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 RESPONDENT

Team 14
Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the Appellate court correctly held that Horton Hopkins' regulation of Petitioners' web pages was not a violation of the First Amendment where the school principal, with 20 years of experience and judgment, believed that the web site would cause a substantial disruption in the educational environment.

II. Whether school officials adhered to the Fourth Amendment when they searched a student for drugs after receiving an anonymous tip and linking the student to others with histories of drug use.

III. Under *Saucier v. Katz*, whether school officials are entitled to qualified immunity for their actions when the constitutional guidance was not "clearly established" at the time of the search due to wide disparity among the circuits and limited guidance by the Supreme Court.

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CONSTITUTIONAL PROVISIONS AND STATUTES 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 . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.
>
> U.S. Const. amend. IV.

42 U.S.C. § 1983 (1996) provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Horton Hopkins High School ("Horton Hopkins"), a public school, found itself dealing with the war on drugs which had slowly crept into Hopkinsville over the last five years. R. at 1[1]. In December 2007, the war claimed a victim: 17 year-old Kelly Smith, the captain of the volleyball team, who overdosed on cocaine at a party. R. at 1. In 2008, 25 students were suspended for using illegal drugs on school grounds. R. at 1. In the first two months of the 2009 school year alone, 15 students were caught smoking marijuana on school grounds. R. at 1. The school district enacted a strict, zero-tolerance policy to combat this growing trend. R. at 1.

Kit Politte ("Politte") founded a school-sponsored club at Hortons Hopkins named "Drug Use Damages Schools" ("DUDS"). R. at 2. This club consists of 130 Hortons students. R. at 2. DUDS's mission is to help curb drug use within the student body. R. at 2. In line with this mission, Politte created "Fighting All Dealers," ("FAD") an online web page which called for students and community members to submit information about potential drug dealers. R. at 2. People submitting "tips" would send them to Politte and she would post what she felt were the "strongest" ones. R. at 2. While at school after hours, Politte discussed the FAD web page with the DUDS membership at a school-sponsored meeting. R. at 2. Every DUDS member is also a member of FAD. R. at 2. Although FAD has some non-student members, 84% of FAD members are Horton Hopkins students. R. at 2.

On October 3, 2008, Petitioner Cory Towles ("Towles") attended a party at the home of Jeff Tweegs, who had been previously suspended from the school for marijuana use. R. at 2. Rumors had circulated that some students would bring marijuana to this party. R. at 2. The police

[1] "R." refers to the page numbers of the District Court and Court of Appeals decisions as well as the writ of certiorari and the school policy.

broke up the party and cited Frank Conrad, a fellow student of Towles, for marijuana possession. R. at 3.

Two days later, Principal Keena Smalls ("Smalls" or "principal") received calls from parents and the police about a photo taken at the party. R. at 3. The photo, taken by an anonymous source, appeared on Politte's FAD web page with the caption "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?". R. at 3. The picture included Towles, sitting with Conrad and another sophomore, John Thomson, outside Tweegs's house during the party. R. at 3. Conrad was smoking an unknown substance. R. at 3. The principal called each student individually into her office and questioned them about the photograph. R. at 3. Each denied possessing drugs. R. at 3. Unsatisfied with their responses, the principal searched their lockers and book bags, per the school's policy. R. at 3, 15. She found a bag of marijuana in Conrad's locker. R. at 3.

The principal then directed a male teacher ("school officials") to conduct a search of each boy in a private room, including Towles. R. at 3. Each student removed his outer clothing to his undergarments and then the teacher searched all clothing pockets. R. at 3. The teacher never touched any of the boys. R. at 3.

In retaliation for the web site and search, Towles made his own web page titled "Students Against Defamatory Statements" ("SADS"). R. at 3. On this web page, he criticized FAD, which he asserted was actually DUDS, for posting inaccurate captions and invading the privacy of himself and his friends. R. at 3-4. Towles then called for "all students" to "speak out against [Principal] Smalls and the rest of these Hopkins idiots," in reference to the school administration. R. at 4.

After the students heard of the web pages, they began accessing them from the school's educational facilities during the school day. R. at 4. They accessed the sites not only from the school's computer labs, but also the school's library. R. at 4. Realizing the situation had gotten out of control and concerned about keeping discipline at the school while preventing what she saw as a potential for student protest, Principal Smalls demanded that both Towles and Politte take down their web pages. R. at 4. Smalls, who had been the principal for 20 years, worried that the web sites were causing too much of a disturbance and interrupting other high school students' education. R. at 1, 4.

Politte and Towles challenged the constitutionality of the principal's regulation of their web sites in the Badger County District Court ("Trial Court"). R. at 1. Horton Hopkins moved for and was granted summary judgment in its favor upon the court finding that Horton Hopkins did not violate the students' constitutional rights. R. at 5. Politte and Towles appealed. R. at 9. The Court of Appeals ("Appellate Court") again found that Horton Hopkins did not violate Politte's and Towles's constitutional rights and affirmed the Trial Court's ruling on the same grounds. R. at 10.

On the Fourth Amendment claim, the Trial Court found the search was both justified at its inception, R. at 7, and reasonable in its scope. R. at 8. Because the court found no constitutional violation, it did not address the qualified immunity issue in its granting of summary judgment for the school on the § 1983 claim. R. at 8. On appeal, the Appellate Court found the search was neither justified at inception nor reasonable in scope. R. at 10. However, it found the school was entitled to qualified immunity, and affirmed the finding of summary judgment for the school. R. at 12. This appeal follows.

SUMMARY OF THE ARGUMENT

If this Court were to hold that Horton Hopkins violated Petitioners' First Amendment rights, it would effectively cripple a school's ability to provide a healthy learning environment for its students. A school may constitutionally regulate a student's speech under certain circumstances. Accordingly, since these circumstances existed, the Appellate Court correctly held that Horton Hopkins had not violated the Petitioners' First Amendment rights when it required the Petitioners' web sites be taken down.

A school may regulate speech that causes a substantial disruption to school or is reasonably capable of disrupting the school environment. In the instant case, children were accessing Petitioners' web sites from school educational facilities. Principal Smalls, with her twenty years of experience and discretion, felt that the web sites would cause further substantial disruptions due to hurtful and misleading characterizations and inflammatory language contained on the sites. As such, the lower courts were correct in finding that Horton Hopkins could regulate the students' speech.

Second, even if this Court finds that no disruption could have occurred, the students' web sites could still be regulated. If an expression is school sponsored, it may be regulated if the expression does not align with the legitimate pedagogical concerns of the school. Here, one of the web sites used the word "idiot" in reference to the school administration while the other web site misled viewers to believe that a student was a drug user. Such poor and inflammatory conflict resolution skills and hurtful, misleading statements could not be part of Horton Hopkins educational goals, and as such, the regulation was lawful.

Towles's Fourth Amendment claim must similarly fail. The search was both justified at its inception and reasonable in scope, as required by nearly 25 years of school-search precedent.

In justifying the search at its inception, school officials relied on an informant's tip, a picture with one of Towles's friends smoking an unknown substance and Towles's relationship with other known drug users. The school properly corroborated the informant's tip and had individualized suspicion to conduct the search.

Both searches were similarly reasonable in scope based on the severity of the infraction: drugs. The initial search of Towles's wallet and book bag were not overly intrusive. Further, the strip search was conducted individually to save embarrassment, and the students were never physically touched during the search.

For more than 40 years, courts have given school officials great deference in their discretion and judgment for their actions in an educational environment. Since that time, courts have continued this deference, especially in light of the growing problem of drug abuse. School officials must not be held to the standard of lawyers in determining what is reasonable for a search.

Finally, even if the Court finds a constitutional violation did occur, this is harmless error as the school officials were entitled to qualified immunity. The law on search was not "clearly established," as the standard requires. The Supreme Court provided little guidance and the circuit courts are sharply divided on what is reasonable. Without clear guidance, school officials could not have known their conduct would clearly violate Towles's constitutional rights.

ARGUMENT

I. Since Horton Hopkins only regulated speech that was within their discretion, both the Trial Court and the Appellate Court correctly decided that no First Amendment violations occurred.

Both the Trial Court and the Appellate Court correctly determined that Horton Hopkins did not violate the Petitioners' First Amendment rights. Further, although both the Trial Court and Appellate Court correctly relied on *Tinker* in rendering these decisions, other, just as viable, bases exist to hold that Horton Hopkins' conduct did not offend the First Amendment.

This Court reviews grants of summary judgment *de novo*. *See, e.g., Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004). Both the Trial Court and Appellate Court were correct in applying the standard from *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969). Under that standard, Horton Hopkins prevails because Petitioners' conduct did, and would continue to, materially disrupt the Horton Hopkins educational environment. Second, and in the alternative, even if *Tinker* does not apply, Horton Hopkins still prevails under the standard in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), because school administrators have certain leeway in restricting speech within schools. Consequently, this Court should affirm the lower courts' rulings that Horton Hopkins did not violate the Petitioners' First Amendment rights.

A. Because the Petitioners' conduct caused and would likely continue to cause material and substantial disruption of the Horton Hopkins school environment, the Trial and Appellate Court were correct to apply the *Tinker* standard.

In constructing a framework to scrutinize the spectrum of student speech issues, courts have routinely acted on the principle that schools must be able to maintain an environment conducive to learning and fostering socially dignified behavior and that "the constitution does not compel school officials to surrender control of the American public school system to public school students." *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986)). The court's mission to secure a safe and effective

learning environment is not new. "[E]ducation is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). In light of this policy objective, the Supreme Court has constructed a "student speech" framework that affords schools leeway in restricting speech. *See* Nathan M. Roberts, Commentary, *Roberts on Morse v. Frederick*, 2008 Emerging Issues 1529 (providing student speech guidelines).

Courts have articulated the roles of four particular cases that encompass the student speech foundation: "The Supreme Court has established three (now four) frameworks for evaluating student speech: (1) vulgar and obscene speech is governed by *Fraser*; (2) school-sponsored speech is governed by *Hazelwood*; and (3) all other speech is governed by *Tinker*." *Lowery*, 497 F.3d at 587 (parenthesis added) (internal citations omitted). Later, *Morse* was worked into this framework, to be applied when illegal drug use is advocated by a student. *See Morse v. Frederick*, 127 S. Ct 2618 (2007) (tailoring a new analysis coexisting with *Tinker*).

The instant case does not concern itself with advocating illegal drug use, but rather the opposite. The web sites in question concern themselves with combating both drug use and libelous conduct. R at 2-3. Therefore, *Morse* should not factor in this Court's analysis and will not be discussed in the First Amendment portion of the brief. Similarly, the content on the web sites was neither lewd nor particularly offensive, and as such, *Fraser* does not apply. Only *Tinker* and *Hazelwood* are relevant to the instant facts and will be discussed in that order. *Tinker* acts as a catch-all provision which encompasses both Politte's and Towles's web sites. In this light, the lower courts properly applied that standard in finding for Horton Hopkins. In the alternative, however, *Hazelwood* offers another ground for Horton Hopkins to prevail and will be discussed in the section following the *Tinker* application.

i. Since both Towles's and Politte's web sites were causing and would likely continue to cause a material disruption, they could be regulated under *Tinker*.

In *Tinker*, the Supreme Court stated, "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork . . . is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513 (citing *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966). Courts have since held that when student conduct "would cause material and substantial interference with school work or discipline" or "might reasonably have led authorities to forecast substantial disruption," that the student conduct "would merit school discipline." *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 37 (2nd Cir. 2007) (quoting *Tinker*, 393 U.S. at 511-14).

Courts have also rearticulated two components of the *Tinker* standard. First, the *Tinker* standard may be applied to off-campus internet speech. *See Doninger v. Neihoff*, 527 F.3d 41, 51 (2nd Cir. 2008) (applying *Tinker* to off-campus student blog); *see also Wisniewski*, 494 F.3d at 35 (applying *Tinker* to off-campus student Instant Message transmission). Second, if school officials reasonably believe that the student expression will disrupt the classroom, they may regulate the speech. *See Lowery*, 497 F.3d at 596; *see also 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."). Here, because there was current disruption that would have likely escalated, the lower courts properly found for Horton Hopkins.

After the web pages reached the school, disorder began to ensue and Principal Smalls determined it would get worse. R. at 4. Students began accessing the web sites from the school's educational facilities, including the computer labs and the school's library, as well as from their own homes. R. at 4. Also, calls started coming in from parents demanding the attention of Principal Smalls. R. at 3. Realizing the situation had gotten out of control and trying to prevent

what she saw as a potential for student protest, the principal demanded that both Towles and Politte take down their web pages. R. at 4. Principal Smalls, who had been the principal for 20 years, worried that the web sites were causing too much of a disturbance and were interrupting other high school students' education. R. at 1, 4. This Court should defer to her 20 years of experience and discretion in determining whether a future substantial disruptive was reasonably foreseen.

Later, it was Towles's "call to arms" that persuaded the Trial Court to find for Horton Hopkins, stating, "Towles' [sic] call to action on his web page, '[l]et's speak out against Smalls and the rest of these Hopkins idiots,' could reasonably be seen as future disruption at school." R. at 6. The Trial Court also found Politte's web site to be disrupting under *Tinker* because it was her web page that induced Towles's web page and thus was inseparable. R. at 6.

ii. Prior cases with parallel facts have relied on *Tinker* in finding for the school.

This case is like *Doninger*. F.3d at 41. In *Doninger*, the student had written an off-campus online blog criticizing the school principal's decision to cancel an upcoming student event. *Id.* at 41. In response to that blog, the principal disallowed Doninger from running for student counsel. *Id.* at 43. The Court properly applied the *Tinker* standard, concluding that the blog "foreseeably created a risk of substantial disruption in the school environment." *Id.* at 50.

In particular, the *Doninger* court found two things probative in reaching this determination. *Id.* First, the court cited the choice of language contained in the blog and the fact that the blog was geared toward inciting disorder. *Id.* at 51. Specifically, the court cited the phrase "call the Douchebags in the central office to piss them off more." *Id.* (quotations omitted). The court found both this call to action, which essentially was to cause disorder, and the use of the word "Douchebag" particularly probative in meeting the *Tinker* standard. *Id.* Second, the

court criticized the blog for containing "at best misleading and at worst false" information pertaining to the school event, reasoning that misleading information was more likely to incite substantial disruption at school. *Id*.

The facts in the present case bear a striking resemblance to *Doninger*. First, the language contained in Petitioners' web sites was similarly offensive. R. at 4. Towles's web page labeled the administration "idiots." R. at 4. This language is "hardly conducive to cooperative conflict resolution." *Doninger*, 527 F.3d at 51. Further, just as in *Doninger*, Towles's statement inciting the student body to "not tolerate" and "speak out against Smalls and the rest of these idiots" echoes the statements in *Doninger*, which prompted calls to the central office. R. at 4.

Second, as in *Doninger*, Politte's web site contained at best misleading and at worst false information. R. at 3. Politte published a photo of Towles's friend smoking an unknown substance and labeled it as marijuana, which is, at best misleading because the substance being smoked remains unidentified. R. at 3. Further, the entire selection process for Politte's web site bred misinformation because Politte published information based on what she felt were the "strongest" leads as opposed to checking the accuracy of the photo or the credibility of the source. R. at 3. Consequently, not only does Politte's web site contain misleading information, but it also has the capacity to make such hurtful publications commonplace, and it was reasonable for Smalls to foresee future disruptions.

Accordingly, from both the current disruptions and the likelihood of further escalation, it was reasonable for Principal Smalls to conclude, while using her 20 years of experience and judgment, that a material and substantial disruption would affect the school environment. As such, this Court, just as the court in *Doninger*, the Trial Court, and the Appellate Court, should find that the *Tinker* standard is met.

B. If this Court finds that *Tinker* does not apply, *Hazelwood* then governs the instant case and supports a finding for Horton Hopkins because Petitioners' web pages were "school sponsored."

Horton Hopkins prevails under *Hazelwood* because school administrators can censor de facto school organizations. The law under *Hazelwood* is that "First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings," *Fraser*, 478 U.S. at 682, and must be "applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266. Further, the Supreme Court has recognized that, "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts." *Id*. at 267 (citation omitted).

The *Hazelwood* court's holding is now the standard: "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. The *Hazelwood* court defined "school sponsored expressive activit[y]," as one that "might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge of skills to student participants and audiences." *Id.* at 271. Therefore, a school may censor a de facto school organization as long as the censorship is aligned with legitimate pedagogical concerns. Since this is precisely what happened in the instant case, Horton Hopkins prevails under *Hazelwood*.

FAD is a school organization which Horton Hopkins could censor. Politte started with DUDS, a school organization that is explicitly school sponsored. R. at 2. Later, Politte created FAD and its accompanying web site. R. at 2. This web site gives rise to the current controversy.

R. at 4. FAD and DUDS share the same mission in that they both seek to curb school drug use. R. at 2. Also, they both share the same founder: Politte. R. at 2. Further, DUDS is comprised solely of FAD members, who have met to discuss FAD within the Horton Hopkins school facility during a DUDS meetings. R. at 2. Additionally, Horton Hopkins students comprise 84% of the entire FAD membership, most likely because they were solicited for information along with other community members. R. at 2. Accordingly, because FAD and DUDS are essentially the same school organization, they are subject to *Hazelwood* scrutiny.

Although Towles's web site is further removed from being "school sponsored," it may still be regulated under *Hazelwood*. *See* 484 U.S. at 271. Towles's web page became so intertwined with FAD and DUDS that his site could not exist without the photo on Politte's page. R. at 2. As such, the web pages should be treated the same. Policy would suggest this outcome. If a person could avoid regulation simply by not becoming an "official member" of a group but still generate discussion and engage the mission statement of that organization, the law cannot treat this person differently. This legal distinction would collapse into arbitrariness. Following this logic, this Court should look to Towles's actions rather than his label in finding that since his web page could not exist without DUDS, and he became so intertwined with DUDS, he should also be subject to *Hazelwood*.

Further, Towles's web site can be regulated under *Hazelwood* because he specifically addressed school members in his website and attempted to "impart particular knowledge to student[s]," which permitted Horton Hopkins to regulate his web site in alignment with First Amendment protections. *Hazelwood*, 484 U.S. at 271. Towles's web site reads "Hopkins school officials committed a far worse injustice when they subjected my friends and me to an unreasonable search . . . [w]e need to fight . . . I call for all students . . . to speak out against

Smalls and the rest of these Hopkins idiots." R. at 4. The first part of this message attempts to impart knowledge to the student body that Towles had been "unreasonably" searched. R. at 4. Further, the message was directed to students and even asked them to "speak out" against the school. R. at 4. As such, it may be regulated per *Hazelwood*.

The restrictions of Petitioners' web sites were in line with Horton Hopkins' legitimate pedagogical concerns. First, drug use has become a problem at Horton Hopkins over the last five years. R. at 1. Accordingly, Horton Hopkins administrators took action by enacting a zero-tolerance drug policy. R. at 1. Implicit in this enactment is the message that Horton Hopkins was ready and willing to remedy the drug problem without enlisting the aid of vigilante student groups. Second, Politte's web site contained misleading photographs of Towles. R. at 3. Although the school mission statement is absent from the record, it can be safely stated that creating a web page that slanders other students is a far cry from Horton Hopkins' goals in teaching students how to treat one another. Third, Towles created his web page in retaliation to the school and even called the administration "idiots." R. at 4. Again, this kind of disruptive and vulgar approach to conflict resolution can hardly be attributed to the type of behavior Horton Hopkins would support.

That said, the web pages engage in the type of discourse that would normally receive praise in public education. For instance, Politte's web page combats drug use while Towles's web page combats slander and unreasonable searches and seizures. R. at 2-3. While Horton Hopkins concedes that Petitioners' intentions may seem sincere, in practice these web pages were much more nefarious. Politte's web page caused disruptions in school through misleading photos and speculation. R. at 4. Similarly, Towles's web page called for disruption and used vulgar language. R. at 4. Although the meaning behind the pages may have been virtuous, their

practice necessitated regulation in line with the legitimate pedagogical practices of teaching conflict resolution skills and not encouraging slander. Accordingly, because both Petitioners' web pages were within the *Hazelwood* framework and were restricted in line with legitimate pedagogical concerns, this Court should find that Horton Hopkins also prevails under *Hazelwood*.

II. School officials properly adhered to school Fourth Amendment guidance, and the search was both justified at inception and reasonable in scope.

While the Appellate Court correctly found that school officials were entitled to qualified immunity in their search of Towles, the Court erred when it found that school officials' conduct was neither justified at its inception nor reasonable in its scope. The Trial Court properly found no constitutional violation in the search because 1) school officials possessed sufficient information to believe that they would find drugs in Towles's belongings or on Towles's person, and, 2) the scope of the search was similarly reasonable, though neither of the lower courts analyzed this prong.

The Fourth Amendment provides protection against "*un*reasonable searches and seizures," not all searches and seizures. U.S. Const. amend. IV (emphasis supplied). In creating the standard to determine reasonableness in a search, the U.S. Supreme Court in *New Jersey v. T.L.O.* struck a balance between schoolchildren's legitimate expectations of privacy in the Fourth Amendment and the school's equally legitimate need to maintain a learning environment. 469 U.S. 325, 326 (1985). The Court held that school officials need not obtain a warrant before searching a student under their control. *Id*. The officials are not held to the higher standard of probable cause, but rather reasonableness, under all the circumstances, of the search. *Id*.

Relying on the school's need to maintain a learning environment, the Court defined reasonableness as "whether the search was justified at its inception and whether, as conducted, it

was reasonably related in scope to the circumstances that justified the interference in the first place." *Id*. A search will be justified at its inception "where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id*. The 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 student's age and sex and the nature of the infraction." *Id*.

A. The search was justified at its inception because school officials adhered to *T.L.O.* guidance, possessed individualized suspicion, and properly used the informant's tip.

Several courts have articulated the following set of factors to determine if a search is justified at its inception: 1) the child's age, history and record in school, 2) the prevalence and seriousness of the problem in the school to which the search was directed, 3) the exigencies in making a search without delay and further investigation, 4) the probative value and reliability of the information used as a justification for the search and 5) the particular teacher or school official's experience with the student. *In re Juvenile 2006-406*, 931 A.2d 1229, 1234 (N.H. 2007) (quoting *S.V.J. v. State*, 891 So.2d 1221, 1223 (Fla. Dist. Ct. App. 2005)).

Taking the *S.V.J.* factors in their totality, the search was justified at its inception. First, Towles was 16 years old. R. at 2. Courts have found that the "likelihood that a child is engaging in independent criminal activity tends to increase with the age of the child." *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1321 (7th Cir. 1993). Second, the drug problem at Horton Hopkins remained deadly serious with a recent death of a star athlete from a drug overdose. R. at 1. Twenty-five students were suspended last year and fifteen students were caught smoking marijuana on school grounds just in the first two months of school. R. at 1. Third, the mobility of marijuana and students' ability to quickly pass it from one person to another makes the search exigent. Cases of suspected drug use and gun possession were the Sixth Circuit's worries when it

said, "[l]ike police officers, school officials need discretionary authority to function with great efficiency and speed." *Watkins v. Millennium Sch.*, 290 F. Supp. 2d 890, 900 (S.D. Oh. 2003). Finally, the probative value of the photo of the student at a "drug party," an informant's tip, and Towles's association with other known drug offenders makes the information relied upon as justification for the search quite strong.

The only factors that weigh against a finding that the search was justified at its inception are Towles's lack of history, record in the school, and the school's experience with Towles. However, Towles had only been at the school for a couple of months at the time of the incident, so the school had little chance to gather history of drug use or association with other known drug users. Accordingly, Towles's lack of prior drug problems in his brief two months at Horton Hopkins does not negate the other *S.J.V.* factors that strongly weigh in favor of the search being justified at its inception.

i. School officials had individualized suspicion of the four students searched because they searched only those students identified in the photo and the owner of the home.

While a lack of individualized suspicion does not render a search unreasonable, a line of cases suggests greater scrutiny should be used when individualized suspicion is not present. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005). In this case, however, the school officials conducted a search based on individual, not generalized, suspicion. The officials' questioning and subsequent search of the four students stemmed from pictures at the party, an informant's tip and the group members' past drug use. These facts run counter to *Thomas ex. rel. Thomas v. Roberts*, 323 F.3d 950, 952 (11th Cir. 2003). In *Thomas*, the school officials strip searched an entire class of fifth grade students after $26 disappeared from a teacher's desk while the students were in the classroom. *Id*. The *Thomas* court found the school district lacked

individual suspicion because they simply searched everyone in the classroom without determining likely suspects. *Id*. at 953.

The Sixth Circuit agreed with the Eleventh Circuit in *Beard*, where the police and school officials searched over 20 students for stolen money without individualized suspicion. 402 F.3d at 601. Absent individual suspicion, the court found a strip search to be unconstitutional. *Id*. at 605. The court in *H.Y. ex. rel. K.Y. v. Russell County Board of Education* followed the same path when a class of 15 students was strip searched to locate $12 taken from a teacher's purse. 490 F. Supp. 2d 1174 (2007).

In *Thomas*, *Beard*, and *H.Y.*, the school officials did not "possess individualized suspicion that pointed to a specific student or group of students." *Thomas*, 323 F.3d at 1167. In the present case, however, the school officials acted on an informant's tip, pictures of the students at a "drug party," and group members' past drug use. The officials did not search everyone at the party, but only a select four that had a relational link. As such, the school officials based their search on individualized suspicion, counter to the cases above.

ii. School officials properly corroborated the informant's tip and used other information, to justify the search at its inception.

The Supreme Court has instructed courts to evaluate informant's tips based on the "totality of the circumstances," and to allow a "lesser showing" in order to meet the reasonable suspicion standard. *Alabama v. White*, 496 U.S. 325, 329 (1990). Reasonable suspicion is dependent upon both the content of information and its degree of reliability, and can arise from information that is less reliable than that required to show probable cause. *Id*. If a tip has a relatively low degree of reliability, more information will be required to establish the "requisite quantum of suspicion" than would be required if the tip were more reliable. *Id*. The Eleventh Circuit ruled that student tips are more reliable because student informants face the possibility of

disciplinary repercussions if the information is misleading. *C.B. ex. rel. Breeding v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996). Courts have approved reliance on tips from fellow students. *E.g. S.C. v. State*, 583 So.2d 188, 192 (Miss. 1991) (noting that tips from students are less suspect than those from society in general).

Had the school officials in this case simply relied on the Internet posting from Friendkepedia, they would have fallen short of reasonable suspicion. The school officials, however, relied on more than the anonymous tip to justify their reasonable suspicion. To corroborate a tip, school officials can verify that present circumstances, rather than future acts, are as reported. *United States v. Gibson*, 64 F.3d 617, 623 (11th Cir. 1995). Towles's friends had a history of drug use and Towles attended the party that was rumored to be a "drug party." R. at 7. The photograph "plainly showed Towles at a party where drugs and alcohol were present." R. at 7. Conrad was smoking an unknown substance in the picture. R. at 3. The principal also found a bag of marijuana in Conrad's locker prior to conducting the search of Towles and the others. R. at 7. Based on the totality of the circumstances, including the anonymous tip from Friendkepedia, the school officials had the reasonable suspicion necessary to conduct the search.

This is unlike *Phaneuf v. Fraikin*, 448 F.3d 591, 598 (2nd Cir. 2006), on which the Appellate Court relied to invalidate the informant's tip in the present case. In *Phaneuf*, the school officials had only the word of a "trustworthy" student and never sought to corroborate the tip prior to the strip search. *Id*. The official in *Phaneuf* did not have the benefit of a picture showing the student at a drug party or have knowledge of the student's association with other students with past drug problems, as in the present case. The *Phaneuf* official did not take the initial, less invasive steps of searching lockers, pockets and bags prior to the strip search, such as the steps

taken here. However, even in the case of the sole evidence being an uncorroborated tip, as in *Phaneuf*, the court allowed for a search of pockets, a back pack, a locker or a desk drawer. *Id*.

B. The search of Towles's book bag and wallet was reasonable in scope based on the severity of the infraction and the lack of intrusiveness of the search.

The search of Towles's book bag and wallet adhered to the reasonableness-in-scope requirement of *T.L.O.* A 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 student's age and sex and the nature of the infraction." *T.L.O.*, 469 U.S. at 326. In the present case, the school officials' objective was to find drugs that they reasonably expected were within the school. Possession of drugs is one of the most severe infractions in a school environment, so it must be given the greatest level of permissibility. *Cf. Cornfield*, 991 F.2d at 1321 (noting a "highly intrusive search in response to a minor infraction would . . . not comport with the sliding scale advocated by the Supreme Court in *T.L.O.*"). Book bags and wallets are prime hiding spots for drugs as small in size as marijuana, so it was reasonable to inspect the bag. *See Williams ex. rel. Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir. 1991) (taking into account the size of the item sought, the search of a purse was not unreasonable).

Even when courts have found a strip search unreasonable, those courts held the less invasive search of a book bag or purse as being permissible in scope. In *H.Y.*, for example, the court found that not only were the searches of book bags, desks and purses of students reasonable in scope when searching for $12, but a teacher reaching into student's pockets was permissible as well. 490 F. Supp. 2d at 1185-1186; *see Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1085 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 987 (U.S. Jan. 16, 2009) (No. 08-479) (noting a reasonable search scope is the most logical places for prescription drugs: the student's purse); *see also, Cornfield*, 991 F.2d at 1320 (calling a pocket search a "minor

inconvenience”). A brief search, while individually questioned by Principal Smalls in her office, did not rise to the level of excessively intrusive.

C. The strip search of Towles was reasonable in scope because it was completed individually to minimize embarrassment, Towles was not touched and it was based on the most serious of infractions: drugs.

Numerous courts in different circuits have found strips searches to be reasonable in scope based on the seriousness of the drug infraction. In other cases, courts have invalidated strip searches on less serious infractions, like stolen money, but would have upheld the search if drugs or weapons were the object. In *Williams*, the court found the strip search was reasonable in light of the item sought, a small vial containing narcotics. 936 F.2d at 887. The school officials had additional justification in *Williams* when, after searching the student’s locker and purse, the officials suspected the student may be concealing the contraband on her person. *Id*.

Other courts have found strip searches for stolen money to be unconstitutional based on the severity of the infraction, but would have allowed a strip search if drugs were the object of their search. *See H.Y.*, 490 F. Supp. 2d at 1187 (noting that the strip search was “occasioned by the possible theft of twelve dollars, rather than a student’s possession of drugs or weapons”); *Watkins*, 290 F. Supp. at 900 (distinguishing that the theft of money from a student suspected of drug use or weapons would have justified a more intrusive search); *Beard*, 402 F.3d at 605 (noting a “search to find money serves a less weighty governmental interest than a search undertaken for items that pose a threat to the health or safety of students, such as drugs or weapons”); *State ex. rel. Galford v. Anthony*, 433 S.E.2d 41, 49 (W. Va. 1993) (evaluating the nature of the infraction of stolen money in terms of the danger it presents to other students, the infraction “does not begin to approach the threat posed by the possession of weapons or drugs”).

The *Cornfield* court followed the same logic. Even while careful to acknowledge a strip search’s impact on a student, the *Cornfield* court upheld the reasonableness of the strip search

when it was done in the privacy of the boy's locker room, the officials did not touch the student and they stood a distance away. *Cornfield*, 991 F.2d at 1324. Even though the officials did not ultimately find contraband, the court refused to conclude retrospectively that the search was unreasonable in scope. *Id*. Focusing on similar facts, the court in *Widener v. Frye*, found the search constitutional when it was done outside of the presence of classmates and the student was never asked to remove his undergarments. 809 F. Supp. 35, 38 (D.C. Oh. 1992). The *Widener* court understood the student's embarrassment but held that it did not alter the fact that the search was reasonable in scope. *Id*.

Even when an item sought is not itself illegal, the court has upheld a strip search based on suspicion of illegal activity. In *Singleton v. Board of Education*, the court found that even a large sum of money, along with the possibility that it may be stolen, justified the strip search of a student. 894 F. Supp. 386, 390-91 (D.C. Kan. 1995). In *Singleton*, the court focused on the fact that the search was done in the privacy of the principal's office with only two male administrators present. *Id.* at 391. The officials never required the student to remove his underwear and he was not touched inappropriately. *Id*.

The facts of the strip searches in *Cornfield*, *Widener*, and *Singleton* are directly on point with the facts in the present case. In all three cases, the students never removed their underwear and were not touched during the search, as in the present case. The school officials stood a distance away and checked the student's pockets, as in the present case. Finally, each of these searches was conducted by members of the same gender as the student, as in the present case.

D. Though the case is distinguishable, the Ninth Circuit's decision in *Redding* sharply departs from precedent and mischaracterizes the *T.L.O.* standard.

The Ninth Circuit sharply departed from more than 20 years of precedent stemming from *T.L.O.* in *Redding*. In *Redding*, another student implicated the plaintiff in possession of the over-

the-counter drug ibuprofen, a violation of school rules. 531 F.3d at 1075. After agreeing to a search of her belongings which did not turn up the drugs, school officials took her to the nurse's office for a more extensive search. *Id*. There, they directed the plaintiff to remove her socks, shoes and jacket for inspection. *Id*. After she shook her bra and undergarments to ensure that no ibuprofen was hidden, she re-dressed and returned to class. *Id*. Nothing in the record indicates that she was touched as part of this search. *Id*. at 1086.

The school officials in *Redding* relied on the exculpatory statement of another student who had been questioned. *Id*. at 1082-83. Prior to beginning the search, the court said school officials should have weighed the evidence that the plaintiff had no disciplinary problems and was an honor student. *Id*. at 1074, 1077. The court said the school officials should have taken the time to discuss the plaintiff's statement with her teachers, parents and other students prior to the second search. *Id*. at 1083. Based on the lack of corroboration of the classmate tip, the court found the strip search unjustified at its inception. *Id*. at 1085. It further found the search to be unreasonable in scope based on the nature of the infraction, possession of an over-the-counter drug, which is not violative of a state or federal law, despite being a violation of the school's rules. *Id*. at 1086.

The *Redding* court confused the *T.L.O.* standard by holding that the "level of suspicion required for a search to be justified at its inception varies with the intrusiveness of the search." *Id*. at 1095 (Hawkins, J., dissenting). This holding has no support in *T.L.O.* and "it is by no means certain that the Supreme Court would approve." *Id*. *T.L.O.* expressly separates the two prongs. 469 U.S. at 341. Intrusiveness of the search applies to the second reasonableness-of-scope prong, not the first justified-at-inception prong. *Id*. at 326. The *Redding* court instead combined these two prongs and required school officials to determine the reasonable scope of the

search based on the information known at the beginning, reasoning which has no basis from *T.L.O*.

Under the *Redding* court's decision, the principal's backpack search, which did not turn up any ibuprofen, broke the causal link required for any secondary searches. 531 F.3d at 1082. The court relied on the facts in *T.L.O.* where the initial discovery of cigarettes justified the secondary search for marijuana. *Id*. Since there was no initial discovery in *Redding*, the court reasoned that the principal could not have continued without conducting additional investigation. *Id*. at 1083. However, T.L.O. never required an initial discovery of a violation to continue to a more extensive search. The *Redding* decision creates a new requirement to continually reassess the justified-at-inception prong as the search progresses, which was never required in *T.L.O*.

Using the Ninth Circuit's logic, a principal who is not lucky enough to discover the contraband in the initial search could never continue to search without going through additional investigation, even if the contraband was small enough to be hidden in multiple locations outside the bounds of an initial search. The *T.L.O.* court disagreed with this requirement for additional investigation. *See T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring) ("The time required . . . to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education."). This requirement to continually reevaluate the justified-at-inception prong puts school officials in the position of lawyers, interpreting case law and statutes, rather than educating students.

Even if this Court were to accept the causal link requirement in *Redding*, the school officials in the present case made the link after they found drugs in Conrad's locker. R. at 7. Towles appeared with Conrad in the picture from the party. R. at 3. Marijuana is small enough

that it could be pocketed or moved around from locker to locker to avoid detection by school officials. Once the school officials found drugs in the initial locker search, a search which plaintiff does not contest, the discovery provided the causal link for a more extensive search, even with *Redding*'s onerous requirements.

The *Redding* court decries what it calls "guilt by association" in which the plaintiff's lending of a "planner" to another student caught with drugs necessarily means the plaintiff is also guilty of possessing drugs. *Redding*, 531 F.3d at 1084-1085. The court neglects the common sense approach, though, that suggests "it is significantly more likely [a student] will receive contraband from a classmate who has lent her personal items than from someone with whom she has hardly any relationship." *Id*. at 1101 (Hawkins, J., dissenting).

The Appellate Court in the present case also rejects the common sense approach that drugs, especially as small in size as marijuana, are easily concealed and quickly passed from one friend to another to avoid detection. By rejecting this common sense approach, the Appellate Court goes against the express language of *T.L.O.* in its concern that officials would have to school themselves on the niceties of probable cause. *See T.L.O.*, 469 U.S. at 343 (expressing that "[t]he 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 common sense.").

Beyond the Ninth Circuit's departure from precedent and the fact that *Redding* is only persuasive for the State of Grace, this case is quite distinguishable from the present case. The *Redding* court concentrated on the scope of the search being unreasonable based on the nature of the infraction: ibuprofen pills. 531 F.3d at 1086. The court minimized the infraction, calling the pills "run-of-the-mill" and finding that "nothing in the record provide[d] any evidence that the

school officials were concerned . . . about controlled substances violative of state or federal law." *Id*. at 1087. The court found "[n]o legal decision . . . permitted a strip search to discover substances regularly available over the counter at any convenience store." *Id*. at 1087-88.

The present case, however, directly involves the "controlled substances violative of state or federal law," marijuana, which is not "available over the counter in any convenience store." There is no graver concern for school officials than drugs and weapons, and there is no more important infraction. *See Anthony*, 433 S.E.2d at 546 (expressing the danger posed by the possession of drugs or weapons). Logically, if a strip search is the most intrusive type of search available, then it could only be justified for the most important of infractions: guns and drugs. Drugs were the object of the search in the present case, and the reasoning of the *Redding* court, while invalidating a strip search for a more minor infraction such as ibuprofen, would validate the Horton Hopkins officials' search for the gravest of concerns: drugs.

E. In following a long history of deference, courts must afford school districts great discretion in their decisions.

This Court should follow the long line of cases which gives deference to school officials. In keeping with the holding of *Tinker*, courts must afford school officials great deference in matters that threaten safety in the school environment. *Tinker*, 393 U.S. at 507. In *Tinker*, the U.S. Supreme Court "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id*. Just six years later, the Supreme Court reiterated its deference to school officials, specifically as it relates to § 1983 claims, stating that the public school system "relies necessarily upon the discretion and judgment of school administrators and school board members and § 1983 was not intended to be a vehicle for federal

court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees." *Wood v. Strickland*, 402 U.S. 308, 326 (1975).

The Supreme Court emphasized the effect of drug use in school and the educator's interest in combating it in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 661 (1995). The Court explained "[s]chool years are the time when the physical, psychological and addictive effects of drugs are most severe." *Id*. The Court recognized the need for deferring to educators' judgments about how to combat the problem, saying "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, and the educational process is disrupted." *Id*. at 662.

Most recently, the Supreme Court reaffirmed the need for deference in *Morse*. In *Morse*, the Court noted the importance of combating student drug use by stating that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." 127 S. Ct. at 2623. If the Supreme Court allows school officials to prevent speech encouraging illegal drug use, then school officials must also be allowed to find and confiscate the drugs themselves when there are reasonable grounds to believe that drugs are present on school grounds.

III. Even if the Court finds a constitutional violation, it is harmless error as the school officials are entitled to qualified immunity for their actions.

The Appellate Court properly found that school officials were entitled to qualified immunity in their search of the students. R. at 12. In order to determine whether officials are entitled to qualified immunity, courts use a two-step test created in *Saucier v. Katz*, to decide: 1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and 2) if so, whether that right was "clearly established" at the time of the defendant's alleged misconduct. 533 U.S. 194, 201 (2001). Even if a constitutional violation occurred, the question is

whether the school officials acted reasonably under the circumstances, and thus will be entitled to qualified immunity. *See Wilson v. Layne*, 526 U.S. 603, 614 (1999) (noting "law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, even if the actions result in a constitutional violation").

The Supreme Court recently clarified the *Saucier* rule, finding it inflexible and made it no longer mandatory. *Pearson v. Callahan*, 129 S. Ct. 808, 811 (2009). In *Pearson*, the Court focused on the "substantial expenditure of scarce judicial resources" and that needless constitutional questions "waste the parties' resources by forcing them to assume the costs of litigating constitutional issues . . . when the suit could otherwise be disposed of more readily." *Id*. at 811-812. Importantly, *Saucier* had departed from the court's general rule of constitutional avoidance. *Id*. at 812. Consequently, a court is no longer required to address both *Saucier* questions if it feels that qualified immunity is warranted. *Id*.

In order for a right to be "clearly established," the right allegedly violated must be defined at the appropriate level of specificity. *Wilson*, 526 U.S. at 615. It is not enough to say any violation of the Fourth Amendment is "clearly established." *Id*. The analysis must be "undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. Here, the appropriate level of specificity is whether a reasonable school official would have known that: 1) an individual, private search by a teacher of the same gender, 2) of a 16 year-old student's clothing, 3) while the student is in his underwear, is a constitutional violation to 4) search for drugs after an official found drugs in a locker of a known friend of the student. Based on the case law and statutes available at the time, school officials could not have known that their conduct would violate a constitutional right, as the Appellate Court properly held.

Courts first look to Supreme Court cases to determine a "clearly established" right, then within the circuit, and finally to decisions of other circuits. *Beard*, 402 F.3d at 607. The Supreme Court school search guidance comes largely from *T.L.O.* However, *T.L.O.* provides little guidance as to how the factors should be applied and what level of suspicion would be required for a strip search. *Id*. The *T.L.O.* standard has "left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a . . . § 1983 cause of action." *Id*. Based on the *T.L.O.* standard alone, school officials would not have known that their actions in the present case violated a "clearly established" right.

Circuit court findings vary greatly in what is required for a school official to initiate a constitutional strip search of a student. The Sixth, Seventh and Tenth circuits upheld strip searches by school officials. *Cornfield*, 991 F.2d at 1316; *Williams*, 936 F.2d at 881; *Singleton*, 894 F. Supp. at 386; *Widener*, 809 F. Supp. at 35. In *Singleton*, the court even upheld the strip search for money, a less severe infraction than drugs. 894 F. Supp. at 391. Conversely, the Second, Sixth and Eleventh circuits found strip searches to be unconstitutional. *Phaneuf*, 448 F.3d at 591; *Beard*, 402 F.3d at 598; *H.Y.*, 490 F. Supp. 2d at 1174; *Watkins*, 290 F. Supp. 2d at 890. Within the Sixth Circuit alone, four decisions exist of which two find a strip search constitutional and the other two do not. *Compare Williams*, 936 F.2d at 881 (finding a strip search for drugs reasonable), *and Widener*, 809 F. Supp. at 35 (upholding a strip search when looking for marijuana) *with Beard*, 402 F.3d at 598 (invalidating a strip search for stolen money), *and Watkins*, 290 F. Supp. 2d at 890 (finding a strip search for missing money).

Further, the Supreme Court provided guidance to qualified immunity when judges themselves disagree on a constitutional question. *See Wilson*, 526 U.S. at 618 (noting "if judges thus disagree on a constitutional question, it is unfair to subject police to money damages for

picking the losing side of the controversy"). The Court reiterated this reasoning in the oral arguments in *Morse* with Justice Souter suggesting that the spirited debate between justices was strong evidence that the law was not clearly established. Transcr. of Oral Argument at 49-50, *Morse*, 127 S. Ct. 2618.

Less than two years ago, the Supreme Court reaffirmed the need for deference for school officials in *Morse*. 127 S. Ct. 2618. If the Supreme Court allows school officials to prevent speech encouraging illegal drug use, then school officials could reasonably believe that they are allowed to find and confiscate the drugs themselves when there are reasonable grounds that drugs are present on school grounds. However, without clear guidance from the Supreme Court on this specific issue, school officials could not possibly know under what circumstances a strip search was unconstitutional. While the Supreme Court may provide that guidance in the *Redding* case, for which it granted certiorari, that level of post-*T.L.O.* guidance does not currently exist. Accordingly, based on the wide discrepancy of case law between the circuits, and even within some circuits, the Appellate Court correctly held that the law was not "clearly established" and that the school officials were entitled to qualified immunity.

CONCLUSION

The lower courts correctly held that school officials did not violate Petitioners' First Amendment rights. *Tinker* governs the First Amendment analysis and was properly applied, while *Hazelwood* offers alternative grounds for Respondent. Further, the search of Towles was both justified at inception as well as reasonable in scope based on the facts and the severity of the infraction: drugs. Finally, the courts correctly held that school officials were entitled to qualified immunity for Towles's Fourth Amendment claim because the right was not "clearly established" at the time of the incident. For the foregoing reasons, Respondents respectfully request that this Honorable Court affirm the Appellate Court's decision order.