violation of First Amendment rights because “it was reasonably foreseeable that the [drawing] would come to the attention of school authorities . . . and . . . would foreseeably create a risk of substantial disruption within the school environment.” *Wisniewski*, 494 F.3d at 39-40.

Just last year, the Second Circuit dealt with a student, who claimed a First Amendment violation after being punished for posting a “vulgar and misleading message” on an “independently operated, publicly accessible web log.” *Doninger v. Niehoff*, 527 F.3d 41, 43 (2d Cir. 2008). The Second Circuit held that since the blog post created “a foreseeable risk of substantial disruption at [the school],” there was no constitutional violation. *Id.* Relying on *Wisniewski*, the Second Circuit stated that “a student may be disciplined for expressive conduct, *even conduct occurring off school grounds.*” *Id.* at 48 (emphasis added). The court acknowledged that even though the posting was created off-campus, it “was purposefully designed by [the student] to come onto the campus.” *Id.* at 50. The posting directly pertained to events at [the school] and [the student’s] intent in writing it was specifically ‘to encourage her fellow students to read and respond.’” *Id.*

Here, Politte started DUDS, “a school-sponsored club she hoped would help curb drug use within the student body.” (R. 2). There are 130 School students that have joined the club. (R. 2). The DUDS members “post flyers throughout the school [and] organize school assemblies” (R. 2). Further, Politte “promoted her webpage at [a] DUDS meeting . . . in a Horton Hopkins classroom,” and 198 out of the 235 webpage members are School students. (R. 2). On

October 4, 2008, Politte posted a picture of Towles, and two other students, on her website and provided the caption: “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. 3). This photo resulted in several parents and the police contacting Principal Smalls. (R. 3). After this encounter, Towles created his own website bashing Politte and DUDS and encouraging students to stand up against the school. (R. 3-4).

The Second Circuit, relying on *Wisniewski* and *Doninger*, would declare that the off-campus speech can create a foreseeable risk of substantial disruption within the School. Here, as in *Wisniewski*, it was reasonably foreseeable that the websites would come to the attention of School authorities because nearly 200 School students were members of Politte’s website. And, since Towles’ website was in reaction to Politte’s website, it is reasonably foreseeable that Towles’ website would also come to the attention of School authorities. Moreover, exactly as in *Doninger*, Politte and Towles both designed their websites to come onto the School campus. Further, both websites were directly related to School-related events and both encouraged readers to read and respond.

Therefore, the Respondents did not violate the Petitioners’ First Amendment rights by demanding they shut down their websites because the websites resulted in a substantial and material disruption within the School. However, even if this Court does not find that a substantial disruption actually occurred, it was still reasonable for the Respondents to forecast a future substantial disruption. Further, it was reasonably foreseeable that the Petitioners’ websites would come to the attention of School officials because both websites were directly related to School-events and encouraged readers to read and respond. Thus, the Court of Appeals was correct, and this Court should affirm that the Respondents did not violate Petitioners’ rights.

II. RESPONDENTS' SEARCH DID NOT VIOLATE THE PETITIONER'S FOURTH AMENDMENT RIGHTS, AND EVEN IF THIS COURT FINDS THE SEARCH UNCONSTITUTIONAL, RESPONDENTS ARE NEVERTHELESS ENTITLED TO QUALIFIED IMMUNITY AS NO CLEARLY ESTABLISHED RIGHTS WERE VIOLATED.

Respondents respectfully request this Court to reverse the Court of Appeals' decision finding that the Respondents' search was unconstitutional. However, if this Court does find the search to be unconstitutional, the Respondents request this Court to affirm the Court of Appeals' holding. Principal Smalls, already aware that the School was in the midst of an increasingly serious drug problem, was alerted by the Hopkinsville police that a student was cited for marijuana possession at Tweegs' party. After learning this, Principal Smalls saw a photograph of three School students, including the student cited for marijuana possession, at Tweegs' party smoking something. Principal Smalls, based on her knowledge of the marijuana possession and the photograph, had a reasonable suspicion that those particular students, in the photograph, were engaged in drug use. Therefore, Principal Smalls' search was justified at its inception because there were "reasonable grounds for suspecting," *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985), that all four boys she called into her office were possibly in possession of marijuana. Further, the search was reasonable in scope because it allowed searching for small objects hidden inside pockets (where marijuana was found), and in lockers (where more marijuana was found), without subjecting the students to physical contact or exposure to others. Thus, as Principal Smalls did not violate any student's constitutional rights, it necessarily follows that she did not violate any "clearly established" rights. Accordingly, she is entitled to qualified immunity.

a. Courts Should Defer to Educators' Decisions When Battling Drug Use.

Recently, the Supreme Court has recognized the need to address the drug problem. In *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, the Court noted "the importance of the governmental concern in preventing drug use by schoolchildren." 536 U.S. 822, 834 (2002)

(upholding drug testing of students involved in competitive extracurricular activities). Indeed, the School's concern "is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995) (upholding suspicionless drug testing of student athletes). The *Acton* Court characterized the school's interest in deterring drug use as "important - indeed, perhaps compelling" because "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* at 661. Moreover, "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 662. Similarly, in *Earls*, the Supreme Court explained that the "nationwide drug epidemic makes the war against drugs a pressing concern in every school." 536 U.S. at 834.

In evaluating Principal Smalls' actions in addressing the scourge of drugs, this Court is urged to recall the need for deference to the educators' expertise, *see supra* Part I.a, especially when dealing with the epidemic of student drug use. Deference to educators' judgments recognizes that the court's role in school administration is limited in order to avoid placing unwise constraints on the ability of educators to preserve the learning environment and protect the safety of students. After all, "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *T.L.O.*, 469 U.S. at 339. Because of this alarming trend, the *T.L.O.* Court recognized "that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *Id.* at 340.

Further, the *Acton* Court, recognizing the need for deference to educators' decisions to maintain discipline and protect students, rejected the argument that the Fourth Amendment requires the least intrusive search possible. 515 U.S. at 663; *Earls*, 536 U.S. at 837 (rejecting argument that the Fourth Amendment requires employing the least intrusive means because it would "raise insuperable barriers to the exercise of virtually all search-and-seizure powers."). A court's task is not to decide whether the search was the most appropriate, nor is it to determine the perfect balance between student privacy and social and educational interests necessitating the search. Courts should instead defer to educators' decisions. Of course, this does not mean abdication of reviewing authority, but it does mean courts must "spare teachers and . . . 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." *T.L.O.*, 469 U.S. at 343. Here, both reason and common sense support Principal Smalls' decision.

b. Principal Smalls' Search of Petitioner Did Not Violate Any of His Rights Because the Search was Justified at its Inception and Reasonable in Scope.

The standard by which such searches are to be judged was established more than twenty years ago in *T.L.O.* 469 U.S. 325. In *T.L.O.*, the Supreme Court upheld the search of a high school freshman's purse after a teacher caught T.L.O. smoking cigarettes in the bathroom. *Id.* at 346. T.L.O. was sent to the principal's office, where she denied that she had been smoking. The assistant vice principal then opened T.L.O.'s purse, where he found a pack of cigarettes and some rolling papers. He then searched the purse more thoroughly and found marijuana, a pipe, plastic bags, a substantial amount of money, an index card containing a list of students who owed T.L.O. money, and two letters that implicated her in marijuana dealing. *Id.* at 328.

School administrators need the tools to preserve a safe school environment and to protect students from serious health risks. The *T.L.O.* Court joined the majority in concluding that "the

accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators . . . to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause” *Id.* at 341. “Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances” *Id.* The *T.L.O.* Court set forth a twofold inquiry to determine the reasonableness of any search: first, was the search justified at its inception, and second, was the search reasonable in scope. *Id.* A search is justified at its inception when a school official has “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.* at 342. The search is permissible 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.

T.L.O.'s well-established principles make it clear that in return for security and the guidance immature minds need, students have a diminished expectation of privacy in school. Furthermore, school officials, in order to carry out their custodial responsibility, must have the flexibility to respond swiftly and informally to protect students and maintain order. Rarely will that flexibility be needed more than when school officials confront the threat of drug abuse.

i. Principal Smalls’ decision to search was justified at its inception because it was based on strong reasonable suspicion.

The first prong of the *T.L.O.* test for school searches, justified at inception, requires that 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.* at 342. Here, Principal Smalls had several reasons to suspect that the boys she called into her office, and subsequently searched, were in possession of marijuana or other drugs: first, she had caught one of the boys, Tweegs, smoking marijuana on campus only a few months before, (R. 2); second, a few days

before, Conrad was cited for marijuana possession at Tweegs' party, (R. 3); and third, there was a photograph from Tweegs' party of Conrad, Towles, and Thomson, sitting together, in which Conrad was smoking. (R. 3). Therefore, there were substantial reasons to believe that all the boys may possess marijuana, and Principal Smalls had a reasonable basis to search the book bags and lockers of the students, especially since students have virtually no expectation of privacy in their lockers. *See Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981) (holding that students have no reasonable expectation of privacy in lockers, desks, or other school property provided for storage of their property). However, Towles is not challenging the search of his locker. (R. 4 n.2). Further, students have very little expectation of privacy in book bags, which may be searched without individualized suspicion. For example, in *H.Y. v. Russell County Bd. of Educ.*, 490 F. Supp. 2d 1174, 1185 (M.D. Ala. 2007), the court held that the school's interest in order and ensuring its rules are followed and perpetrators caught "outweighs Plaintiffs' privacy interest in their book bags, books, purses, pockets, socks, and shoes, and the contents of their pockets."

The results of that initial search were quite illuminating. Conrad, the student who had been cited for possession of marijuana two nights before, had marijuana in his locker. (R. 3). This finding increased the suspicion on Towles and Thomson because they were the ones pictured with Conrad, who was smoking, at Tweegs' party. The locker search revealed that Conrad did not restrict his marijuana use to off-campus. So, the chances increased that the students, who seemed to be sharing in Conrad's off-campus experiences, might share his on-campus experience as well. Moreover, Principal Smalls' experience taught her that people who possess marijuana are most likely to keep it hidden safely on their persons. A baggie in a pocket is a much safer hiding place than in a locker, which is subject to searches at almost any time. Thus, this justified a search of the clothing of all four boys, including Towles.

ii. The search was reasonable in scope because it was reasonably related to the objectives and minimally intrusive.

Not only was the search justified at inception, the manner of the search was "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." *T.L.O.*, 469 U.S. at 342. The only way to discover if the students were hiding drugs in their clothes (as it turned out Thomson was) was to search those clothes, such as pants pockets, carefully. Even though the manner of the search and its scope need not be the least intrusive possible, *Earls*, 536 U.S. at 83, the School's method was less intrusive than most other searches that could have been undertaken. Requiring the students to remove their pants before a teacher searched them, avoided uncomfortable and inappropriate physical contact. Ultimately, it may have been the least intrusive means available, given the need to find small items like baggies of marijuana that can easily be hidden in clothes.

It is easy for students to hide marijuana or other drugs in their pockets, just as Thomson did in this case. (R. 3). The only useful search is one that reaches in the pockets and this can be done in two ways. A person could physically reach into the pockets, as the student is wearing the clothing, an experience that is uncomfortably close to inappropriate contact between an adult and a child. As serious as the scourge of drugs are, this Court can surely take notice of the serious concerns of adults in authority engaging in such inappropriate physical contact with children. The other method is a clothing search like the one Principal Smalls ordered. (R. 3). A student is asked to go to a private area and remove his clothing, except undergarments, for a teacher of the same sex to search. Here, the students were not asked to reveal more of their bodies than they would in many social situations, like at a swimming pool. With their clothes removed, the teacher searched the pockets carefully without ever touching the students at all.

Further, as in *T.L.O.*, the search came in two stages. There, the first cursory search revealed cigarettes and rolling papers. This justified a more intrusive search that revealed the evidence of T.L.O.'s involvement in marijuana trafficking. Here, the first search revealed one of the three boys in the photograph, Conrad, had marijuana in his locker. This created further grounds for believing that the boys would have drugs, possibly in their pockets or elsewhere in their clothing. Only after these further grounds for suspicion arose did the search intensify and adopt the slightly more intrusive method of searching the clothing, in a way that avoided any physical contact. This was necessary to satisfy the objective of the search, which was to discover if there were drugs hidden in the boys' clothing. In fact, the objective of the search was achieved, as marijuana was found in Thomson's jeans pocket. (R. 3).

In any case, when the search's objective is to determine if the student has concealed items on his or her person, the search must be more intrusive to detect the items. Thus, courts have taken a common-sense approach to determining whether a search's scope was reasonably related to the circumstances. One factor that courts have considered is the size of the object sought. *See Williams v. Eddington*, 936 F.2d 881, 887 (6th Cir. 1991) (object sought was a small vial of drugs, justifying a strip search). Another factor is the privacy of the environment where the search is conducted. *See Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993) (nude strip search conducted in the privacy of boys' locker room was not too intrusive); *see also Singleton v. Bd. of Educ. USD 500*, 894 F. Supp. 386, 391 (D. Kan. 1995) (upholding a strip search conducted in the privacy of administrator's office). Another critical factor is whether the person conducting the search is the same sex of the students being searched. *See Williams*, 936 F.2d at 883 (search of female student conducted by female administrator in female secretary's presence). Still another factor is whether the student was required to remove

his or her underwear. *See Singleton*, 894 F. Supp. at 391 (student not required to remove underwear). Finally, the courts consider whether the student was touched inappropriately. *See Bridgman v. New Trier High Sch.*, 128 F.3d 1146, 1150 (7th Cir. 1997) (student not touched during search except to take blood pressure and pulse); *see also Cornfield*, 991 F.2d at 1323 (student not touched); *Singleton*, 894 F. Supp. at 391 (student not touched inappropriately).

The searches the School conducted of the boys, specifically Towles, passed these tests. The objects being sought were small, flexible baggies of marijuana, easily hidden in pockets. The search was conducted in a private space where the student was not exposed to others. The searcher was a male gym teacher; the same sex as the boys. None of the students were touched nor did they remove underwear. The focus of the search was on their clothes, not their persons. Thus, the scope of the search was extremely reasonable and limited.

1. A sensitive weighing of both T.L.O. factors shows that search of Petitioner was reasonable.

As the *T.L.O.* Court's statement of its two-factor test makes clear, what counts as reasonable grounds to justify a search is intertwined with the scope of the search undertaken on the basis of that suspicion. As the Seventh Circuit aptly described it, because both parts of *T.L.O.*'s "two-prong test" are intertwined, together they create a "sliding scale" in which "whether a search is 'reasonable' in the constitutional sense will vary according to the context of the search." *Cornfield*, 991 F.2d at 1320. Thus, "a highly intrusive search in response to a minor infraction would similarly not comport with [that] sliding scale," but a similar search in response to a serious infraction where there is a significant basis for suspicion would be acceptable. *Id.*

Therefore, courts have been willing to find a strip search acceptable when there is suspicion of a serious infraction and an intrusive search is necessary. For instance, in *Cornfield*, the Seventh Circuit upheld a nude strip search of a high school student who was suspected of

carrying drugs. *Id.* at 1316. In that case, school staff members noticed a suspicious bulge in the crotch of a student's sweatpants. When asked by school officials if he was "crotching" drugs, he "grew agitated and began yelling obscenities." *Id.* at 1319. Two teachers then escorted him to the gym, where they had him remove his clothes and "visually inspected his naked body and physically inspected his clothes." *Id.* The Seventh Circuit held that the strip search was reasonable under the Fourth Amendment, even though the student was fully nude, and even though he in fact did not have any drugs on his person. *Id.* at 1323.

Similarly, in *Williams*, the Sixth Circuit upheld a strip search when drugs were suspected. 936 F.2d 881. A female student's report, along with other evidence, alerted the principal that Williams and another girl had used drugs at school. After a search of Williams' locker, books, and purse produced no evidence of drugs, the principal asked a female assistant principal to strip search Williams. *Id.* at 883. No drugs were found. Ultimately, the Sixth Circuit found that the school officials had a reasonable suspicion that Williams would have drugs or evidence of drug use on her person. "Further, Defendants were not unreasonable, in light of the item sought (a small vial containing suspected narcotics), in conducting a search so personally intrusive in nature." *Id.* at 887. Again, in *Tarter v. Raybuck*, the court held that school officials had made a reasonable search of a student's person (although he did not remove all of his clothing) where they "had observed activity they reasonably believed to indicate the use and sale of marijuana, activity which plainly constituted a violation of a well established policy." 742 F.2d 977, 983 (6th Cir. 1984). Further, in *Singleton*, the court upheld a strip search to find \$150, since the students were not required to remove underwear and no body cavity searches were performed. 894 F. Supp. at 388-89, 391.

The decisions striking down strip searches have done so because the searches were more intrusive, and the grounds for suspicion, much weaker than was the case here. For instance, in *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006), the Second Circuit held that school officials did not have reasonable suspicion to justify a strip search. The only basis of suspicion was the discovery of cigarettes in Phaneuf's purse and an uncorroborated statement by another student that she had heard Phaneuf tell others that she had hidden marijuana in her underpants. *Id.* at 593. The court held that these facts alone could not support a suspicion that Phaneuf was carrying marijuana in her underwear. *Id.* at 597. Therefore, school officials did not have reasonable suspicion to justify a strip search of that student, which entailed " pull[ing] her underpants away from her body and turn[ing] around so that . . . her buttocks" could be examined. *Id.* at 594. The situation in *Phaneuf* contrasts starkly with this case in two distinct ways. First, substantially greater grounds for suspicion existed here. Though the student in *Phaneuf* had cigarettes in her purse, there was no evidence that she used or possessed marijuana, except for gossip from another student. Here, Principal Smalls had a police report that Conrad had marijuana at the same time he was photographed smoking with Towles and Thomson. (R. 4). Second, the search was much less intrusive. In *Phaneuf*, the student was asked to pull down her underwear and show one of the most private parts of her body; but here, the boys only stood in a private room in their underwear, and the object of the search was not them, but their clothes.

As in *Phaneuf*, some courts have disapproved of so-called strip searches by school administrators because they either lack reasonable grounds for suspicion that the students in question were involved in wrongdoing, or on the fact that the search in those instances was much more intrusive than needed. For example, in *Thomas v. Roberts*, 261 F.3d 1160, 1167 (11th Cir. 2001), an entire class of students were searched, in groups, and asked to strip, even to the extent

of taking off their underwear, after a fifth-grade student lost an envelope containing twenty-six dollars. The court rejected that search because there was no individualized suspicion for the strip searches. *Id.* at 1166. It also concluded that the strip searches were highly intrusive, noting that the students had to reveal their underwear and that most of the girls had to expose their breasts. *Id.*; see also *Redding v. Safford Unified Sch. Dist. # 1*, 531 F.3d 1071 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 987 (2009) (where a middle school girl was asked to expose her breasts and pelvic area in a search for ibuprofen simply because another student claimed she possessed it). Here, the boys were not asked to expose their private areas, and the search reasonably focused on the sort of place where a plastic baggie is likely to be hidden, in a student's pockets.

c. Even if a Constitutional Violation is Found, Respondents are Entitled to Qualified Immunity Because no Clearly Established Rights Were Violated.

The United States Supreme Court has established that courts must grant flexibility to educators who administer our nation's schools to face the difficult problem of drug use. The *T.L.O.* Court recognized the need for deference to school officials' efforts to combat drug abuse when it stated, “[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.” 469 U.S. at 339. Because of this alarming trend, the Court acknowledged “that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.” *Id.* at 340.

The role of the courts in school administration should necessarily be limited to avoid placing unwise constraints on the ability of those educators to preserve the learning environment and protect the safety of students. It therefore stands to reason that educators, who must make quick decisions concerning student safety, should not be subjected to personal liability because

of the sensitivity and controversy of an action. School officials, like Principal Smalls, need qualified immunity where their actions were neither plainly incompetent nor in knowing violation of clearly established law. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.").

“The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). Normally, a court resolving any government official’s qualified immunity claim follows a two-step sequence set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). First, the court must decide whether the facts that a plaintiff has “alleged or shown” make out a violation of a constitutional right. *Id.* at 200. Second, if the plaintiff has satisfied the first step, the court must decide if the right at issue was “clearly established” at the time of defendant’s alleged misconduct. *Id.* Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right. Recently, the Court relaxed the two-step procedure and made it easier to find qualified immunity, explaining that it is not mandatory to make both findings in that order. *Pearson*, 129 S. Ct. at 818. This is because

[t]here are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise...

in deciding whether there was a violation of the constitution when it is clear there should be immunity. *Id.* However, even though the two-step procedure is not mandatory, the Court did “recognize that it is often beneficial.” *Id.* Here, the first step could indeed be beneficial, because that step would reveal that no constitutional right has been violated.

As discussed at length, many courts have upheld much more intrusive searches than the one that took place here. The decisions which struck down “strip searches” were based on more intrusive searches or much less individualized suspicion than the search here. In those cases, such as *Phaneuf*, *Redding*, and *Roberts*, students were required to expose and show parts of their bodies, which are normally covered by underwear, resulting in a much more intrusive search.

At the very least, the legal uncertainty surrounding student searches should preclude the finding of a clearly established law, which is necessary to deny a governmental official the protection of qualified immunity. *Saucier*, 533 U.S. at 202. Principal Smalls and the School are entitled to qualified immunity, unless the “specific contours of the law” were so well developed or “sufficiently clear that a reasonable official would understand that what he is doing violates [a constitutional] right.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). This is a standard that “must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The procedural history of this case shows that a judge, a trained jurist deliberating over time about this matter, considered what Principal Smalls did to be permissible. Thus, it is illogical for this Court to hold that Principal Smalls could have understood that what she did was violating a clearly established right.

Here, it is not clear that it would be unconstitutional to proceed with a clothing search, such as the one ordered by Principal Smalls. Principal Smalls knew that Tweegs had been caught with marijuana on campus, Conrad had been cited for marijuana possession at Tweegs’ party, and that Towles was spotted in a photograph sitting with Conrad, while Conrad was smoking, on the night Conrad was cited for possession. *See Cornfield*, 991 F.2d at 1321-28 (nude search justified at inception where student had history of drug related offenses and educators observed what appeared to be a male student “crotching” drugs); *Singleton*, 894 F.

Supp. at 390-91 (strip search permissible in scope where search occurred in office with two educators of the same gender and student was not required to remove underwear).

Moreover, it is far from clear that a search for drugs that included removal of items of clothing, but avoided all physical contact, would be considered too intrusive under the circumstances. This is much less intrusive than the situation in *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997), in which two eight-year old second grade girls were twice forced to undergo strip searches in an attempt to find a missing seven dollars. In fact, the evidence suggested those students were required to pull down their underpants. *Id.* at 822. Despite that very intrusive search, over a much less serious problem, based on very little individualized suspicion, the Eleventh Circuit held that the school officials who ordered that search were entitled to qualified immunity. The court explained that

For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.

Id. at 823. Based on the circumstances Principal Smalls faced, there is no pre-existing law compelling the finding that she could not order students to undergo a clothing search, in a private place where they were not required to expose those parts of their bodies traditionally considered more private and kept covered by underwear. In fact, the School has its own policy authorizing such searches. Thus, Principal Smalls could not have known that she was violating a clearly established right, when a policy that was most likely drafted by the School's administration and attorneys allowed for such searches.

Since courts have upheld more intrusive searches, which were based on less individualized suspicion than existed here, it cannot be true that Towles had a clearly established right to not be subjected to a clothing search. Even if this Court were to draw further lines,

restricting the rights of educators to fight drugs, it cannot be held that those lines were “clearly established.” Rather, this Court must protect our educators’ ability to do the difficult job of maintaining order in schools, without the daunting threat of liability because their legal sophistication does not allow them to predict the future course of appellate jurisprudence.

CONCLUSION

For the aforementioned reasons, the Respondents request this Court to affirm the Court of Appeals’ decision finding that the Respondents did not violate the Petitioners’ First Amendment rights. Further, Respondents request this Court to reverse the Court of Appeals’ decision finding that the Respondents’ search was unconstitutional. However, if this Court does find the search to be unconstitutional, the Respondents request this Court to affirm the Court of Appeals’ holding.

Respectfully submitted,

Counsel for Respondents, Team 12

APPENDIX

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.