

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 THE PETITIONER

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QUESTIONS PRESENTED

1. Does a school official violate students' First Amendment right to free speech when she attempts to regulate the students' off-campus website and the website does not contain speech that materially and substantially interfere with the school's disciplinary action?
2. Does a school official violate a student's Fourth Amendment right to be free from unreasonable searches when the search is not justified at its inception and is excessive in scope?

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CONSTITUTIONAL PROVISIONS INVOLVED

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

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

U.S. CONST. amend I.

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

The right of the people to be secure...against unreasonable searches and seizures, shall not be violated...

U.S. CONST. amend. IV.

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

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

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Kit Politte, an 18-year old senior at Horton Hopkins School (“Horton Hopkins”), started a school sponsored club called Drug Use Damages Schools (“DUDS”) on September 2008 for the purpose of lessening student drug use at school. (R. 2.) Some Horton Hopkins students became members of that club. *Id.* DUDS members organized school assemblies concerning the dangers of illegal drug use and posted flyers throughout the school that promoted a drug-free lifestyle.

Id.

On September 10, 2008, DUDS hosted a school assembly, featuring speaker Jeffie Zarling, who told Politte that the only way to stop the drug problem in the school was to convince people to point out drug dealers. *Id.* In response to her conversation with Mr. Zarling, Politte created a network webpage called “Fighting All Dealers” (“FAD”) on her home computer. The website targeted residents of the town of Hopkinsville and called for community members to anonymously submit information about potential drug dealers. *Id.* Politte promoted her FAD webpage during a September 15th meeting that was held on school premises after school. *Id.*

Horton Hopkins is a public high school in Hopkinsville, situated in the State of Grace. (R. 1.) In January 2007, Principal Keena Smalls requested that a strict zero-tolerance drug policy be enacted that would allow school officials to test students for drugs and conduct searches of the students’ lockers and personal property. *Id.* According to the Horton Hopkins School District Policy, a student in possession of alcohol or illegal drugs could be subject to searches of their person and property without parental consent. (App. 15.) Additionally, the student could receive a minimum three day suspension if he or she was discovered to be carrying an illegal substance. (R. 3.)

This zero-tolerance policy was proposed due to the increased drug use on the school's campus over the past five years. (R. 1.) During the first two months of this school year, fifteen students were caught smoking marijuana on campus. *Id.* In the previous year, twenty-five students were suspended for using illegal drugs, and the captain of the volleyball team died of a cocaine overdose in December 2007. *Id.*

Cory Towles is a 16-year old sophomore student at Horton Hopkins who transferred from another school. (R. 2.) At his former school, Towles was an honor student and a member of the junior varsity baseball team. His only disciplinary problems were two detentions he received for being tardy as a freshman. *Id.*

On October 3, 2008, Towles attended a house party hosted by a Horton Hopkins junior, Jeff Tweegs. Towles stated that he saw some students smoking and drinking beer at the party, but witnessed no drug use. By the time Towles left at 11:30 P.M., Tweegs's neighbors phoned Hopkinsville police and complained of noise. *Id.* The Hopkinsville police cited five students for under-aged drinking and cited sophomore Frank Conrad for marijuana possession. (R. 3.)

On October 4, 2008, Politte received an e-mail with an attachment containing a photograph from the party. The photograph showed Cory Towles sitting outside Tweegs's house with two other students, one of them smoking. Politte posted the photograph on her FAD webpage and attributed the photograph to "an anonymous Horton Hopkins student." *Id.* The caption on the photo read: "Police finds drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" *Id.*

The following morning Principal Smalls received phone calls from several parents who had seen the photograph on the FAD webpage. *Id.* Principal Smalls was also contacted by Hopkinsville police regarding the students who were cited at Tweegs's party. After having

viewed the photograph on the FAD webpage, Principal Smalls individually interviewed four students: Towles, Conrad, Thompson, and Tweegs. All four boys denied possessing drugs. Principal Smalls searched their lockers and book bags pursuant to Horton Hopkins's policy and found a small bag of marijuana in Conrad's locker. *Id.* She asked each boy to submit to an individual private search. All four boys refused.

Despite the lack of consent by the students, the gym teacher, Mr. Waters, conducted a search of the boys in a private room. *Id.* Each student was told to strip down to his undergarments while Mr. Waters searched the student's clothing and pockets. Mr. Waters found a small bag of marijuana in Thomson's jeans, but found nothing on Towles. *Id.* At no time did Mr. Waters touch any of the boys. *Id.*

In response to Kit Politte's webpage, Towles created his own website on his personal computer. *Id.* Towles's webpage included an accusation that DUDS had invaded his right to privacy, criticism of the school's administration for its treatment of him, and a request for students to speak out about the searches. (R. 4.) Horton Hopkins students began accessing Politte's and Towles's websites from their home computers and from computers at school during their free time. *Id.* Principal Smalls demanded that both websites be shut down, but both students refused. *Id.* Principal Smalls admitted that she was angry about Towles's criticism of the school administration's actions regarding the drug problem at school. *Id.*

Politte and Towles now seek a reversal of the State of Grace Court of Appeals' ruling that granted Respondent school officials' motion for summary judgment. The Badger County District Court found that the school officials' attempt to regulate student speech was constitutional under the First Amendment. (R.1.) The District Court held that because the school could reasonably forecast a disruption, and that Towles's call to action was not entitled to First Amendment

protection. The District Court held that the school officials permissibly searched Towles under the Fourth Amendment because the search was justified at its inception and the scope was permissible. *Id.* Due to the school's independent evidence that Towles possessed illegal drugs at the time of the search, the District Court ruled that the school's search of Towles was justified at its inception. *Id.* Because a male faculty member searched Towles and performed the search without touching him, the scope of the search was held to have been permissible. *Id.* The State of Grace Court of Appeals subsequently affirmed the District Court's Judgment against Petitioners Politte and Towles. (R. 9.)

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the State of Grace Court of Appeals and overrule the summary judgment motion of Respondent Horton Hopkins High School District and Principal Keena Smalls ("school officials") against Politte and Towles. First, the school officials violated Politte's and Towles's First Amendment right to free speech by regulating the students' off-campus speech. Second, the school officials violated Towles's Fourth Amendment rights by conducting a search of his person without reasonable cause.

The school officials violated Politte's and Towles's First Amendment right to freedom of speech when Principal Smalls ordered Politte and Towles to take down their websites. Politte's and Towles's speech is protected because it is not on-campus speech that substantially or materially interferes with school discipline. Politte's and Towles's websites constituted off-campus speech because they were both created on the students' personal computers. Therefore, Politte's and Towles's speech is protected off campus speech that does not fall into an exception to the First Amendment. Since Politte's and Towles's speech was protected, the school officials

violated the students' constitutional rights when they ordered that the students' websites be taken down.

Furthermore, the school officials violated Towles's Fourth Amendment rights when they conducted a search of his person and belongings without reasonable cause. Although the right to be free from unreasonable searches is not absolute for students in a school setting, the school officials violated Towles's rights when they conducted a highly intrusive search without any reasonable suspicion. The only evidence that Principal Smalls had in this case was a photograph showing Towles in the general vicinity of a student who was smoking. The school officials did not have any evidence that Towles had ever used or possessed illegal drugs. Because the school officials lacked reasonable grounds to believe that Towles had illegal drugs in his possession, the search of his person and belongings was an unconstitutional violation of the Fourth Amendment.

The conducted search also did not meet the requirements of the test set out in *New Jersey v. T.L.O.* because the search was neither justified at its inception nor reasonable in scope. *New Jersey v. T.L.O.*, 469 U.S. 325 (1984). The search of Towles was not justified at its inception because it was not based on a reasonable belief that Towles was in possession of drugs at the time of the search. The search of Towles was not reasonable in scope because a strip search was a serious intrusion that was not reasonable in the circumstances. Therefore, the school officials violated Politte's and Towles's First Amendment right to free speech by regulating the students' off-campus speech. The school officials also violated Towles's Fourth Amendment right to be free from unreasonable searches when it conducted a search of his person and belongings without reasonable cause.

ARGUMENT

I. HORTON HOPKINS HIGH SCHOOL OFFICIALS VIOLATED POLITTE’S AND TOWLES’S FIRST AMENDMENT RIGHT TO FREE SPEECH WHEN THEY ORDERED THE STUDENTS TO TAKE DOWN THEIR OFF-CAMPUS WEBSITES.

The Court of Appeals erred when it found that the school officials did not violate Politte and Towles’s First Amendment Rights. Politte’s and Towles’s off-campus speech is entitled to First Amendment protection because their actions are under the protection of the First Amendment and their speech does not substantially and materially interfere with appropriate Horton Hopkins High School discipline. The appropriate standard of review for this Court is *de novo* because “in cases raising First Amendment issues...an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995).

A. Because Politte’s and Towles’s speech was not on campus speech that materially and substantially interferes with appropriate school discipline in the operation of the school, their speech is entitled to protection under the First Amendment.

A threshold question in determining the free expression rights of public school students is whether the students’ communications constitute off-campus or on-campus speech. On campus speech is speech that occurs on school grounds, or speech that is school sponsored or occurs at a school sponsored event. *See Morse v. Frederick*, 127 S. Ct. 2618 (2007). First Amendment protection was extended to on campus speech when this Court proclaimed that public school teachers and students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969). However, public schools may regulate on campus speech if they can demonstrate that “engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate

discipline in the school.” *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744,749 (1966)).

In *Tinker*, students who wore black armbands on their sleeves to show their disapproval of the Vietnam War were suspended by their high school principal when they refused to take them off. *Tinker*, 393 U.S. at 504. This Court ruled that those school officials violated the students’ First Amendment rights because the students peaceably and silently wore their arms bands and “neither interrupted school activities nor sought to intrude in school affairs or the lives of others.” *Id.* In *Tinker*, this Court said that if there was no proof that a disruption occurred in the schools, the school officials must provide evidence that it was reasonable to believe that a disruption was likely to occur. *Id.* at 503. According to this Court, *Tinker* officials failed to demonstrate facts showing they had reason to anticipate that wearing armbands would substantially interfere with the work of the school or infringe on the rights of other students. *Id.* at 509. The school officials’ actions were unconstitutional because there was no substantial disruption by the students and the school authorities appeared to have been motivated by avoiding controversy that would result from the expression. *Id.* at 510.

Conversely, in *Blackwell v. Issaquena*, this Court held that the students’ right to free speech was not violated when they acted in a disorderly fashion. In *Blackwell*, the students were distributing buttons, pinning them on others, accosting other students in the hallway, and throwing them through windows. *Id.* The *Blackwell* students’ conduct was distinguishable from *Tinker*, because in *Blackwell*, the students engaged in an unusual degree of boisterous conduct, collision with the rights of others and undermining of authority. *Id.*

Here, Principal Smalls claims she was concerned about a protest breaking out and disrupting classes, but she failed to demonstrate a foreseeable material disruption due to her

inability to articulate facts that support her fear. (R. 6.) For instance, the Second Circuit of United States Court of Appeals held that foreseeability of a material disruption was shown when a student posted a statement on her off-campus blog asking students to contact a school administrator to “piss her off more.” *Doninger v. Neihoff*, 527 F.3d 41 (2008).

The *Doninger* court noted three factors of foreseeability to establish substantial and material interference. *Id.* at 50-51. First, the language used by the student was not only plainly offensive, but also potentially disruptive to efforts in resolving the ongoing controversy. *Id.* Second, the student used misleading or false information to encourage students to contact the administrator. *Id.* Finally, the student had been called away from class several times in order to manage the growing dispute. *Id.*

Unlike *Doninger*, Politte and Towles were not using plainly offensive language and were not asking people to engage in disruptive behavior. Politte attempted to be the moderator of her webpage and only put up photographs on her website that she deemed were the most credible. Similarly, Towles did not use any false or misleading information to encourage anyone to act disruptively. Because there was no disruption of daily class or school operations, there was no dispute to manage. *Id.*

Here, Politte promoted her webpage at school after hours, but did not ask students to specifically write letters or call Principal Smalls. (R. 2.) Towles asked students to “speak out against Smalls and the rest of these Hopkins idiots,” but did not ask anyone to come to school and be disruptive. (R. 4.) There was no substantial and material interference because the students did not direct their webpage to disrupting the activities of their school.

The disruption that occurred in *Blackwell* was substantially disruptive because students were accosting other students and interfering with proper school decorum. That case is different

from this situation. Here, the students made off campus statements were made that had no bearing on the ability of the school to function. Politte's and Towles's actions are clearly distinguishable from the students' action in *Blackwell* because, here, the speech did not occur on campus and neither student was engaging in disruptive in school. *Blackwell*, 363 F.2d at 750.

Towles's call to action for students to "speak out against Smalls and the rest of Hopkins idiots," could not be reasonably seen as a material or substantial disruption because it occurred off campus and students only accessed the webpage during their free time while in school. (R. 4.) Politte's speech could not be reasonably seen as a future disruption because she was communicating a message that was in agreement with the school officials' anti-drug policy. Also Towles's speech included a request for students to speak out against unfairness in the school, and not for the purposes of causing a disruption. (R. 2.)

1. Because Politte's and Towles's speech was not on campus speech that was offensively lewd and indecent speech, their speech is entitled to protection under the First Amendment.

In *Bethel School District Number 403 v. Fraser*, this Court held that school officials could punish a student for using offensively lewd and indecent on-campus speech. *Bethel School Dist. No. 43 v. Fraser*, 478 U.S. 675 (1986). In that case, while making a nomination speech, the student delivered the speech using explicit sexual metaphors. *Id.* In response to the speech, some students "hooted and yelled" and simulated the sexual activities alluded to in the student's speech. *Id.* at 678. In *Fraser*, this Court noted that "[t]he undoubted freedom to advocate...controversial... must be balanced against the society's countervailing interest in teaching students...appropriate behavior." *Id.* In applying that test, this Court found that Bethel School officials had acted within their authority in suspending the student because it had

acknowledged limitations where the speech is sexually explicit and the audience may include children. *Ginsberg v. New York*, 390 U.S. 629 (1968).

In *Fraser*, the school officials could regulate the student's speech because his speech was not political speech as in *Tinker*. The students in *Tinker* engaged in political speech because they expressed opposition to the Vietnam War. *Fraser*, at 683. The student's speech was plainly offensive to both teachers and students due to its content. *Id.* This Court noted that the content of the speech glorified male sexuality, and was insulting to teenage girls. *Id.* at 682. This Court also noted that the content of the speech could be seriously damaging and that that many of the young on lookers seemed bewildered after it was given. *Id.* According to this Court, schools do not have to tolerate lewd conduct from students. *Id.* at 683.

Politte started the club, Drug Use Damages Schools, and promoted an anti-drug statement which is parallel to the schools policy. Here, Politte's website content was not lewd, indecent, or offensive because she was promoting a positive message understood by all to be in agreement with the school's mission. (R. at 2.) Similarly, Towles's statement did not use explicit or graphic language and the subject matter was not sexual or lewd in nature, and he only expressed his disapproval of the school's treatment of the drug problem at Horton Hopkins High School.

2. Because Politte's and Towles's speech was not on campus speech that was school sponsored, their speech is entitled to protection under the First Amendment.

Finally, this Court has established that a school's regulation is permissible where the speech occurred on campus and is school sponsored. *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). Schools In *Hazelwood*, this Court ruled that a school may censor the contents a high school newspaper produces as a part of the schools journalism curriculum. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, a student newspaper attempted to

publish articles regarding pregnancy and divorce, and the school principal objected to the printing of these articles due to invasion of right to privacy concerns. *Id.* When speech is school sponsored and occurs on campus, the school may regulate the speech on the basis of legitimate pedagogical concerns. *Id.* at 262.

Here, Politte's and Towles's websites were not school sponsored and not school sanctioned. While Politte's website was accessed by Hortons Hopkins High School students, her target audience was directed at all residents of Hopkinsville. This is different from the student-ran paper in *Hazelwood* that specifically targeted school students. (R. 2.) Here, both students created their web pages at home on their personal computers. (R. 2-3.)

Similarly, it was established in *Morse* that sponsored speech has also been found where it occurred during normal school hours, was sanctioned by the principal, and where there were district rules that provided that pupils conduct are subject to district rules for student conduct. *Morse*, 127 S.Ct at 2124. This Court held that "because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student. *Morse v. Frederick*, 127 S.Ct. 2618, 2620 (2007). In *Morse* the student promoted illegal drug use by holding up a banner that read: "Bong hits for Jesus" across the street from the school at a school sponsored activity. *Id.* at 2623.

Neither Politte nor Towles's respective websites were school neither sponsored, nor created during school hours, nor created on school property with school funds. Their speech is entitled to be protected under the First Amendment because it is off-campus speech that is afforded greater protection. Even though other students access the websites during their "free time," neither Politte nor Towles accessed the websites while on school property. (R. at 4.)

Because Politte and Towles's websites did not promote the illegal use of drugs, the websites are entitled to protection under the First Amendment. Politte's website promoted an anti-drug policy and Towles's website commented on how the schools' administration was handling the drug problem at the school: neither of them promoted illegal drug use. The speech at issue is a justified exercise of Politte and Towles fundamental right to freedom of speech as protected by the First Amendment and noted by this Court in *Tinker*. *Tinker*, 393 U.S. 503 at 511.

B. Politte and Towles's off campus websites contained protected speech under the First Amendment because it did not fall into one of the prohibited off-campus speech categories.

Politte's and Towles's off-campus speech is protected because it is not speech that falls into one of the First Amendment exceptions. Off-campus is speech that is created without using school property or recourses, *Emmet v. Kent Sch. Dist.*, No. 415, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000); or created by a student using a home computer, *J.S. v. Bethelhem*, 757 A. 2d 412 (2000); or speech that occurs in the privacy of one's own home, *Porter v. Ascension Parish School Board*, 125 S.Ct. 2530 (2005).

While this Court has applied the *Tinker* test to on campus speech, there is still an issue as to whether the *Tinker* test should be applied to off-campus speech as well. Most courts have applied the *Tinker* test to off-campus speech. *Killion v. Franklin Regional School District*, 136 F. Supp.2d 446, 454-55 (W.D. Pa. 2001). Even if this Court applies its *Tinker* test to determine whether school officials can regulate Politte's and Towles's off campus speech, the students' speech will be protected under the test. When school officials attempt to regulate speech beyond the school yard, their actions must be evaluated by the principles that bind government

officials in the public arena. *Thomas v. Board of Education*, 607 F.2d 1043, 1050 (2nd Cir. 1979).

In *Thomas*, a group of students were suspended after publishing an allegedly morally offensive, indecent, and obscene magazine called “Hard Times”. *Id.* at 1043. The students had diligently labored to ensure that “Hard Times” was printed outside the school and that no copies were sold on school grounds. *Id.* at 1050. The students in *Thomas* removed other students’ names from the magazine, worked to sever connections between their publication and the school, and refused to sell copies to younger students. *Id.* at 1045. The Second Circuit of the United States Court of Appeals correctly stated: “we may not permit school administrators to seek approval of the community-at-large by punishing students for off-campus expression.” *Id.* at 51. This means that schools regulation should be limited to the school yard, and when schools go beyond their confines, they are overreaching their boundaries.

1. Because Politte’s and Towles’s speech does not contain a “true threat,” their speech is entitled to protection under the First Amendment.

A “true threat” is speech unprotected by the First Amendment, where the speaker means to communicate a “serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Watts v. United States*, 394 U.S. 705, 707 (1969). Although “true threats” are deemed unprotected by the First Amendment, Politte’s and Towles’s websites contained speech that are not true threats, and therefore, entitled to protection. School can only regulate student expression on web pages or in e-mails if they pose a serious or “true threat” to a person or group. *Id.* at 705.

In *Layshock v. Hermitage*, the Pennsylvania Supreme Court addressed a case involving a student’s website containing derogatory comments about his principal that was created on his grandmother’s computer. *Layshock v. Hermitage Sch. Dist.*, 412 F.2d 502 (2006). The Court in

Layschock found that the website did not constitute a “true threat.” *Id.* Here, neither Politte’s nor Towles’s websites could reasonably be seen by the school to be a “true threat” because there were no statements that demonstrated an intent to commit acts of violence of violence against anyone.

2. Because Politte’s and Towles’s speech did not contain fighting words, their speech is entitled to protection under the First Amendment.

Fighting words are not protected by the First Amendment Fighting words, by their very utterance, “inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1972). In *Chaplinsky*, this Court explained that fighting words are words that are “likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” *Chaplinsky*, 15 U.S at 572. Courts weigh the circumstances surrounding words in determining whether they constitute fighting words. *Id.* The words “must do more than bother the listener; they must be nothing less than an invitation to exchange fisticuffs.” *Id.*

Politte’s words can hardly be seen as fighting words because they were promoting the same anti-drug message as the school and were not insulting or promoting confrontation.

Towles’s words, while expressing a message of disapproval, also did not contain fighting words because there was no language that can be seen as challenging someone to fisticuffs.

3. Because Politte’s and Towles’s speech is distinguishable from cases where courts have found off campus speech regulation permissible due to substantial and material disruption of school activities, there speech is protected by the First Amendment.

As established by this Court in *Tinker*, Horton Hopkins cannot restrict Politte’s and Towles’s expression because their speech does not materially and substantially interfere with appropriate school discipline. *Tinker*, 393 U.S. at 509. This court articulated the school official’s

burden when it noted: “in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of Expression.” *Id.* To defend its actions, Horton Hopkins must demonstrate that they reasonably believe a foreseeable substantial disruption of or material interference would occur.

In *Wisneiski*, an eighth grade student had created icon on AOL Instant Messenger depicting a pistol firing a bullet at a person’s head with with the words: “Kill Mr. VanderMolen.” *Wisnieswski v. Board of Educ. of Weedsport Cent. School Dist.*, 494 F.3d 34, 36 (2d. Cir. 2007). The Second Circuit of the United States Court of Appeals concluded that even if the instant message could be viewed as an expression, the Instant Messenger icon was available for viewing by the student’s friends and classmates for three weeks. *Id.* at 36. In order to determine whether disruption was foreseeable, the Second Circuit of the United States Court of Appeals looked at the threatening nature of the icon, the number of students receiving it, and that it had been circulated for three weeks. *Id.* at 40.

Principal Smalls had a fear that a protest would break out, but there was no foreseeable risk of substantial and material interference. In *Tinker*, this Court stated that in order for a school to justify prohibition of student expression, they had to demonstrate more than a mere desire to avoid the discomfort and unpleasantness that always accompanies and unpopular view point. *Tinker* 393 U.S. at 511. Horton Hopkins has failed to show that their offered reason was caused by something more than a mere desire to avoid discomfort and unpleasantness.

In *J.S. v. Bethlehem Area School District*, the Common Wealth Court of Pennsylvania affirmed a student’s expulsion from school because the student created a website on his home computer titled “Teacher Sux.” *J.S.*, 757 A. 2d 412 (2000). After viewing a picture of her severed head dripping with blood, a picture of her face morphing into Adolph Hitler, and a

solicitation for funds to cover the cost of a hit man for the teacher, the algebra teacher had to take a leave of absence. The Commonwealth Court of Pennsylvania, noting that the case involved off-campus activity, applied the *Tinker* test and concluded the website hindered the educational process by distracting teachers.

Here, Politte's and Towles's website did not contain any violent or threatening communications. While Principal Smalls may have received a few phone calls regarding the photograph that Politte put on her webpage it was not a substantial amount of calls because she did not purport to have any major disruptions. Further, while other students accessed Politte and Towles's websites during their free time, there was no classroom interference.

Conversely, schools cannot restrict student speech simply because they do not approve of the students message. In *Beussink v. Woodland R-IV School District*, the court granted preliminary injunctive relief for the plaintiff after school officials attempted to suspend him after discover of derogatory material on his personal internet homepage. *Beussink v. Woodland r-IV School Dist.*, 30 F. Supp.2d 1175 (1998). The webpage had been created off school grounds and was critical of the school, the district, and employees. The principal admitted to suspending *Beussink* because he didn't approve of the content of the site.

Here, Principal Smalls admitted she was angry about Towles's criticism of the school officials' actions in dealing with the drug problem on school grounds. (R. at 4.) This Court stated that "clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline is not constitutionally permissible." *Tinker*, 393 U.S. at 511. Principal Smalls asked Politte to take down her site after seeing Towles's criticism of their policy, and had not previously expressed disapproval. Towles's website was constructed, students began accessing

both Politte's and Towles's website from their homes and school computer labs, and library during their free time throughout the school day and after school hours, but only during school hours.

In *Behymer-smith v. Coral Academy of Science*, a school was prohibited from preventing a student from reciting a speech which contained the words "hell" and "damn" because they failed to demonstrate that the poem materially and substantially interfered with the requirements of appropriate school discipline in the school. In *Behymer*, the Court recognized three areas of student speech discussed by the Supreme Court: 1) vulgar, lewd obscene, and plainly offensive speech, 2) School-sponsored speech, and 3) speech that falls into neither of these categories. *Behymer-smith v. Coral Academy of Science*, 427 F. Supp.2d 969, 972 (2006) (Citing *Frederick v. Morse*, 439 F.3d 114, 1121 (9th Cir. 2006).

Politte's and Towles's actions are similar to *Behymer* because they are not lewd or obscene, school sponsored, but is speech that falls into neither of those categories. Politte's website was accessed by members of the student body, but none of those students were engaging in rowdy disruptive behavior and only accessed the website during their free time.

In *Mahaffey v. Aldrich*, a high school student challenged his suspension for posting a death wish list, naming people he wanted dead on the site. *Mahaffey v. Aldrich*, 236 F. Supp.2d 779 (E.D. Mich. 2002). The website was called "Satan's Webpage" and stated specifically that the site's purpose was to say "what is cool and what sucks." *Id.* at 782. The United States District Court of Michigan found that no real threats were posed that would cause a substantial disruption and the school had acted unconstitutionally. *Id.* Appellants' conduct is similar to the high school student in *Mahaffey* because their sites were posing no real threat or harm.

In *Emmet v. Kent School District No. 415*, the District Court for the Western District of Washington issued a temporary restraining order prohibiting the school from suspending a high school student for creating a website from his house without using school resources or time. *Emmet v. Kent Sch. Dist.*, No. 415, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000). The site criticized administration and faculty, and mock “obituaries” of other students and allowed visitors to vote on who would be the subject of the next mock obituary. *Id.* The court held that there was not a true threat or that he student had any violent tendencies. *Id.*

This Court should be persuaded by this case because it is off campus speech as well and has similar conduct. Horton Hopkins fails to demonstrate that Polite and Towles’s websites contain language that could rightfully be restricted. Student speech is afforded more protection when it occurs off campus and does not fall into one of the exceptions.

II. HORTON HOPKINS SCHOOL OFFICIALS VIOLATED TOWLES’S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES WHEN THEY CONDUCTED A SEARCH OF HIS PERSON AND BELONGINGS WITHOUT REASONABLE CAUSE.

The Court of Appeals was correct when it held that the search of Towles violated his constitutional rights. However, the Court erred when it ruled that the school officials were exempted from liability by the doctrine of qualified immunity. Towles is entitled to the protection of the Fourth Amendment because the search of his person was not justified at its inception and was unreasonable. School officials cannot search the person or belongings of a student without reasonable cause to believe that the student is in violation of school rules.

A. Towles is entitled to protection under the Fourth Amendment because he had a legitimate expectation of privacy in his person.

The right to be free from searches of one’s person is a fundamental right. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). An expectation of privacy exists in any forum that has traditionally been

seen as beyond government interference, such as one's "person, papers, or effects." U.S. CONST. amend. IV. In order to establish a Fourth Amendment violation, Towles must establish that (1) he had a legitimate expectation of privacy in a location; and that (2) the privacy was breached by a government actor. *Terry*, 392 U.S. at 8-9.

An expectation of privacy does not arise merely because a person happens to be in a certain location, but in order "to receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is prepared to recognize as legitimate." *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)). Legitimate expectations of privacy have been recognized when a person is in their own home, *Terry*, 392 U.S. at 8-9; while a person is at work, *Oliver v. United States*, 466 U.S. 170, 178 (1984); and even when a person is walking down the street, *Terry*, 392 U.S. at 8.

In *Terry*, this Court held that a police officer is permitted to stop and frisk a person when the officer has reasonable suspicion of wrongdoing. *Terry*, 392 U.S. at 6. In that case, the officer was able to search three men because based on their unusual behavior, he had reason to believe that they were planning a robbery. *Id.* The three men took turns walking up and down the street and pausing to look into the same store window. *Id.* This indicated to the veteran officer that the men were planning to rob that store. This Court held that police officers can search a person without a warrant if the officer has reason to believe either that the suspect is engaged in wrongdoing or that he is in possession of a weapon. *Id.* Without this reasonable suspicion, a search is presumptively unconstitutional.

Here, the only evidence in Principal Smalls's possession was a photograph that showed Towles sitting next to a person who was smoking. (R. at 3.) The photograph did not indicate that Towles himself was smoking or engaging in any other wrongful conduct. *Id.* Unlike the officers

in *Terry*, here Principal Smalls had no reasonable suspicion that Towles had used drugs or that he was in possession of drugs at the time of the search.

B. The school officials who breached Towles’s right to freedom from unreasonable searches are state actors because public school officials are creatures of the state.

In order to establish a Fourth Amendment violation, Towles must prove the second prong of *Terry*, that the person who committed the unreasonable search was a state actor. *Terry*, 392 U.S. at 8-9. Under the Incorporation Clause of the Fourteenth Amendment, the Fourth Amendment applies to state actors as well as to federal actors. *Elkins v. United States*, 364 U.S. 206, 213 (1960). This Court found in *Camara v. Municipal Court* that “[the] basic purpose of the Fourth Amendment... is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The educational system is regulated by the government and is “an activit[y] of sovereign authority” because all students are required to attend some form of school. *T.L.O.*, 469 U.S. at 335. Because of the involvement of government in every aspect of the educational system, schools and school officials are considered state actors. *Id.* Therefore, the action of the school officials, as state actors, in unreasonably searching Towles is a violation of Towles’s Fourth Amendment rights.

C. Towles is protected by the Fourth Amendment because the search of his person was unsupported by reasonable suspicion and was therefore unconstitutional.

Only those searches that are determined to be “arbitrary,” *Camara*, 387 U.S. at 528, or “unreasonable,” *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 619 (1989), are invalid under the Fourth Amendment. The key to determining what is reasonable “depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *Id.* (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

This Court has held that all of the circumstances surrounding a search must be considered in determining its validity. *T.L.O.* at 341. Courts must take the school's reasons for conducting the search into consideration and weigh them against the student's right to be free from searches. *Id.* It is only when the school's interest in conducting the search outweighs the student's interest in personal security that a search of that student will be constitutional. *Id.*

As part of its analysis of the search, this Court should also take into account whether the school's policy imposes sanctions that are inconsistent with the rulings of this Court. In *Vernonia v. Acton*, this Court held that school officials have the right to conduct random drug tests on students who participate in extra-curricular activities. *Vernonia*, 515 U.S. at 650. The school in that case required all students who wished to participate in any after school activities to submit to a urinalysis test. *Id.* The purpose of the test was to insure that the students were not using illegal drugs and thereby to protect student health and safety. *Id.* This Court held that since schools have a legitimate interest in preventing drug use amongst its athletes, the school officials are permitted to order drug tests for everyone who signs up for a school-sponsored activity. *Id.* at 661. This Court was careful to note, however, that an important aspect of its decision in *Vernonia* was that the information obtained in the search would not be "turned over to law enforcement authorities or used for any internal disciplinary function." *Vernonia v. Acton*, 515 U.S. 646, 658 (1995).

Here, the fact that the school drug policy requires students found to be in possession of drugs or alcohol to be suspended from school for at least three days and perhaps face criminal penalties, distinguishes this case from *Vernonia*. Because the Horton Hopkins drug policy specifically imposes disciplinary sanctions on students who violate it and includes the possibility of arrest, the school should be held to a higher standard than that used by this Court in *Vernonia*.

Since the school's drug and alcohol policy is inconsistent with this Court's prior rulings, the search of Towles conducted pursuant to that policy must be deemed unconstitutional.

III. THE SEARCH OF TOWLES BY SCHOOL OFFICIALS VIOLATED HIS FOURTH AMENDMENT RIGHTS BECAUSE IT WAS NEITHER JUSTIFIED AT ITS INCEPTION NOR REASONABLE IN SCOPE.

In *T.L.O.*, this Court held that school officials were permitted to conduct a search of a student's person and possessions as long as the search was "reasonable." 469 U.S. at 341. The student in that case had been seen smoking cigarettes in a school lavatory. *Id.* at 328. Upon searching the student's purse, the vice principal discovered additional drugs as well as drug paraphernalia. *Id.* This Court held that the search was valid because the vice principal had been told by a school teacher that the student had been smoking on school property. *Id.* at 345. Because the search was confined to the student's purse, an area that is usually used to conceal drugs, the search was deemed "reasonable."

Here, there was no evidence that Towles was seen breaking any school rules or engaging in any drug-related activity. Towles certainly had not been seen smoking on school grounds, as had the student in *T.L.O.* Because Towles was not witnessed using or possessing drugs on school property and because the search of his person went farther than necessary to determine whether a violation had occurred, this Court is not bound by its holding in *T.L.O.*. This Court is therefore free to hold that the search of Towles was an unconstitutional invasion of his Fourth Amendment rights.

- A. The search of Towles was not justified at its inception because the school officials lacked reasonable grounds to believe that the search of Towles would turn up evidence that he had violated the rules of the school.

The first prong of the reasonableness test found in *T.L.O.* is that a search must be justified at its inception. In *T.L.O.*, this Court defined the justified at its inception prong as "reasonable

grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *T.L.O.*, 469 U.S. at 341. This requirement of reasonable suspicion does not necessitate absolute certainty; it is merely a standard of sufficient probability. *Id.* at 737. School officials are not proscribed from searching a student until they know for certain that the student has violated school rules. *Id.* However, school officials may not conduct a search simply on a hunch. *Id.* at 731.

In *Cornfield v. Consolidated High School District No.230*, the United States Court of Appeals for the Seventh Circuit held that school officials could strip search a student who, over the course of a week, was observed on multiple occasions to have a suspiciously shaped bulge in the crotch area of his pants. *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993). The student had a history of disciplinary problems and attended a behavioral disorder program. There were also allegations that he had previously been seen in possession of drugs while on campus. Although the search of the student was upheld, the Seventh Circuit Court was careful to distinguish the case because “given [the teachers’] suspicion that [the student] was [concealing drugs in his groin area], their conclusion that a strip search was the least intrusive way to confirm or deny their suspicions was not unreasonable.” *Cornfield*, 991 F.2d at 1323. The observations of several teachers that the student appeared to be concealing something inside his clothing justified a search of his person because a strip search was the only way for the school to determine whether the “bulge” that had been observed was drugs, a weapon, or something innocuous.

Here, there is nothing in the record to indicate that Towles had any kind of unusual bulge anywhere on his person. Nor was Towles observed acting in a suspicious manner while on school property. While in the *Cornfield* case, removing the student’s clothing was the only way

to determine what the peculiar bulge in his groin was, there was no such necessity here. Because school officials had no reason to believe that strip searching Towles was the only means of locating any drugs that might be concealed within his clothing, the search of Towles is not analogous to that of that of the student in *Cornfield*. As a result, this Court may distinguish this case from *Cornfield* and hold the search of Towles unconstitutional.

1. The search of Towles was unconstitutional because it was not based on information known to the school officials at the time that the search began.

School officials cannot use any contraband found during a search as a means of justifying that search. The school officials must know the reason for the search at the time the search begins. *Phaneuf*, 448 F.3d at 591; see also *United States v. Swindle*, 407 F.3d 562 (2d Cir. 2005); *Des Roches v. Caprio*, 156 F.3d 571 (4th Cir. 1998). Allowing school officials to justify a search using the evidence discovered in that search would be a violation of the principles underlying the Fourth Amendment. *Terry*, 392 U.S. at 9.

At the time the search began, the school officials knew that police had cited several students at the party. (R. at 3.) Towles was not one of the students who were cited by police; therefore, the school officials had no justification for believing that Towles had been in possession of drugs or alcohol at the party. Without that belief, Principal Smalls had no reasonable justification for searching Towles. Nor is it relevant that Mr. Conrad and Mr. Thompson have a history of marijuana possession. Their previous possession of drugs might have made a search of their respective persons more reasonable, but it has no bearing on a search of any other student. To permit a search just because a student has friends who have used drugs “is nothing more than ‘guilt-by-association.’” *Redding v. Safford Unified Sch. Dist. No.1*, 531 F.3d 1071, 1084 (9th Cir. 2008). Guilt-by-association is not a strong enough basis on which to

deny a constitutional right. *Id.* Towles has no prior history of drug use. The mere fact that he was at a party with people who did have such a history is not enough to establish that Towles himself was in possession of drugs.

- B. The search of Towles was unconstitutional because it was highly intrusive and not reasonable in scope due to the fact that the measures adopted were not reasonably related to the objectives of the search.

The second prong of the T.L.O. analysis requires that the search be reasonable in scope; “a search will be permissible in its 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” *T.L.O.*, 469 U.S. at 342. Even if this Court finds that the search of Towles was justified at its inception, the search can still be declared invalid “by virtue of its intolerable intensity and scope.” *Terry* 392 U.S. at 18. It is necessary, therefore, to examine the scope of the search by taking into account three factors: (1) the age of the student who was searched; (2) the sex of that student, and by extension the sex of the searching party; and (3) the nature of the infraction.

A search conducted in the same manner and under the same circumstances might be decided differently depending on whether the child was twelve or eighteen. *Doe v. Renfrow*, 61 F.2d at 91; *Jenkins v. Talladega City Board of Education*, 115 F.3d 821 (11th Cir. 1997). In the case of prepubescent children or very young teenagers, courts have wavered on whether to allow school officials to strip search students; “it does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude.” *Renfrow*, 631 F.2d at 92-93. This Court has also recognized, however, that prepubescent children are less likely to be sensitive to the indignities of a strip search because

they are more accustomed to having adults assist them in restrooms and with dressing. *Jenkins*, 115 F.3d at 827.

Older children are also entitled to protection from unreasonable searches because of the emotional issues that are often present in adolescence. In *Cornfield*, the Court of Appeals for the Seventh Circuit found that “the sixteen-year-old [student] was of an age at which children are extremely self-conscious about their bodies: thus, the potential impact of a strip search was substantial.” *Cornfield*, 991 F.2d at 1323. Although it ultimately upheld the search, the court in *Cornfield* recognized that adolescence is a time at which children are likely to be extremely sensitive to the indignities surrounding a strip search. *Id.* A Court reviewing a search should take into account the age of the child and the likely impact that a strip search would have on a person of that age.

Like the student in the *Cornfield* case, Towles is sixteen and can be assumed to suffer all of the traditional anxieties that accompany adolescence. Because of his age, the school officials, who are given charge of young people and are presumably familiar with children’s anxieties, should have been sensitive to the fact that a strip search would be a severe intrusion. Out of respect for the sensitivity of adolescent students, the school officials should use a strip search only as a last resort.

A search can still be excessively intrusive even if a member of the same gender as the student performs it. In *Phaneuf v. Fraikin*, a strip search conducted by the female student’s mother and witnessed by two female staff members was held invalid because the search was both unreasonable and excessive in light of the circumstances. *Phaneuf v. Fraikin*, 448 F.3d 591 (2006). The fact that all of the parties involved in the search of Towles were male is not dispositive in determining the validity of the search.

The manner of the search is key to an analysis of this prong, because “as the intrusiveness of the search intensifies, so too does the standard of Fourth Amendment reasonableness.” *Cornfield*, 991 F.2d at 1321. If a search is “intrusive” and if it invades the “interests of students” farther than “is necessary,” the search will be unreasonable. *Id.* If the alleged infraction is relatively minor, such as the theft of a small amount of money, a strip search is likely to be seen as an unconscionable intrusion on personal liberty.

In *Oliver v. McClung*, the District Court for the Northern District of Illinois held that the strip search of thirteen year old girls in order to obtain four dollars and fifty cents is unconstitutional. *Oliver v. McClung*, 919 F.Supp. 1206, 1214 (N.D. Ind. 1995). The search in *Oliver* was conducted in response to the reported theft of four dollars and fifty cents from a middle school gym class. All of the girls in the locker room were forced to remove all of their clothing, including their bras, in order to establish that they had not taken the money. The Court was not convinced that the indignity of a strip search was warranted in a case involving such a small amount of money. Although the District Court in *Oliver* was careful to say that the age of the students would not have made the search improper if it was for the purpose of finding drugs or weapons, that reasoning is clearly not applicable here since there was no evidence that Towles possessed drugs at the time he was searched.

C. Horton Hopkins officials are not entitled to a grant of summary judgment based on the doctrine of qualified immunity because Towles can establish a constitutional violation and his right to be free from searches was clearly established at the time of the violation.

The doctrine of qualified immunity is an exemption from suit that is granted to “government officials performing discretionary functions.” *Wilson v. Layne*, 526 U.S. 603, 609 (1999). This immunity serves to give government officials a “shiel[d] 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.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Qualified immunity is an entitlement to be free from the encumbrances of litigation and it is not a defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). If a party is held to be a state actor, he can assert the doctrine of qualified immunity at an early stage of litigation. *Saucier v. Katz*, 533 U.S. 194 (2001). If the elements of qualified immunity are present, the appropriate remedy is summary judgment. *Id.*

This Court has indicated that for constitutional purposes, public school teachers are state actors. *T.L.O.*, 469 U.S. at 334. As a result, school officials may claim that they are immune from suit. *Id.* Here, Horton Hopkins cannot establish that (1) it did not violate Towles’s constitutional rights and that (2) these rights were not clearly established at the time of the violation. Therefore, the lower court erred in granting qualified immunity to the school officials.

This Court recently decided that it is often most efficient to first determine whether a constitutional violation has taken place. *Pearson v. Callahan*, No. 07-751, 2009 U.S. LEXIS 591 at *16 (Jan. 21, 2009).

1. Because Towles can establish that a constitutional violation occurred, he can defeat the first prong of a motion for qualified immunity.

The first prong of the qualified immunity analysis is whether, “taken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer’s conduct violated a constitutional right.” *Katz*, 533 U.S. at 194. Absent a constitutional violation, there is no need to proceed further with a qualified immunity analysis. *Id.*

Towles can assert a constitutional violation. A bodily search “is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.” *Terry*, 392 U.S. at 17. There must be some evidence to justify this “serious intrusion.” *Id.* Without even minimal reason to believe that Towles had violated any

school rule, the school officials did not have enough evidence to support such an intrusive search. Absent a reasonable belief that Towles had violated school rules, the strip search conducted by school officials constituted a violation of Towles's Fourth Amendment rights.

2. Because Towles's right to be free from unreasonable searches was clearly established at the time of the search, he can defeat the second prong of the qualified immunity analysis.

The second prong of the qualified immunity analysis determines "whether the right at issue was "clearly established" at the time of the alleged misconduct," *Pearson v. Callahan*, 2009 U.S. LEXIS 591, at *16, (quoting *Saucier v. Katz*, 533 U.S. at 194). This requirement is designed to prevent government officials from being held liable for activities that they had no reason to believe were illegal. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If the right is not clearly established, the government official would have no reason to believe that his activities were improper and thus would be immune from liability. *Id.*

There has been disagreement among the courts as to whether school officials have the right to strip search their students in an attempt to locate illegal drugs. In general, what has been clearly established is that there must be "some quantum of individualized suspicion" in order for such a search to be permissible. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976). While there have been exceptions to the requirement of individualized suspicion, these "are generally appropriate only where the privacy interests implicated by a search are minimal." *T.L.O.*, 469 U.S. at 342.

A strip search is far from a "minimal" intrusion on constitutional liberties. *Terry*, 392 U.S. at 17. It has been clearly established that in circumstances other than minimal intrusions, reasonable and individualized suspicion must be found in order for a search to be valid. *T.L.O.*, 469 U.S. at 342. Because there was no reason for Principal Smalls to suspect that Towles had

been in violation of either the law or the rules of the school, the search that was performed on Towles's person and effects was both unreasonable and unconstitutional. Towles's right to be free from that search was clearly established at the time of its invasion.

Because the school officials cannot establish that they were entitled to regulate Politte's and Towles's off-campus websites, the students' are entitled to protection under the First Amendment for their internet speech. And since Towles has established that his constitutional rights have been violated by the unconstitutional search of his person and belongings, he is entitled to relief under the Fourth Amendment.

CONCLUSION

For the aforementioned reasons, Ms. Politte and Mr. Towles respectfully request that this Court reverse the judgment of the Court of Appeals of the State of Grace.

Respectfully Submitted,

Team No. 19
Counsel for Petitioners

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