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IN THE
SUPREME COURT OF THE STATE OF GRACE

Ms. Kit Politte and Mr. Corey Towles,
Petitioners,

v.

Horton Hopkins School District and Ms. Keena Smalls,
Respondents.

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

BRIEF FOR THE RESPONDENTS

Team No. 20
Counsel for Respondents

QUESTIONS PRESENTED

1. Whether under the First Amendment, school officials may regulate a student's internet speech when the creator can reasonably foresee the expression reaching school grounds, the expression actually does reach school grounds, and the expression creates a reasonably foreseeable risk of substantial disruption to the school environment?

2. Whether under the Fourth Amendment, school officials who have a reasonable suspicion that a student is either using or possessing drugs may conduct or order a personal search of that student when the school has experienced an increase in the quantity and severity of drug related incidences involving its student and the search is necessary to protect the safety and welfare of the school community?

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RELEVANT CONSTITUTIONAL PROVISIONS

First Amendment

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

U.S. Const. amend. I.

Fourth Amendment

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

U.S. Const. amend. IV.

RELEVANT SCHOOL POLICY

Horton Hopkins School District
DRUG AND ALCOHOL USE POLICY

Horton Hopkins School District recognizes that the illegal use of alcohol and drugs is unacceptable and that the problems associated with it pose a significant threat to our school community and to society in general. The District further understands that the use of chemical substances can have a profound impact on the student's own education, as well as other students' educational opportunities. The District therefore takes the following steps to maintain a drug-free school system.

Suspicion of Drug Use or Drug Possession

When drug use or possession is suspected on school property, the District reserves the right to conduct personal searches of students, as well as searches of lockers, desks, other school property, and book bags and other personal containers. The District will request consent before beginning a search, however, the school may continue with a search even if the student refuses to give consent. The District may also conduct drug testing by urinalysis on an as-needed basis. The District will balance the likelihood the student possesses drugs against the risk of infringing the student's individual rights.

a) Personal Search
   The District may contact a student's parent or legal guardian before commencing a personal search, but this is not mandatory. The District may judge if parental involvement is necessary on a case-by-case basis. A faculty member of the same gender as the student will conduct the personal search.
b) Consequences
   1. Illegal drugs
      In cases where students are found in possession or under the influence of illegal drugs, the school may contact police, and must contact the student's parent or legal guardian. Discipline will be decided on a case-by-case basis, but the offending student will receive a suspension of no less than three days.
   2. Alcohol or tobacco
      A parent or guardian will be notified in cases where a student is found in possession or under the influence of alcohol or tobacco. The District will dispose of all alcohol or tobacco, and notify the parent or guardian of the disposal.
   3. Extra-curricular activities
      Students in violation of this policy will be banned from all athletic and other extra-curricular activities for the remainder of the school year.

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STATEMENT OF THE CASE

1. The State of Horton Hopkins School

For twenty years Keena Smalls ("Principal Smalls") has been the principal at Horton Hopkins High School ("Horton Hopkins"). (R. 1) In response to the increase drug use on school grounds and the tragic loss of the school's volleyball team captain to a cocaine overdose, the school enacted a zero tolerance drug policy. (R. 1, 15) "Horton Hopkins School District Drug and Alcohol Policy" provides that upon suspicion of drug use or possession, the school reserves the right to conduct a personal search of the student. (R. 15)

2. Petitioner Politte Creates a Student Organization and Webpage

In September of 2008, Petitioner Kit Politte, ("Petitioner Politte") a senior at Horton Hopkins, started a school sponsored club called "Drug Use Damages Schools" ("DUDS") which consisted of approximately 130 Horton Hopkins students. (R. 2) Following a group organized assembly; the guest speaker told Petitioner Politte that the best way to curb drug use was to point out drug dealers and users to the community. (R. 2) That evening, Petitioner Politte created a network webpage from her home computer on Friendkepedia, a social networking site. (R. 2) Petitioner Politte's webpage, "Fighting All Dealers" ("FAD"), solicited tips about suspected drug dealers. (R. 2) Petitioner Politte reads the submitted emails and anonymously posts what she believes are the strongest tips. (R. 2) She promoted her webpage at a DUDS meeting held in a classroom at Horton Hopkins, after class hours. (R. 2) At the time, 198 of the 235 network members were Horton Hopkins students and 130 students were also members of DUDS. (R. 2)

3. The Party and Photographic Tip

Petitioner Corey Towles ("Petitioner Towles" or "Petitioner") is a sixteen year old recent transfer student. (R. 2) In October of 2008, Petitioner Towles attended a party at the home of

Jeff Tweegs ("Tweegs") who had recently been suspended for smoking marijuana. (R. 2) Despite Tweegs' disciplinary record, and rumors that there would be marijuana at the party, Petitioner Towles was anxious to befriend Tweegs because he was the captain of the baseball team. (R. 2) He hoped that by attending the party his chances of making the team would increase. (R. 2) Petitioner Towles attended the party, where students were smoking and drinking beer, he did not see any drug use. (R. 3) After Petitioner Towles left the party, the police arrived and cited students for underage drinking; Frank Conrad was cited for possession of marijuana. (R. 3) Petitioner Politte received an email the next day with an attached photograph taken at the party which pictured John Thompson smoking an unidentified substance sitting with Petitioner Towles and another student, Frank Conrad. (R. 3) Petitioner Politte posted the photo on the website with a caption that read "*Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?*" (R. 3) The names of the students were not posted, but Petitioner Towles' face was clearly visible in the photo. (R. 3)

4. The Search

The police and several parents contacted Principal Smalls and reported that students had been cited at the party. (R. 3) Principal Smalls viewed the page and then called Petitioner Towles, John Thompson, Frank Conrad and Tweegs into her office. (R. 3) All four students denied possessing drugs. (R. 3) As per school policy, Principal Smalls conducted a search of each of the students' lockers and book bags. (R. 3) Although the students previously denied possessing drugs, during this search she found a bag containing marijuana in Frank Conrad's locker. (R. 3) Due to the seriousness of the suspected infraction and the fact that marijuana had been uncovered in the preliminary search, even though the students did not consent to a personal search when asked, Principal Smalls instructed the physical education teacher, Mr. Waters, to

conduct a search. (R. 3) Each boy was taken to a private room where he was asked to remove all clothing except his undergarments. (R. 3) Mr. Waters only searched the student's clothing and never touched the boys. (R. 3) Although no drugs were found in Petitioner Towles' possession, Mr. Waters did find marijuana in John Thompson's jeans pocket. (R. 3)

5. Towles Creates His Own Webpage Calling For Action

In response to the postings on Petitioner Politte's webpage and the subsequent search conducted, Petitioner Towles went home and created his own webpage called Students Against Defamatory Statements ("SADS"). (R. 3) Towles posted a message on his webpage which encouraged students to "fight the injustice." He stated "I call for all Horton Hopkins students to let our administrators know. . ." and also referred to Principal Smalls as one of the "Hopkins idiots." (R. 4) Students heard about the webpages and began accessing them from school computers. (R. 4) Feeling that the situation had "gotten out of control" and in an attempt to preempt any future substantial disruption, Principal Smalls instructed both Petitioners to take down their webpages. (R. 4) Since they both refused, Principal Smalls suspended the students until they complied. (R. 4) Although Principal Smalls admitted to being annoyed by the criticism, her main concern was keeping order and discipline at the school because she believed there was potential for a student protest and that the webpages had already started to disturb the classroom environment and the education of other students at Horton Hopkins. (R. 4)

6. Petitioners File Suit Against Horton Hopkins and Principal Smalls

Petitioners brought a First Amendment claim against Horton Hopkins and Principal Smalls, as applied to school officials through the Fourteenth Amendment, in the Badger County District Court that the demand to take down their webpages was unconstitutional. (R. 1) Petitioner Towles also alleged that his search was unconstitutional as a violation of the Fourth

Amendment, as applied to school officials through the Fourteenth Amendment. (R. 1) The District Court held that there was not a violation of the students' rights and granted summary judgment. (R. 8) The Petitioners appealed the decision to the State of Grace Court of Appeals which affirmed the District Court decision in regard to the First Amendment issue. (R. 10) The Court held that the search was unreasonable, however, they found that the school officials were entitled to qualified immunity. (R. 12) The Petitioners have appealed the decision to this Court.

SUMMARY OF THE ARGUMENT

Principal Smalls' actions were those of a responsible educator merely ensuring the safety and welfare of the school community. At no time was there a violation of either Petitioners' Constitutional rights. Petitioners allege that the actions of the school violated their First and Fourth Amendment rights. However, holding in favor of the Petitioners would cripple Horton Hopkins by severely hindering their ability to maintain order in their schools.

School Officials have a right to regulate student expression, whether in or outside of the classroom, which either materially or substantially disrupts the classroom environment or when the factual circumstances may lead an official to reasonably forecast a substantial disruption. Although several lower courts have applied this standard to off campus speech, in the absence of a clear Supreme Court precedent, some courts limit the reach of school officials to situations where the student created speech can reasonably be foreseen to reach campus, or when the speech actually reaches school grounds. In this case, both Petitioners' websites called for student action and were accessed on school computers. Therefore, the speech contained in the webpages is subject to regulation by school officials despite the fact that it was created off campus.

Since school officials have a duty to preempt disruption to the school environment if the surrounding circumstances lead to a reasonably foreseeable disruption, the school may regulate

speech. However, they may not do so merely because the school disfavors the viewpoint. Schools may also use this reasonable forecast standard to punish students after the publication of such speech. In the present case, since both webpages called for action on behalf of the students, and the students of the school had already accessed the site from school computers and were "riled up," it was reasonable for Principal Smalls to conclude that there was a reasonable forecast of substantial disruption and demand that the Petitioners take down their webpages. Additionally, from a public policy perspective, given the nature of communicative technology it is imperative that school officials have a form of recourse when students, such as Petitioners, post messages on the internet which may substantially disturb the school environment.

Furthermore, the search of Petitioner Towles did not violate his Fourth Amendment rights because the search was both justified at its inception and reasonable in scope, and as such met the requirements set forth by the Supreme Court in *T.L.O.* and its progeny for a constitutionally permissible search under the Fourth Amendment in the school setting.

Faced with the growing problems of drug use within our schools, courts have relaxed the probable cause requirement traditionally mandated for a constitutional search, and in its place have adopted a reasonableness standard. First the Court requires that a search be justified at its inception. A search will be considered justified at its inception when the facts necessitating the search would lead a reasonable person to believe that there was a violation of a law or regulation. In the case at bar, the reasonableness comes from a photographic tip which suggested that Petitioner Towles may be using or possessing drugs. Based on the tip, an initial search of the backpacks and lockers was conducted. Because marijuana was found in the locker of one of the students who was pictured with Petitioner Towles, the secondary search was also justified at its inception. The marijuana which was uncovered in the initial search provided the corroboration

necessary to move on to a more thorough search.

The court also requires that a search be reasonable in scope. This determination is made by weighing the age of the student, the suspected infraction and the extent of the search. Here, taking into account the serious nature of the suspected infraction, drug use, the fact that the student was a sixteen year old student athlete, and the fact that the student was not subject to a nude strip search nor was he physically touched at any time, the search falls well within the bounds of what the courts have considered reasonable under the Fourth Amendment.

Finally, even if this court were to find that the search of Petitioner Towles was not reasonable under the Fourth Amendment, the law regarding personal searches within the school setting is not clearly established, and for that reason the school officials at Horton Hopkins are entitled to qualified immunity.

STANDARD OF REVIEW

In cases which involve a First Amendment right, the Supreme Court has held that 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." Therefore the appropriate review is *de novo*. *Bose Corp. v. Consumers Union of U.S.*, Inc. 466 U.S. 485, 499 (1984). Likewise, in *Ornelas v. United States,* the court held that as a general matter, cases involving reasonable suspicion under the Fourth Amendment should be reviewed *de novo* on appeal. 517 U.S. 699 (1996).

ARGUMENT

I. PETITIONERS' FIRST AMENDMENT RIGHTS WERE NOT VIOLATED BY THE DEMAND TO TAKE DOWN THEIR WEBPAGES BECAUSE STUDENT INTERNET SPEECH WHICH CREATES A REASONABLE FORECAST OF SUBSTANTIAL DISRUPTION MAY BE REGULATED BY SCHOOL OFFICIALS.

While students do maintain First Amendment rights upon entering school grounds, those rights "are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The Supreme Court has held that student expression, whether "in class or out of it" may be regulated by school officials if such expression has the effect of "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school . . ." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969). The school may also regulate speech when there are "any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . ." *Id*. at 514. Student speech is also denied First Amendment protections when it is either vulgar or offensive. *Bethel*, 478 U.S. at 683. Additionally, a school is also permitted to maintain editorial control over content and style of school sponsored student expression. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). First Amendment guarantees do not extent to threats, whether they occur on or off campus. *Watts v. United States*, 394 U.S. 705 (1969).

While the Supreme Court has not dealt with a case involving purely off campus speech, the Court has found it proper for a school to regulate a student's expression in the interest of deterring drug use during an off campus school approved, class trip during school hours. *Morse v. Frederick*, 127 S. Ct. 2618, 24, 28 (2007). However, in the absence of clear Supreme Court precedent which addresses student speech, created off campus, which is not associated with a school sponsored activity, many lower courts have applied *Tinker* when it was reasonably foreseeable that the expression would reach school grounds or actually did reach school grounds. *See Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2nd Cir. 2007); *Boim v.*

Fulton County Sch. Dist., 494 F.3d 978, 985 (11th Cir. 2007). The lower courts have upheld a school's regulation of student expression if the facts would reasonably lead school administrators to forecast a substantial disruption to the school environment. *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 974 (5th Cir. 1972); *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 827-28 (7th Cir. 1998). Furthermore, from a public policy perspective, it is imperative that school administrators be able to regulate student speech created over the internet.

In the case at bar, while neither webpage can be characterized as a threat, nor did they contain language that was vulgar or offensive, nor was either website sponsored by the school. (R. 2, 4) However, since both webpages used language which called for action on behalf of the students, it was reasonably foreseeable that the Petitioners expression would reach school grounds. (R. 2, 4) Additionally, this expression also reached school grounds when members of the student body accessed the speech from school computers. (R. 4)

Therefore, it was not only appropriate for Principal Smalls to demand that the webpages be taken down, but also a necessary preemptive measure employed to avoid substantial disruption to Horton Hopkins. Hence, the decision of the lower courts should be affirmed with respect to the First Amendment Issue.

A. Student internet speech is subject to regulation by school officials when it is foreseeable that the speech will reach campus, or when the speech actually does reach campus.

As evidenced by the content of the webpages created by the Petitioners, each webpage was created with the intention that the message would reach the students of Horton Hopkins and each student did in fact succeed in that mission. (R. 2, 4). Therefore, Principal Smalls' demand that the webpages be taken down did not violate the Petitioners' First Amendment rights.

The Supreme Court in *Tinker* held that student expression "in class or out of it" which

materially disrupts class work, or gives administrators cause to reasonably forecast a substantial disruption to the school environment, is not protected by the constitutional guarantee of freedom of speech. 393 U.S. at 513- 14. (holding that wearing black armbands to school in protest of the Vietnam War did not materially and substantially disrupt the classroom environment nor was there a reasonably forecast of substantial disruption). Since *Tinker*, the Supreme Court has not heard a case involving expression created off campus which was not part of a school activity, but several lower courts have, and have applied the standard set forth in *Tinker. E.g., Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587,601 (W.D.P.A. 2007); *See Shanley*, 462, F.2d at 970; *Klein v. Smith*, 635 F. Supp. 1440, 1442 (W.D.P.A. 1986); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Miss. 1998). Since it has been the predominant practice by the lower courts, it is proper for this Court to apply the *Tinker* standard when evaluating the First Amendment claim of Petitioners.

Although other courts have applied *Tinker* only in limited circumstances, even in these jurisdictions, Petitioners' webpages would be subject to a *Tinker* analysis. In the Second Circuit, the court applied *Tinker* to off campus speech when the student could foresee the expression created reaching school grounds or school authorities. *Wisniewski*, 494 F.3d at 39, *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 48 (2nd Cir. 2008).

In *Wisniewski,* the Second Circuit decided that it was appropriate to use the *Tinker* standard when evaluating whether it was proper for a school to discipline a student for creating an AIM icon which depicted a gun firing a bullet into a man's head and the words "Kill Mr. Vandermolten," the school's English teacher, because it was reasonably foreseeable that the icon would come to the school's attention. 494 F.3d at 35, 39-40. A year later the Second Circuit

relied on that decision in *Doninger* when it upheld a school's decision to disqualify a student from running for senior class secretary because she posted a message on her livejournal.com blog which encouraged her fellow students to contact the school's principal to "piss her off." 527 F.3d at 45-46, 50. By advocating that the student body contact the school's principle, it was reasonably foreseeable that the student expression would reach school officials. *Id*.

Here, it was foreseeable that both Petitioners' webpages would reach school grounds. Similar to the student's post in *Doninger*, Petitioner Towles' statement "*I call for all Horton Hopkins students to let our school administrators know*" was a call to action that was intended to reach school officials. (R. 4) Moreover, like the icon in *Wisniewski*, Petitioner Politte could foresee that the content of her webpage would reach school when she made posted a picture of Horton Hopkins' students and included the caption "*Are Horton Hopkins students becoming drug dealers?*" (R. 3) Therefore, *Tinker* reaches the content of both Petitioners' webpages.

Furthermore, other Circuit and District Courts have applied *Tinker* when the student expression reaches school grounds, whether the student intended for the communication to reach campus or not, when the student does not properly safeguard his expression. *Boucher* 134 F.3d at 829; *Boim*, 494 F.3d at 985; *Porter v. Ascension Parish Sch. Bd.*, 393 F. 3d 608, 615 (5th Cir. 2004); *Killion v. Franklin Reg'l Sch. Dist.*, 135 F. Supp. 2d 446, 455 (W.D.P.A. 2001).

In *Killion*, the court determined that *Tinker* was the appropriate standard to apply when a student was punished for creating and e-mailing a "Top 10" list about the school's athletic director which was then reformatted and brought to school by an undisclosed student. 135 F. Supp. 2d at 448, 454. The court acknowledged that there was no need to determine if a heightened level of scrutiny need apply because there was "overwhelming authority to analyze according to *Tinker*" and while it was not brought onto campus by the creator, it still reached

school grounds. *Id.* at 454. Similarly, the Eleventh Circuit in *Boim* emphasized that since a student failed to safeguard her expression by bringing her narrative to school and then showing it to her friend, the narrative had entered the realm of school authority and *Tinker* was the appropriate standard. 494 F.3d at 983, 989. The Seventh Circuit also applied *Tinker* when evaluating a student's article, featured in an underground newspaper, which instructed students on how to hack into the school's computer system. *Boucher*, 134 F.3d at 826-827. Even though the newspaper was created off campus, since it not only advocated for action within the school, but was also distributed in school bathrooms and lockers, the court held that *Tinker* was the appropriate standard. *Id.* at 828. Conversely, in *Porter,* the Fifth Circuit determined that the school's jurisdiction did not reach a student's painting that was brought to campus, and thus, did not apply *Tinker*. *Porter*, 393 F. 3d at 615. The Court found that since the student created the picture in his own home, stored the painting in his closet, and the painting was subsequently found by his brother and brought to school without the creator's knowledge two years later, the student had attempted to safeguard his speech, had no intention to have it reach campus, and did not foresee that such speech would actually reach campus. *Id.*

Here, like in *Killion,* although neither student accessed their webpages on school grounds, they were accessed by other members of the student body on school computers. (R. 4) Additionally, similar to the article in *Boucher,* both students advocated for action by the student body which then lead to the webpages being accessed on the school's computer. (R. 4) Furthermore, Petitioner Politte, like in *Boim,* promoted her webpage to DUDS members at the meeting that took place in a school classroom after class hours. (R. 2) Moreover, the webpages of both Petitioners are clearly distinguishable from *Porter* because neither student made any attempt to safeguard their expression from reaching the school grounds. (R 1-4). Therefore,

since the expression reached school grounds, *Tinker* may be appropriately applied.

Conversely, the Second Circuit has held that when activity is deliberately designed to take place off of school grounds, even if there are a few inconsequential contacts with the school, the school is not permitted to extend its power over the student's expression in accordance with *Tinker*. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2nd Cir. 1979). In *Thomas,* the court held that even though there was some school contact, the student's satirical publication was deliberately designed to be an expression off school grounds and was improperly regulated by the school authorities. *Id.* However, several courts that do apply *Tinker* to off campus expression rely on the *Thomas* decision. *E.g. Wisniewski*, 494 F.3d at 39. In *Thomas* the court acknowledged that there may be situations in which students substantially disrupt the school environment from a remote location, permitting the school to regulate off campus expression. *Thomas*, 607 F.2d at 1052 n17. The case at bar is distinguishable. Unlike the publication in *Thomas,* it was clear that both Petitioners' speech was intended to reach campus. Petitioner Politte announced her website to other students while on school grounds and also posted a picture of Horton Hopkins students. (R. 2-3) Moreover, Petitioner Towles specifically called for action by the student body against the school administration on his webpage. (R. 4)

The Petitioners' webpages, although created off campus, may be regulated by school officials if the requirements of *Tinker* are met because it is customary in the lower courts to apply this standard to off campus expression, it was foreseeable that the webpages would reach Horton Hopkins school grounds, and that the webpages actually did so.

B. Petitioners' webpages created a reasonably foreseeable risk of substantial disruption to the Horton Hopkins school environment and for that reason the demand to take down the webpage was proper.

Petitioners each created a webpage that specifically called for action by students that

attend Horton Hopkins. (R. 2, 4) This call to action created a reasonably foreseeable risk of substantial disruption to the classroom environment. Thus, Principal Smalls' demand that the webpages be taken down and enforcement of suspension upon both Petitioners' refusal was not only proper but necessary as a responsible preemptive measure.

The Supreme Court stated in *Tinker* that "facts which might reasonably have led authorities to forecast substantial disruption of or material interference with school activities …" is within the school's authority to restrict. 393 U.S. at 514. Courts have since held that it is not only proper but it is a school official's affirmative duty to preempt problems that may take place on school grounds. *Doninger* 527 F.3d at 51(citing *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007)); *LaVine ex rel. LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (holding that school officials had a duty to prevent disruption when a student brought a poem about shooting a teacher to school). *Tinker* does not require that a disruption is certain to occur; it only requires that there are facts which may reasonably lead school administrators to forecast disruption; however they may not do so merely to punish the student for expressing a disfavored viewpoint. *Shanley*, 462, F.2d at 974; *Boucher*, 134 F.3d at 827-28; *Layshock*, 496 F. Supp. 2d at 601. The "reasonable forecast" test is not restricted to prior acts but may also be used as a consequence of a student's publication once that publication has been distributed. *Boucher*, 134 F.3d at 828.

In *Doninger*, the Second Circuit, relying on the Sixth Circuit, determined that the school principal had acted properly when she disqualified a student from running for senior class secretary after the student posted a message on her blog, hosted by livejournal.com, which encouraged other students to contact the administration and "piss them off" after speculation that the school's annual "Jamfest" concert was cancelled. 527 F.3d at 51(citing *Lowery v. Euverard*,

497 F.3d 584, 596 (6th Cir. 2007)). The court explained that given the circumstances of the "Jamfest" dispute, and that the student body was already "riled up" the morning after the posting was made, and the school administration was already "diverted from their educational duties," the student's message on her blog created a substantial risk of disruption to the school environment. *Id.* at 51. However, after the Second Circuit made this determination, the student filed a suit for damages against the school officials. *Doninger v. Niehoff*, No. 3:07CV1129, 2009 WL 103322, at *1 (D. Conn. Jan. 15, 2009). On the student's motion for summary judgment, the court acknowledged that school officials may have several motives for acting on student behavior and explained that while there were sufficient facts to support a finding of reasonable fear of disruption to the school, the fact that the school did not discover Doninger's blog entry until weeks after the incident involving "Jamfest" had been settled, created a material issue of fact as to what the true motivation for the punishment was. *Id*. at *6-7.

Distinguishable from *Doninger*, in the case at bar, there are no timing issues present. Both students were asked to take down their webpages immediately after the student body began accessing the pages from the school computers (R. 3-4). Furthermore, as acknowledged in the *Doninger* District Court decision, while Principal Smalls had multiple motives for demanding that the webpages be taken down "her main concern was keeping discipline and order at school and preventing what she saw as a potential for school protest" (R. 4). Additionally, like the student in *Doninger,* both Petitioners' webpages called for action by students in the school. (R. 2, 4) Petitioner Politte's webpage encouraged members, 198 of which are Horton Hopkins students, to submit tips on suspected drug use. (R. 4) Likewise, Petitioner Towles' webpage clearly "called" out to the student body to act against the school administration on his webpage (R. 4). Thus, since both Petitioners' webpages called for the students to act, and the timing of

the demand to take down the pages does not present any concern, it was reasonably foreseeable that the webpages would substantially disrupt the school environment.

Similarly, in *Boucher*, the Seventh Circuit vacated the lower court's preliminary injunction which instructed the School Board to cease enforcement of a student's expulsion after an article he created on how to hack into the school's computer was featured in an underground newspaper. 134 F.3d at 828. The court found that not only was it proper to employ the reasonable forecast test after the article had already been published and distributed, but found that there was a reasonable forecast of disruption because the article was a call to action against the school as opposed to a simple critique of the school. *Id.* This is distinguishable from the Fifth Circuit's decision in *Shanley* where the court found that there were no demonstrable facts that would indicate a reason to foresee a substantial disruption to the school environment since the underground paper in that case was distributed peacefully, did not encourage students to bring the newspaper to school, and merely contained two articles discussing the recent newsworthy topics of birth control and legalization of marijuana. 462 F.2d at 964, 970.

In the case at bar, both Petitioners' pages are calls to action, like the student's article in *Boucher*, as opposed to a discussion of a contentious topic as in *Shanley*. While both Petitioners' webpages do admittedly seem to purport a viewpoint they wish to share with other students, both Petitioners unreasonably call for action by members of the student body in a manner which could reasonably be foreseen to cause substantial disruption. (R. 2, 4) Petitioner Politte encourages members of her network to e-mail her tips about potential drug use that she would subsequently post while Petitioner Towles calls for the student body to speak out against the School administration. (R. 2, 4) Additionally, given the possible disruption on campus, like in *Boucher*, it was reasonable to use disciplinary action after the publication of the posts had been created

because there still was a reasonable forecast of disruption. (R. 4) Thus, given the "call to action" of both webpages, it was reasonable for Principal Smalls to forecast possible disruption to the school grounds at Horton Hopkins and demand that the webpages be taken down.

Conversely, in *Layshock*, the court found that no reasonable jury could find that there were enough facts for the school administrators to believe that there was a reasonable fear of disruption caused by a students' creation of a "myspace" page parodying his principle. 496 F. Supp. 2d at 601. The student's parody was the least offensive of three parodies created, the school could not attribute any minor disruption that had occurred to the profile he created, and his punishment was to resume after the holiday recess when any fear of disruption would have been nonexistent. *Id.* at 593, 597, 601.

The parody in *Layshock* is clearly distinguishable from the case at bar because the potential for disruption is attributable to both Petitioners' webpages since students began accessing both webpages from the school library computers. (R. 4) Furthermore, there is no indication in the record that the suspension imposed on Petitioners would occur during a period in which the school would be out of session. (R. 4)

Therefore, the webpages created by the Petitioners created a reasonably foreseeable risk of substantial disruption to the school environment, making it proper for Principal Smalls to insist that the webpages be taken down.

C. Given the nature of the internet and communicative technology, from a public policy perspective, it is necessary for school administrators to be able to restrict student internet speech which creates a reasonably foreseeable risk of substantial disruption to the school environment.

Principal Smalls and the Horton Hopkins School Board are charged with the duty of maintaining order and fostering an educational environment for the students who pass through the schoolhouse gates. Given the new technology driven environment in which we live, from a

public policy perspective, school administrators must be able to have some recourse when students post messages publically on the internet which can reasonably be foreseen to materially and substantially affect the school setting. Therefore, Principal Smalls acted responsibly and her decision to have the students take down their webpages was proper.

As acknowledged by the district court in *Doninger*, with the prominence of the internet and the ever increasing speed of communicative technology, the administrators' jurisdiction over internet speech has become increasingly difficult to discern. 2009 WL 103322, at *10 (holding that the defendants were entitled to qualified immunity since First Amendment protections for internet speech have not yet been clearly established). The court explained that the precedent being used by the plaintiff, where students created a newspaper, using a typewriter at home, and distributed it off grounds, did not provide much guidance because:

> [W]e are not living in the same world that existed in 1979 ... Today, students are connected to each other through email, instant messaging, blogs, social networking sites, and text messages. An email can be sent to dozens of hundreds of other students by hitting "send." A blog entry posted on a site such as livejournal.com can be instantaneously viewed by students, teachers, and administrators alike. Off-campus speech can become on-campus speech with the click of a mouse.

Doninger, 2009 WL 103322, at *10 distinguishing *Thomas*, 607 F.2d at 1050.

Given this changing environment, off campus speech, "which almost inevitably leaks onto campus" has given school educators more cause for concern than in the past. *Doninger*, 2009 WL 103322, at *10 (quoting *J.S. Blue Mt. Sch. Dist.*, No. 3:07c585, 2008 WL 4279517 at *7 n. 5 (M.D.Pa. Sept. 11, 2008)). Students, like the Petitioners, who decide to create message which not only target the student body and school administrators, but also create a foreseeable risk of substantial disruption, should not be immunized from regulation simply because they chose to post their message publically from their home computers as opposed to distributing their

message tangibly on school property. Therefore, this Court should uphold the lower court's decision and find that Principal Smalls' demand to take down the webpages was proper.

II. THE SEARCH OF PETITIONER TOWLES DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS BECAUSE THE SEARCH WAS BOTH JUSTIFIED AT ITS INCEPTION AND REASONABLE IN ITS SCOPE

The search of Petitioner Towles, which was conducted by school officials at Horton Hopkins, in an attempt to uncover reported drug use, did not violate his Fourth Amendment rights. (R. 3) The Fourth Amendment to the United States Constitution provides that people have a right to be "secure in their persons, houses, papers and effects against unreasonable search and seizure." U.S. CONST. amend. IV. The Supreme Court, through its Fourth Amendment jurisprudence, has articulated standards for constitutionally permissible personal searches in the school setting. The search of Petitioner Towles conforms to these standards.

In *Elkins v. United States,* the Court extended this guarantee to protect against unreasonable searches by state officers. 364 U.S. 206, 213(1960). In *New Jersey v. T.L.O.,* the Court restated and further clarified the issue by stating that the Federal Constitution, by virtue of the Fourteenth Amendment, extends the prohibition of conducting unreasonable searches and seizures to state officers, and that it is "equally indisputable" that this protection is also extended to public school officials. 469 U.S. 325, 334 (1985). The Court in *T.L.O* also held that, while students do have a legitimate expectation of privacy, the expectation is less than that of the general population and a balance must be struck between that expectation and the schools' "legitimate need to maintain an environment in which learning can take place." *Id*. Realizing that striking this balance would require some modification of traditional Fourth Amendment procedures, the Supreme Court in *Griffin v. Wisconsin* held that the operation of a school presents "special needs" and that officials need not obtain a warrant, nor establish probable cause

to conduct a constitutionally permissible search. 483 U.S. 868, 873-4 (1987). A search under these circumstances will not violate the Fourth Amendment provided that the search is based on reasonable suspicion of an illegal activity, or an activity which would interfere with the safety and welfare of the school community. *T.L.O.*, 469 U.S. at 330. The court in *T.L.O.* established a twofold inquiry for determining whether a particular search is reasonable: the test inquires "whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the search initially." 469 U.S. at 326.

A. The search of Petitioner Towles was justified at its inception because there was a reasonable expectation that the search would uncover concealed drugs or evidence of an illegal activity.

The search of Petitioner Towles' book bag and subsequent search of his person were both justified at their inception. A search will be considered justified at its inception when the facts surrounding the impetus of the search would lead a reasonable person to believe that there was violation of a particular law or regulation. *T.L.O.*, 469 U.S. 326. The Supreme Court in *Vernonia v. Acton*, clarified that the Fourth Amendment does not impose an "irreducible requirement" that a search be based on individualized suspicion, and that by taking into consideration the burden which is placed on school teachers and administrators to maintain order within the schools, a search based on a generalized suspicion of wrongdoing is permissible. 515 U.S. 646, 654 (1995*); see also, Bd. of Educ. Of Pottawatomie v. Earls*, 536 U.S. 822 (2002) In analyzing the search of Petitioner Towles, we must consider the search in two stages, first we must consider the search of his backpack and then, upon determining that the first search was justified, we can analyze the search of his person. *T.L.O.*, 469 U.S. at 329.

1. *The search of the students' book bags was justified at its inception because it was a minimally intrusive search that was initiated based on a reliable tip.*

In the case at bar, the reasonableness of the search comes from the tips provided as well as

from the totality of the circumstances known to the school officials at the time that the search was initiated. *Cornfield ex rel. Lewis v. Consol. High Sch. Dist.,* 991 F.2d 1316, 1322 (11th Cir. 1993). The implication of the tip provided to Horton Hopkins was that Petitioner Towles was in possession of drugs at the party. (R. 3) It is important to note that a tip need only raise *reasonable* suspicion. *Alabama v. White*, 469 U.S. 325, 329-30 (1990) (emphasis added). It was reasonable for school officials to believe that Petitioner Towles may still be in possession of drugs when he arrived at school only two days after the party. In order for an official to be justified in acting on a tip all that is required is "some level of objective justification" and, the official ordering the search must be able to "articulate something more than an inchoate and unparticularized suspicion or hunch." *Id.* at 329. The officials at Horton Hopkins met that standard. *Id*. Armed with a photograph which clearly pictured Towles sitting with two other students, one who had been cited for marijuana possession, the other who was smoking an unidentifiable substance, the school's reliance on the tip was reasonable. (R.3)

The fact that the tip implicated more than one student does not render the search unreasonable. *Vernonia,* 515 U.S. at 653. Although the suspicion here arguably falls short of individualized suspicion, (because a group of three is implicated); the Supreme Court has stated clearly that generalized suspicion will suffice when combating a pressing issue such as drug use in the schools. *Earls,* 536 U.S. at 834. However, arguably there is a level of individualized suspicion that occurs when only a small insulated group is implicated, such as in the case at bar.

The Horton Hopkins officials relied on the phone calls from the parents and law enforcement, the photo, and the recent drug crisis at the school, in making their determination that they possessed a "reasonable justification" for conducting the search of Petitioner Towles and the other students. (R.1, 3) Prior to making the decision that a personal search was

necessary, Principal Smalls conducted a search of the lockers and book bags of each student who was identified in the photo. (R. 3) The initial search was not only reasonable, but an indication that the school was attempting to balance the privacy interests of the students with the task of maintaining order and safety in the school. *Redding v. Safford Unified Sch. Dist. No.1*, 531 F.3d 1071, 1079 (9th Cir. 2009).

The initial search of the lockers was based on a "well founded suspicion" that one, if not all of these students were in possession of marijuana." *T.L.O.*, 469 U.S. at 330. In *T.L.O.*, where the suspected infraction was smoking in the lavatory, the school officials made an initial search of the student's pocket book, where they found a pack of cigarettes, and noticed a pack of rolling papers. *Id*. at 325. The discovery of the rolling papers provided the necessary justification for a further search. *Id*. The Court held that the students' possession of cigarettes after repeated denials provided the "necessary nexus" between the item searched for and the infraction under investigation. *Id*. at 345. Similarly, the discovery of a small bag of marijuana in the locker of one of the students who was pictured with Towles provided the nexus for the continued search of the student's book bags, and eventually, their persons. (R. 3) Because the preliminary search yielded physical evidence of marijuana, a causal link existed; this in turn justified the second more extensive search of the student's persons. (R. 3) Arguably, the fact that the marijuana was found in another student's locker would lead some to believe that the search of Towles was no longer warranted. However, the decision to continue to search all of the students who were implicated was reasonable, and therefore, has met the standard required of school officials under the Fourth Amendment.

2. *The personal search of Petitioner Towles was also justified at its inception because the search of the lockers and backpacks provided the corroborating evidence which justified a secondary search.*

The Horton Hopkins School officials were reasonable in transitioning from a search of the Petitioner's book bag and locker to his person because the fact that marijuana was found in the initial search served as corroborating evidence warranting a more thorough search of all the parties who were implicated. *T.L.O.*, 469 U.S. at 347.

In *C.B. ex rel. Breeding v. Driscoll,* the Eleventh Circuit found a personal search to be justified when the search was based on a third party tip that the student was possessing marijuana. 82 F.3d 383, 388 (11th Cir. 1996). Relying on *Alabama,* the court reasoned that the information which comes from an anonymous source can help provide the reasonable suspicion which is required for a [personal] search to be justified at its inception. *Id.* In *Cornfield*, the court relied on a teacher's suspicion that a student seemed more "well-endowed" than he was the day before, in holding that a nude strip search was reasonable. 991 F.2d at 1319. Suspecting the student of "crotching drugs" (*hiding drugs in the crotch of his pants*) the court considered the tip, as well as the totality of the circumstances, in determining that the search was justified at its inception. *Id.* at 1323. In *Cornfield*, the officials relied on a number of recent negative incidents, which together with the "bulge" in the students' pants gave rise to a reasonable suspicion. *Id.*

Contrast these facts with the situation presented in *Phaneuf v. Fraiken* where the Second Circuit found the strip search of a student to be unreasonable, and therefore not justified at its inception. 448 F.3d 591, 600 (2d Cir. 2006). In *Phaneuf* the search was conducted based upon a single tip, which was provided by a single student. *Id.* at 593. There, the school official attempted to justify the search by claiming that the tip came from a reliable student. *Id.* However, prior to conducting the search, there was no indication that the official knew which student had reported the hidden marijuana; making the reasonableness of the search, based solely on that tip, questionable. *Id.* Standing alone, where allegations of a student implicate another

student in an illegal activity, there exists a "concern that that a tip will be motivated by malice" and further investigation will be required for a search to be considered reasonable. *Id*. These facts are distinguishable from the case at bar. Not only was a photographic tip provided which clearly cast some measure of reasonable suspicion on Petitioner Towles, but in addition, an initial non-intrusive search of the parties provided evidence of marijuana which alleviated concern that the initial reports were motivated by malice. (R. 3)

In *Rudolph ex rel. Williams v. Lowdes County Board of Education*, the court held that a strip search of a student who was seated in the vicinity where drugs were found was reasonable, and as such, justified at its inception. 242 F. Supp. 2d 1107, 1112 (M.D. Ala. 2003). The court held that the location of the drugs, together with a student tip was sufficient to form an individualized suspicion that the student may be engaging in an illegal activity. *Id.* at 1115. There, the court considered the critical importance of preventing drug use within the school. *Id*.

The Horton Hopkins school community had recently experienced the death of the school's volleyball team captain from a drug overdose. (R. 2) Additionally, during the week prior to the party rumors had circulated that there were to be drugs at the party, a rumor which Petitioner Towles was likely aware of. (R. 2) Moreover, Towles was pictured in a photograph with two students who within the two days prior had each been found to be in possession of marijuana. (R. 2, 3) Although some may argue that all that Towles is guilty of is associating with the wrong people, the benchmark to keep in mind is reasonableness, and it is undeniably reasonable for a school official to suspect that a student who socializes with students who have been found to have drugs on their person is more likely to also be possessing drugs. *T.L.O.*, 469 U.S. at 329.

Admittedly, Petitioner Towles came to Horton Hopkins with minimal reports of

disciplinary action, and is currently an honor student. (R. 2) Perhaps under different circumstances this information would lead an individual to doubt the reasonableness of a personal search for drugs. However, Justice Gould, in his opinion in *Redding*, argues that "unless we [determine] that the Fourth Amendment gives greater protection to good test takers, there is only so much weight that we may give to [a student's] honor student status." 531 F.3d at 1101 (Gould, dissenting). This argument is equally applicable in the case at bar. The severe nature of the suspected infraction, when considered together with the additional corroborating information vitiates any benefit that may normally arise from a students' status as an honor roll student, or lack of past disciplinary infractions. *Id*. Finally, it is important to remember that the appropriate inquiry is not whether the information which was relied upon turned out to be correct, but whether the school official charged with considering the information could reasonably believe it to be correct. *Id.* at 1323.

In conclusion, a search will be considered justified at its inception when it is found to be reasonable in light of the information known to the officials at the time that the search ensues. *T.L.O.,* 469 U.S. at 341. The Supreme Court in its wisdom, cognizant of the special challenges that face school administrators chose to adopt a standard for searches within the school setting that stops short of probable cause. *Id*. Given the information that was available to the Horton Hopkins officials at the time, the search of Petitioner Towles was reasonable, and as such, justified at its inception.

B. The personal search of Petitioner Towles was reasonably related in scope to the circumstance which justified the initial search considering the serious nature of the suspected infraction, the Petitioner's age, and the overall extent of the search.

The search of Petitioner Towles was reasonably related to the circumstances which justified the search initially. The determination of whether a particular search is reasonable in

scope requires a fact based analysis which will take into account the nature of the suspected infraction, the age of the student and the extent of that particular search. *T.L.O.,* 469 U.S. at 342. Petitioner Towles is sixteen years old and suspected of an infraction of the most serious nature, the use and possession of drugs. (R. 3) Again, we must consider both stages of the search separately; first, the book bag and then, the personal search. *T.L.O.*, 469 U.S. at 326.

The search of the book bag was reasonable in scope. The appropriate inquiry is whether the search of Petitioner's book bag was excessively intrusive in light of the school district's compelling interest in keeping its school free of drugs. *Vernonia,* 515 U.S. at 661. In *Bravo ex rel. Ramirez v. Hsu*, the court held a search of a student's book bag, "well within the bounds of the Fourth Amendment." 404 F. Supp. 2d 1195, 1201 (C.D. Cal. 2005). In holding so, the court considered the unobtrusive nature of the search and stated that the school official looked first to where a student would be most likely to store drugs. *Id*. Similarly, the search of Petitioner Towles' book bag was also well within the bounds of reason. In an attempt to proceed with the least intrusive search possible the school officials at Horton Hopkins began with the search of the book bags and lockers, and only when evidence which served to corroborate the earlier tips materialized, did the officials move on to the thorough personal searches of the students. (R. 3)

The personal search of Petitioner Towles was conducted in a manner which employed the least intrusive method available considering the size of the contraband and the potential for the students to elude the school officials by hiding that contraband on their persons, and therefore was reasonable in scope.

The search of Petitioner Towles was conducted in complete privacy, by a school official of the same sex. (R. 3) Towles, a student athlete is surely no stranger to undressing in a locker room in front of peers and coaches. (R. 2) Arguably, Petitioner Towles' expectation of privacy is

tempered by his voluntary participation in extracurricular activities. *Skinner v. Ry. Labor Exec. Assoc.*, 489 U.S. 602, 627 (1989). In *Rudolph*, the court upheld a nude search of a student suspected of concealing marijuana on his person. 242 F. Supp. 1116. In doing so, the court relied on the fact that an officer of the same sex conducted the search, the search was conducted in a private room and the student was at no time touched. *Id.*; see also *Widener v. Frye*, 809 F. Supp 35, 37(S.D. Ohio, 1992) (holding that where reasonable suspicion exists that a student is concealing drugs on his person a strip search will be considered reasonable as a matter of law). Finally, a search to locate $150.00 was held as reasonable, even when the student was patted down by a school official, and asked to remove his pants. *Singleton ex rel. Smith v. Bd. of Educ. USD*, 500, 894 F. Supp 386, 389 (D. Kan. 1995). Again, the court rested its decision on the fact that same sex officials conducted the search, and the student was not required to remove his underwear. *Id*. The court also clarified that the student was never touched inappropriately. *Id*.

Turning back to the search in *Cornfield*, similar to the fact in the case at bar, the student was also a sixteen year old boy who was suspected of hiding drugs on his person. (R. 3) There, the court upheld a nude, full body search. 991 F.2d at 1323. Cognizant of the fact that the student was of the age where a he was likely to be self conscious of his body, thereby making the potential impact of any search substantial; the court concluded that the fact that the school officials suspected the student of hiding drugs on his person resulted in a strip search as being the "least intrusive way to confirm or deny their suspicions." *Id*. The court also considered that the student was not forced the "suffer the indignity" of being touched by the school officials, or of standing naked in front of them. *Id*. In the case at bar, the petitioner was not at any time naked, nor was he touched by any school official. (R. 3) Moreover, there is no indication that a visual inspection of Petitioner Towles' body was performed. (R. 3) Therefore, it is reasonable to

conclude that the purpose of having Towles remove his clothing and give it to the school officials was to enable them to conduct the search of his clothing and pockets in the manner which would be least obtrusive to his person. (R. 3)

Considering the same factors as above, the Eleventh Circuit held that a strip search of an eight year old, conducted after a report of stolen money, was not reasonable in scope. *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823 (11th Cir. 1997). The court based their decision on the nature of the suspected infraction, the age of the students and the extensive nature of the search. *Id*. In *Doe v. Renfrow,* the court held that a strip search of a thirteen year old girl, who was identified as possibly possessing a controlled substance through a canine search, was unreasonable. 631 F.2d 91, 91 (7th Cir. 1980). Again, the court considered the age of the student as well as the extreme invasion that results from a nude strip search of a young child in holding that the search violated the Fourth Amendment. *Id.* These cases are easily distinguishable from the case at bar, and serve to illustrate the point that the search conducted by the school officials at Horton Hopkins was reasonable in its scope in light of the factors that must be considered. The Supreme Court has stated that "[a]rticulating precisely what is reasonable … is not possible, [that it is] a commonsense, nontechnical [concept] [which deals with] the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Ornelas*, 517 U.S. at 695 (internal quotations omitted). The school officials at Horton Hopkins acted upon their reasonable suspicions, and did so in the least intrusive manner that was available to them, and thus the search of Petitioner Towles was constitutional.

III. EVEN IF THE COURT FINDS THAT THE PERSONAL SEARCH OF PETITIONER TOWLES WAS NOT PERMISSIBLE, THE LAW REGARDING PERSONAL SEARCHES WITHIN THE SCHOOL SETTING IS NOT CLEARLY ESTABLISHED, AND FOR THAT REASON, THE SCHOOL OFFICIALS AT HORTON HOPKINS ARE ENTITLED TO QUALIFIED IMMUNITY.

Because the school officials at Horton Hopkins did not violate a clearly established law when they initiated and conducted the search of Petitioner Towles, they are entitled to qualified immunity. *Pearson v. Callahan*, No. 07-751, 2009 WL 128768, at * 14 (U.S. Jan. 21, 2009). Qualified immunity, when established provides a government official compete immunity from suit. *Id*. at *6 Having recently abandoned its two step procedure for determining when a government official is entitled to qualified immunity, the Supreme Court held that a formula which requires that a party first prove that a constitutional violation occurred before moving to the more informative step of whether the right in question was clearly established is no more than a "rigid order of the battle" which is not appropriate in every situation. S*ee Id*. "Government officials who are performing discretionary functions generally are shielded from liability from 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*, 458 U.S. 800, 818 (1982).

In the case at bar, pursuant to the policy which was adopted by Horton Hopkins, in an effort to control the growing drug problem within the school community, and with a reasonable amount of suspicion that the Petitioner was concealing drugs on his person, Principal Smalls directed Mr. Waters to conduct the least intrusive search of the Petitioner's person that was possible under the particular circumstances. (R. 1, 3) Once again, we are faced with the question of reasonableness; whether Principal Smalls' decision to order the personal search of Petitioner Towles was a reasonable one, in light of what she knew at the time about the established law and about how it should be applied to these particular facts. *Pearson,* 2009 WL 128768 at *14. "In order for a law to be clearly established as of the date of the incident it must 'truly compel (not just suggest…) the conclusion … that what defendant is doing violated federal law in the

circumstances.'" *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (citing *Saylor v. Bd. of Educ.*, 118 F.3d 507, 515-16 (6th Cir 1997). In determining whether the law is clearly established, a court should first seek guidance from the Supreme Court and then from within its own circuit, and then we may seek guidance from other courts, however,

> [f]or the decisions of other courts to provide such 'clearly established law' these decisions must both point unmistakably to the unconstitutionality of the conduct complained of an be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct if challenged on constitutional grounds, would be found wanting.

Williams ex rel.Williams v. Ellington, 936 F.2d 881, 885 (6th Cir. 1991). The case law to date offers little support in this area. Although standards have been set forth in *T.L.O.* and it progeny which offer support to the courts when analyzing the constitutionality of school searches, they do little to offer their guidance to school officials as to when they should be aware that the particular search that they are conducting is beyond what is constitutionally permissible. *Id*. at 886.

One need not look far to conclude that the law regarding personal searches in the school setting is not clearly established. It is simply unreasonable to expect a school official to be able to ascertain the constitutionality of a particular search when learned jurists all over the country are unable to do the same. *Id*. Courts across this country have wrestled with this issue, considering the age of the student, the item searched for and the extent of the searches and have failed to provide a clear standard by which administrators may gauge their behavior. In *Beard*, the Sixth Circuit granted qualified immunity to school officials who conducted highly intrusive strip searches of a group of twenty-five students in an attempt to locate one student's missing prom money. 402 F.3d at 608. In holding so, the court reasoned that cases dealing with this issue from other circuits are not sufficiently similar as to establish that this particular search under these particular circumstances was unreasonable. *Id*. In *Lamb v. Holmes ex rel. A.L.*, where the

school officials conducted a strip search to locate a missing pair of gym shorts, qualified immunity was granted on the grounds that "available case law could hardly be described as clearly establishing the students' rights." 162 S.W.3d 902, 908 (Ky. 2005). However, just recently the Ninth Circuit failed to grant qualified immunity to a school official who, upon reasonable suspicion that a student was concealing drugs on her person, performed a personal search of that student. *Redding*, 531 F.3d at 1089. Considering the divergent holdings with regard to qualified immunity, and the even more conflicting decisional law with regard to when a search will be considered reasonable under *T.L.O.,* it is hard to imagine that a school official will be held liable for merely doing his job, when that job consists of discretionary functions which are critical in maintaining the health and safety within the school environment. Because there are cases which uphold the constitutionality of searches similar to the search of Petitioner Towles, as well as cases where qualified immunity has been granted on facts less compelling than those in the case at bar; should this court find that the search of Petitioner Towles did not meet the reasonableness requirement articulated in *T.L.O.*, at minimum, the school officials at Horton Hopkins should be granted qualified immunity.

CONCLUSION

For the foregoing reasons the Respondents, Principal Smalls and the Horton Hopkins School District respectfully request that this court reinstate the decision of the Badger County District Court.

Respectfully Submitted,

Team No. 20
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