No. 05-1338

IN THE

Supreme Court of the State of Grace

KIT POLITE 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 PETITIONERS

Team No. 21
Counsel for Petitioners

QUESTIONS PRESENTED

1. Was the Respondents' attempt to regulate student's Internet speech created off campus a violation of the Plaintiffs' First Amendment Rights?

2. Was the Respondents' warrantless search of Petitioner Towles on school premises a violation of Towles' Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment?

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<u>CONSTITUTIONAL PROVISIONS</u>

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

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

U.S. Const. amend. I.

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

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

U.S. Const. amend. IV.

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

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

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner Kit Politte is an 18 year old senior at Horton Hopkins High School. (R. 2). She is socially active in the Hopkinsville community. Politte has recognized that drugs are a problem in her community and has actively sought to combat the drug problem. (R. 2). Her efforts include a webpage entitled Fighting All Dealers (FAD) on Friendkepedia, where community members can post tips about potential drug dealers. (R. 2). Friendkepedia is a social networking website open to the public. (R. 2). In addition, a school-sponsored club which she started, Drug Use Damages Schools (DUDS), works towards drug use prevention in the school community. (R. 2).

Cory Towles is a 16 year old sophomore who transferred to Horton Hopkins High School from an out of state school following his freshman year. (R. 2). At his former school, he was an honor student and a junior varsity baseball player. He never had any disciplinary action taken against him, aside from being reprimanded for tardiness twice his freshmen year. (R. 2).

On October 3, 2008, Towles attended a party at the home of Jeff Tweegs, a Horton Hopkins Junior and captain of the baseball team. (R. 2). Towles hoped to meet baseball players and improve his chances of making the team. (R. 2). Towles arrived at the party around 9 pm and left by 11 pm. (R. 3). Towles reported witnessing a few students drinking beer and smoking cigarettes, but did not see any drug use. (R. 3). Towles spent most of his time at the party tossing a football with a few other sophomores outside. (R. 3). Around 11:30pm, more than a half hour after Towles left the party, police responded to a noise complaint at the party and cited five high school students for underage drinking. (R. 3). Police also cited sophomore Frank Conrad for marijuana possession. (R. 3).

The following day, Politte who did not attend the party, received an anonymous e-mail with a photograph attachment. (R. 3). The photograph showed Towles sitting near Conrad and

John Thomson at the party. (R. 3). In the photo, Conrad was smoking a cigarette. (R. 3). The caption accompanying the photograph read "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" (R. 3). Politte posted the photograph on her Friendkepedia FAD webpage. (R. 3). The Webpage did not mention Towles' name, and made no allegation that Towles possessed or used any drugs, or that any drug use was actually occurring in the photograph. (R. 3).

On October 5, 2008 several concerned parents contacted Principal Keena Smalls after viewing the photograph on the FAD webpage. (R. 3). The Hopkinsville police also contacted Smalls to alert her to the five students cited for underage drinking as well as Frank Conrad's marijuana citation. (R. 3). She then viewed the webpage herself. (R. 3). Without further investigation, Smalls summoned Towles, Conrad, Thomson, and Tweegs to her office for questioning. (R. 3). All four students denied possessing drugs, yet Smalls searched their lockers and book bags pursuant to school policy, over the students' objections. (R. 3). This zero tolerance policy was enacted at Smalls request in January 2007 due to increased drug use in the community. (R. 1). Smalls discovered a small baggie of marijuana in Conrad's locker. (R. 3). She then asked each of the boys to submit to a search of their person. (R. 3). All the boys refused, and Jim Waters, the gym teacher, conducted a search of each boy in a private room. (R. 3). The boys were forced to strip, and Waters searched their pockets. (R. 3). Waters found marijuana in Thomson's jeans pocket, but no drugs were found in Towles possession. (R. 3).

In response to the school's actions and Politte's posting on FAD, Towles created his own Friendkepedia webpage called Students Against Defamatory Statements (SADS). (R. 3- 4). Towles expressed on his webpage his outrage and displeasure at the school officials who unreasonably strip searched him. (R. 3- 4). He also called for the students to "let school

administrators know" that they do not appreciate this type of treatment. (R. 3-4). After students became aware of Politte and Towles webpages, they began accessing them from both their home and school computers during their free time and after school hours. (R. 4). Smalls, who was admittedly angry about Towles' criticism of the school administration's actions, demanded that the webpages be shut down. (R. 4). Subsequently, both Politte and Towles were suspended until they agreed to take down the webpages. (R. 4).

Towles and Politte brought suit against Horton Hopkins High School and Principle Smalls pursuant to 42 U.S.C. §1983. (R. 4). They alleged that their First Amendment rights were violated when the school required then to take down their webpages. (R. 4). Towles also alleged that the school violated his Fourth Amendment rights when they subjected him to an unreasonable search. (R. 4). The Badger County District Court dismissed their First Amendment claims, granting summary judgment in favor of the defendants, finding that when limiting the speech in question, the school "could reasonably forecast a disruption" under *Tinker v. Des Moines Independent Community School District*. 393 U.S. 503 (1969), (R. 6). The District Court also dismissed Towles' claim, finding that the search was reasonable at its inception because the defendants had reasonable suspicion that Towles possessed drugs, and that the scope of the search was reasonable. (R. 7-8).

On appeal to the State of Grace Court of Appeals, the Court found that the District Court correctly applied the *Tinker* standard in dismissing their First Amendment Claims. (R. 10). The Court of Appeals found that Towles was in fact subjected to an unreasonable search but the defendants were entitled to qualified immunity since Towles rights were not clearly established. (R. 10-12). The Honorable J. Evans dissented on the issue of Towles and Politte's First

Amendment rights, finding that the speech in question was conducted entirely off campus and therefore not subject to school regulation. (R. 12).

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Grace State Court of Appeals. First, Respondents Horton Hopkins School District and Principal Smalls impermissibly infringed upon Petitioners Politte and Towles First Amendment rights to free speech. Second, Respondents violated Towles Fourth Amendment and Fourteenth Amendment rights by improperly subjecting him to a search of his person, wallet, and backpack.

The internet speech of the Petitioners was neither school-sponsored under *Hazelwood*, nor vulgar, lewd, or plainly offensive under *Fraser*; as a result, *Tinker* applies. *Guiles ex rel. Guiles v. Marineau*, C.A.2 (Vt.) 2006, 461 F.3d 320, *citing Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988), *Bethel School District v. Fraser,* 478 U.S. 675 (1986). The facts do not display evidence that Horton Hopkins High School could reasonably forecast substantial distruption to the classwork and discipline of the school therefore Politte and Towles speech cannot be regulated. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Furthermore, the internet speech of both Politte and Towles were created off school grounds, after school hours. *See Emmett v. Kent School District No. 415,* 92 F.Supp.2d 1088 (W.D.Wash., 2000). As a result, the speech was entirely outside of the school's control.

The Respondents strip search of Towles, for the purpose of finding drugs, was an unreasonable intrusion upon his rights. Searches in a school context must be justified at the inception of the search and reasonable in scope. *New Jersey v. T.L.O.,* 469 U.S. 325, 340 (1985). The search was initiated because of an anonymous photograph of Towles sitting next to a student with a history of drug problems. The photograph does not show Towles violating any laws or

school regulations. This photograph does not provide Respondents with any reasonable suspicion that Towles would possess drugs at school on the day of the search. It provides even less weight than an anonymous tip, and is not reliable. Coupled with a lack of corroboration or eyewitness evidence of drug possession, Respondents' search of Towles was not justified at its inception. The scope of the search was also unreasonable, as it was not fitted to the objectives of the search.

Respondents qualified immunity defense fails because the law is clearly established that a search such as Towles' would not be justified at its inception and would be unreasonably broad. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The opinion of State of Grace Court of Appeals provided conflicting reasoning when it granted Respondents qualified immunity. (R.11). The court Stated that there was no possible reason for Respondents to search Towles, yet later stated that it was unclear whether the search would be justified. (R.11). A reasonable school official in Respondents' position should have known that a search would be unconstitutional.

Argument

I. THE RESPONDENTS' ATTEMPT TO REGULATE POLLITTE AND TOWLES' OFF-CAMPUS INTERNET SPEECH WAS A VIOLATION OF THE PETITIONERS' FIRST AMENDMENT RIGHTS.

The Court of Appeals erred in affirming the District Court's grant of summary judgment for the Respondents, Appellees below. A review by an Appellate Court of District Court's grant or denial of summary judgment is *de novo*, applying the same legal standard employed by the District Court. *Wolfe v. Barnhart*, 446 F.3d 1096 (10th Cir. 2006). "Summary judgment is proper when the pleadings and evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(c); *Pluet v. Frasier*, 355 F.3d 381, 383 (5th Cir. 2004) (*quoting Slaughter v. S. Talc Co.,* 949 F.2d 167, 170 (5th Cir.1991)). Even when taken at its most favorable interpretation, the evidence proffered, does not support the Respondents' claim that Horton Hopkins School District and Principal Smalls permissibly regulated the students' websites under the standard required by *Tinker*. *See Tinker*, 393 U.S. 503. As a result, the grant of summary judgment should be reversed.

A. Petitioners Kit Politte and Cory Towles Internet speech is entitled to protection under the First Amendment.

In 1969, the United States Supreme Court ruled that the constitutional right to freedom of speech or expression are not shed at the schoolhouse gate. *Tinker,* 393 U.S. at 507. In the years that have past, *Tinker v. Des Moines* has come to be recognized as the seminal case on free speech in public schools. *Id*. In *Tinker* a group of students decided to protest the United States involvement in the Vietnam War by wearing black armbands to school. In anticipation of the silent protest of the war school officials passed a no-armband rule. Seven students wore the armbands in violation of the new school rule and five of the students were subsequently suspended. Three of the five suspended students and their parents brought suit in federal court,

arguing that the school had impermissibly violated their First Amendment right to freedom of speech. The case reached the Supreme Court on appeal. In a 7 to 2 decision, the Supreme Court held that "students in school as well as out of school are "persons" under the Constitution" and possess fundamental rights which state must respect, just as they themselves must respect their obligation to the state. *Id*. at 511. School officials do not possess absolute authority over their students, and schools may not be enclaves of totalitarianism. However, the Court expressly stated in its ruling that speech in public schools "cannot be prohibited unless it materially and substantially interfere(s) with requirements of appropriate discipline in operation of school." *Id*. at 504. They noted that "In order for the state, in person of school officials, to justify prohibition of particular expression of opinion, it must be able to show that its action was caused by something more than mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id*. at 509. This has become known as the *Tinker* test or the rule of *Tinker*. In the 40 years that have followed, several cases have reached the courts pertaining to First Amendment free speech rights in public schools. Still, *Tinker* remains the standard. In the interest of balancing the constitutional rights of students with the authority of school officials to regulate, case law has expanded the principle slightly. Today, "the First Amendment protects all student speech that is neither school-sponsored, a true threat, vulgar, lewd, obscene, or plainly offensive, unless school officials show facts which might reasonably have led them to forecast substantial disruption of or material interference with school activities." *Pinard v. Clatskanie School Dist. 6J*, 467 F.3d 755, 767 (9th Cir. 2006), *see also Chandler v. McMinnville Sch. Dist.,* 978 F.2d 524, 529 (9th Cir.1992) (quoting *Tinker,* 393 U.S. at 514).

In *Hazelwood School District v. Kuhlmeier* the Supreme Court held that "educators do

not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 261. The Court defined school sponsored speech as that which a reasonable observer would view as the school's own speech such as a high school newspaper published by students in a journalism class, as seen in the facts of that case. *Id* at 271. As recently as 2007, The Supreme Court once again examined whether or not speech amounted to school-sponsored speech. In determining that the speech in *Morse v. Fredrick*, a banner which stated "Bong Hits 4 Jesus", was school sponsored speech the Court recited a series of factors including; the fact that it occurred during normal school hours, at a school sanctioned event, in the presence of school officials, and that the message was directed at the student body. 127 S.Ct. 2618 (2007). Conversely, in the case at hand, it is undisputed that Petitioners Politte and Towles speech did not occur on school grounds, it was not made in the presence of school officials, nor was it at a school sanctioned event. In fact, both Politte and Towles created and edited their internet speech from their personal computers, in their own homes, after school hours. Politte did promote her webpage at one school-sponsored club meeting, but the meeting took place after school hours and was not held for the purpose of promoting the FAD website.

The Court in *Thomas v. Board of Education* ruled that "when school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends." 607 F.2d 1043, 1052 (2nd Cir. 1979). In coming to its ruling, the Court reasoned that by striking this balance the community is not deprived of the salutary effects of expression and schools are free to establish an academic environment in which the teaching and learning process are free from disruption. *Id*. It is undeniable that, given the facts of this case, a

reasonable observer would not view Politte or Towles speech as the school's own speech.

In addition to regulating school sponsored speech, schools have a clear interest in regulating student speech that constitutes a true theat. In ruling on this case below the Badger County District Court stated "a threshold issue in student speech and cyberspeech cases is whether the speech at issue constitutes a true threat." (R. 5). "True threats encompass statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 534 U.S. 343, 359 (2003). There are no facts in this case which support or establish "an intent to commit an act of unlawful violence" through the webpages of the Petitioners.

Petitioner Politte's internet speech was a single caption posed on her personal webpage on a larger social networking website Friendkepedia. It stated, "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?." (R. 3). The caption accompanied a photograph showing three Horton Hopkins students at a party, one of whom is smoking a cigarette. Towles was among the three students shown in the picture.

Petitioner Towles internet speech was posted in response to Politte's. He stated

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

The Supreme Court has repeatedly held that the First Amendment protects student speech that is merely distasteful. In *Mahaffey v. Aldrich* the United States District Court held that a high school student's suspension for publishing objectionable statements on an internet website

violated the student's First Amendment rights. 236 F. Supp.2d 779 (E.D.Mich.,2002). The website, among other things, included a list of people the student wished would die. The Court determined that "a reasonable person… would not foresee that the statements on the website would be interpreted as a serious expression of an intent to harm or kill anyone listed on the website" and as a result could not be considered a true threat. *Id* at 785. Similarly, in *Watts v. United States* the Supreme Court found that the statement, "if they ever make me carry a rifle the first man I want in my sights is L.B.J." did not amount to a true threat against the life of the then President of the United States. 394 U.S. 705 (1969). The majority of the Court agreed with the speaker that the only offense was a crude offensive method of stating his dissatisfaction or opposition which was entirely permitted and protected under the First Amendment. *Id.*

In contrast, the allegedly threatening statement "if George Bush refuses to see the truth and uphold the constitution I will personally put a bullet in his head" was found to be a true threat. *See United States v. Lockhart*, 382 F.3d 447 (4th Cir. 2004). The Court looked to various factors in distinguishing protected First Amendment speech from unprotected true threats such as the imminence of the threat, the reaction of its listeners, and the context of the speech. *Id*.

In the case at hand, the internet speech in question is devoid of any threat. It simply calls for a "fight against injustice." (R. 4). A reasonable person in Petitioner Towles place would not view that speech to be an "intent to commit an unlawful act of violence." In fact, it does not even call for violence. There is no evidence that any of its listeners acted in a wrongful manner based on the speech. In addition, when read in its entirety it becomes clear that Towles simply wanted it come to the attention of his peers that his rights were impermissibly violated and should be redressed.

Petitioners Politte and Towles speech was neither vulgar, lewd, obscene, nor plainly

offensive. In *Bethel School District v. Fraser* the Supreme Court ruled that the school district acted within its authority by imposing sanctions upon students in response to offensive, lewd, and indecent speech. 478 U.S. 675. *Fraser* involved a student giving a speech at a school assembly, during school hours, which the speaker referred to his classmate "in terms of an elaborate, graphic, and explicit sexual metaphor." *Id* at 678. The courts have repeatedly held that public schools have the authority acting in loco parentis to protect students, especially in a captive audience, from exposure to sexually explicit, indecent, or lewd speech. *Id* at 684. However, neither Petitioners' speech amounted to sexually explicit, indecent, or lewd speech. In fact, both the internet speech of Politte and Towles are devoid of any sexual innuendo, they are not profane, or graphic.

For speech that is "neither vulgar, lewd, indecent or plainly offensive under *Fraser,* nor school-sponsored under *Hazelwood,* the rule of *Tinker* applies, such that schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school." *Guiles*, 461 F.3d at 325. In *Doninger v. Niehoff*, the Court determined that a high school students off-campus posting on an independent website, made in response to supposed cancellation of student event, in which she called school administrators "douchebags" and encouraged others to contact superintendent "to piss her off more," foreseeably created a risk of substantial disruption within the school environment, as required to permit school discipline for remarks without violating First Amendment. 527 F.3d 41 (2nd Cir. 2008). However, the Court stated in its ruling that the language chosen was disruptive of efforts to resolve the dispute, the post was misleading, and it sparked an influx of calls and emails harassing the superintendent. *Id* at 51. There was clear evidence that the school authorities had to take time to deal with the situation distracting them from their "educational mission." *Id* at 51.

Conversely, the Petitioners' internet speech did not materially and substantially interfere with the school's work. It instead more closely resembles a silent, passive expression of opinion as seen in the facts of *Tinker*. Furthermore, Principal Smalls admitted that "she was angry about Towles' criticism of the schools administration's actions in dealing with the drug problem on school grounds." (R. 4). She went on to claim that "she worried that Towles and Politte's were causing too much of a disturbance." (R.4). But, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. 503. The record is void of any facts whatsoever that indicate a disturbance.

Courts considering comparable fact patterns have upheld the right to free speech. In *Beussink v. Woodland R-IV School District* the court granted summary judgment in favor of the student. 30 F.Supp.2d 1175 (E.D.Mo.,1998). The Court determined that although the student's webpage was viewed in the school and included crude language critical of the school, classes were not disrupted. The only showing of any disruption was not caused by the webpage, but rather by the delivery of disciplinary notices to the students during school hours. *Id* at 1179. The Court in *Layshock v. Hermitage School Dist.* found that "no nexus existed between student's creation of internet parody of principle and a substantial disruption of school environment, and school's suspension of a student thus violated his free speech rights." 496 F.Supp.2d 587 (W.D.Pa.2007). The Court found that no classes were cancelled, no widespread disorder occurred, and the only in school conduct was showing the parody to other students as a result there was no disruption to justify limiting the students First Amendment right to free speech. *Id*. In *Killion v. Franklin Regional School District* a student was suspended for an email which ridiculed a staff member of the school. 136 F. Supp.2d. 446 (W.D.Pa 2001). The Court held that the student was improperly suspended for his internet speech created off school grounds and not

during school hours which reached school grounds. *Id*. The school failed to show substantial disruption and therefore the limit on the student's First Amendment right to free speech was impermissible. In reaching its conclusion, the Court emphasized the rule of *Tinker* that "the mere desire to avoid 'discomfort' or 'unpleasantness' is not enough to justify restricting student speech." *Id* at 455 (quoting *Tinker*, 393 U.S. at 508)

B. The Internet speech of Petitioners Kit Politte and Cory Towles was conducted entirely off-campus; as a result, it was entirely outside of the school's supervision or control.

It must also be noted that both Politte and Towles' internet speech were created and conducted entirely off school property. Both students' webpages are on Friendkepedia, a social networking website open to the public. Friendkepdia is not affiliated in any way with Horton Hopkins High School. Politte worked on her webpage at home from her personal computer. Despite the fact that many Horton Hopkins High School students are members of Politte's webpage, her webpage is directed toward all members of the Hopkinsville community who are members of Friendkepedia.

Towles also worked on his webpage at home from his personal computer. While Towles' intended audience was students of Horton Hopkins High School, the internet speech is still outside of the school's supervision. In *Emmett v. Kent School District No. 415* a temporary restraining order was granted prohibiting a school from suspending a student for creating a webpage on the Internet from his home computer without using school resources or time. 92 F.Supp.2d at 1089. The Court determined that despite the fact that the intended audience was undoubtedly the Kentlake High School community the internet speech in question was entirely outside of the school's supervision or control. *Id*. Furthermore, in *Thomas,* the Court found that because the high school students printed their publication outside school and did not sell copies of their publication on school grounds it was beyond the control of school administrators. 607

F.2d at 1045. While there was evidence that the students in *Thomas* utilized a school typewriter and at some point publications were stored in a teacher's closet, the Court reasoned that the on-campus or school related contacts were "*de minimis*," and therefore the speech was still protected under the First Amendment. *Id* at 1050. Similarly here, the only on-campus or school related contacts to Politte and Towles internet speech are "*de minimus*" and so should still be protected as outside the school's control.

C. The Respondents waived their privilege to qualified immunity on the Petitioners First Amendment claims.

Respondents are not entitled to qualified immunity as to the First Amendment claims. The Respondents did raise the issue of entitlement to qualified immunity pertaining to the search of Towles. However, they failed to raise quailed immunity on Politte and Towles First Amendment claims. It has been held that "Because a defendant is required to plead qualified immunity as an affirmative defense, a public official who performs discretionary functions, and could be entitled to a qualified immunity for actions taken within the sphere of his or her official responsibility, must plead that defense or it will be waived." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). As a result, the Respondents cannot at this point raise a defense of qualified immunity to the Petitioners First Amendment claims.

II. THE RESPONDENTS' SEARCH OF TOWLES WAS AN UNREASONABLE VIOLATION OF HIS CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS AS THE SEARCH WAS NOT JUSTIFIED AT ITS INCEPTION OR REASONABLE IN SCOPE.

When Horton Hopkins High gym teacher Jim Waters forced Cory Towles to involuntarily strip to his undergarments, Towles was impermissibly subjected to a strip search[1] in violation of

[1] The First, Fourth, and Eleventh Circuits have all held that forcing someone to strip to their underwear for a search is considered a strip search. *See Justice v. City of Peachtree City,* 961 F.2d 188, 190 (11th Cir. 1992), *Amaechi v. West,* 237 F.3d 356, 363 (4th Cir. 2001) (citing *United States v. Dorlouis,* 107 F.3d 248, 256 (4th Cir. 1997)), *Wood v. Hancock County Sheriff's Dep't.,* 354 F.3d 57, 63 n. 10 (1st Cir. 2003).

his Fourth and Fourteenth Amendment rights to be free from an unreasonable search of his person. U.S. Const. amend. IV, XIV. The Fourth Amendment guards people and their houses, papers, and effects against unreasonable searches and seizures performed by federal officials. U.S. Const. amend. IV. The Fourteenth Amendment expanded this right to protect citizens from unreasonable searches conducted by state officials, including public school officials. U.S. Const. amend XIV, *Elkins v. United States*, 364 U.S. 206, 213 (1960), *T.L.O.*, 469 U.S. at 336. The purpose of this reasonableness requirement is to preserve the integrity of a person's privacy. *Richards v. Wisconsin*, 520 U.S. 385, 392 n.4 (1997). Towles' right to be free from unreasonable bodily search was violated because the search was not justified at its inception, it was not reasonable in scope, and because United States law clearly established that a search was unconstitutional considering the circumstances. *T.L.O.* 469 U.S. at 341.

A. The Strip Search Conducted on Towles' Person was Unreasonable under the Circumstances.

A strip search is among the most intrusive searches the government may make into one's privacy, and has been described "as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). There is no doubt that Towles is entitled to some expectation of privacy in his person, his backpack, and his wallet, even while at school. If the government cannot prove that the search was reasonable, then his constitutional rights have been violated. It is established case law that school officials do not possess absolute authority over their students, and that students are persons under The Constitution and entitled to certain fundamental rights. *Tinker,* 393 U.S. at 511.

The Supreme Court has generally chosen "to err on the side of the individual rights" by presuming that "any intrusion is unreasonable where the government or its agent has not proven

it to be necessary." Shannon O'Pry, A Constitutional Mosh Pit: The Fourth Amendment, Suspicionless Searches, and the Toughest Public School Drug Testing Policy in America, 33 Tex. Tech. L. Rev. 151, 163. Ordinarily, a government official needs a warrant to perform a search of a person. *See e. g Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). There are, however, some exceptions to the warrant requirement. *Katz v. U.S.*, 389 U.S. 347 (1967). The one that applies in the public school setting, as well as Towles' case, is the "special needs" exception.

While students do not shed their constitutional rights at the schoolhouse gate, public schools still have a responsibility to maintain discipline in the classroom and on school grounds. This interest, or "special need", is balanced against a student's expectation of privacy. *T.L.O.*, 469 U.S. at 340. The *T.L.O.* Court held that the government could rely on reasonable suspicion rather than probable cause when they were serving a public interest, such as that in a school environment. *Id*. at 342 n. 8. A student like Towles is entitled to be free from a search of his person unless the government can prove they had reasonable suspicion at the time of the search. The standard adopted by the *T.L.O.* Court and applied in all school search cases is a two step test: (1) a search must be "justified at its inception", and (2) "reasonably related in scope to the circumstances which justified the interference in the first place". *Id*. at 341, *citing Terry v. Ohio*, 392 U.S. 1, 20 (1968). A search would be justified at its inception when reasonable grounds existed for suspecting that a search would produce evidence of a student's violation of a law or school rule. *Id*. at 345. The scope of the search would be permissible when the method of the search was reasonably related to the school's objectives, as long as the search was not excessively intrusive considering the age and sex of the student and the nature of the infraction. *Id*. at 341. The evidence, viewed in the light most favorable to Towles as the party opposing

summary judgment, makes it clear that the Respondents' lacked any evidence to justify a strip search of Towles, and that the scope of Respondents' search exceeded reasonable standards.

1. The search was not justified at its inception because the Respondents lacked any evidence that could give them reasonable suspicion that Towles would have evidence of a crime on his person.

In the present case, Principal Smalls ordered the search of Towles due to pressure from parents who had viewed the anonymous photograph of Towles sitting near Frank Conrad and John Thomson. (R. 3). The District Court in this case began its discussion of the search by boldly stating that it was based on a photographic tip. (R. 7). However, this photograph did not show Towles dealing drugs. It did not show him with drugs at school. It merely showed Towles seated near two other Horton Hopkins students. While the District Court stated that drugs and alcohol were plainly present at the party, in reality, it was simply a photograph of someone who had been cited for marijuana sitting with two other students. The caption implicitly speculated that since one of the students in the photo had marijuana, then all of the students in the photograph must have drugs. This ambiguous photograph of Towles sitting with two other students is even less reliable than an anonymous tip, as there is not even an indirect allegation against Towles. As such, it cannot be the basis of a valid search based on reasonable suspicion.

It is a well settled point of law that a search of a student by a public school official is unlawful if predicated on mere curiosity, rumor, or hunch, the only three things that Towles' strip search could be based upon. *See In re William G.*, 40 Cal.3d 550 (Cal.,1985), (An assistant principal's complete search of a male high-school student due to his friendship with a female high-school student who had fainted, reportedly due to drugs, was completely without reasonable suspicion of wrongdoing). *See also R.J.M. v. State*, 456 So. 2d 584 (Fla.App. 3 Dist., 1984). As pointed out by the Second Circuit, a "strip search of a student must be justified by a high level of

suspicion." *Phaneuf v. Fraikin*, 448 F.3d 591, (2d Cir. 2006). In every case in any circuit that has confronted the constitutionality of a school search, there has always been some evidence that the student had actually done something illegal prior to the search and that evidence of the crime could be found on the student. Here, there is no reasonable suspicion.

In a case that upheld the constitutionality of a search, the *T.L.O*. Court found that there was sufficient probability that the student in that case would have cigarettes in her purse, since that student had just been caught smoking in the bathroom. *T.L.O.*, 469 U.S. at 345. The defendants in that case were therefore justified in initiating their search. In the present case, Towles was not caught smoking marijuana in a school bathroom. In fact, he had not been caught smoking marijuana anywhere. Furthermore, the search in question was conducted days after the photograph had been taken. The *T.L.O*. Court would have certainly reached a different decision if instead of catching the student smoking in that case, the student had been seen in an anonymous photograph days before sitting near someone who had been smoking. The evidence justifying a search in this case does not even approach that found in *T.L.O.*

In *Cornfield v. Consolidated High School District No. 230,* a teacher observed that a student "appeared too well-endowed", and concluded that the student was "crotching" drugs. 991 F.2d 1316, 1319 (7th Cir. 1993). The Court found that the search was reasonable because there was reasonable suspicion that a particular law was violated and the search would produce evidence of it. Although the officials had only observed the unusual bulge in Plaintiff's crotch once, other independent factors supported their suspicion that he possessed drugs, including statements the Plaintiff himself had made about dealing drugs and hiding them by "crotching," reports from his bus driver that he smelled of marijuana, and information from other students that he had had drugs on his person in the past. *Id*. at 1322. Here, there was nothing about Towles'

physical appearance that would indicate illicit drug possession, there were no incriminating statements made by Towles or any allegations against him by his fellow students or anyone else, and there was no history of drug possession. Just as in *T.L.O.,* the Court in *Cornfield* would certainly have reached a different conclusion if teachers had merely seen a photograph of a *different student* crotching drugs, *on a different day*. Combined with the utter lack of any history of drug trouble with Towles, it is apparent that there was no justification for searching him.

Even in a case not requiring individualized suspicion, the privacy interests of the search were very minimal and the government interest in question would have been jeopardized with a requirement of individualized suspicion. *H.Y. ex rel. K.Y. v. Russell County Bd. of Educ.*, 490 F. Supp. 2d 1174 (M.D. Ala. 2007). In *H.Y.*, one of a limited number of students had stolen a teacher's makeup bag and $12. One of the students certainly had the items, but there was no evidence as to which student had it. Here, there was no justification for treating the four students searched as a group. Ignoring the fact that there was no evidence indicating that *any* of the four students would have contraband *at school*, these four students were not being searched for a unique item the one of the certainly had beyond a doubt, as was the case in *H.Y.* This was not a case where someone saw some drugs among the four of the boys, and one of them must have stashed them. There was only the slimmest evidence that Conrad and Towles might have drugs at school, because they had problems with drugs before. While a student's history of drug use can be a factor added to the mix in a school official's decision to conduct a strip search, *Phaneuf v. Fraikin*, 448 F.3d 595, there was absolutely no evidence that Towles had any drugs on him or that he could be lumped in with the other boys as being drug dealers. He did not have a history of close friendship with the others, or of drug use. As such, even without the requirement of individualized suspicion, there was no justification for Towles' search.

Even assuming that the photograph in this case can somehow be construed as a tip, an anonymous tip alone cannot create a reasonable suspicion, although the tip may be taken into consideration when assessing the circumstance. *Alabama v. White*, 110 S. Ct. 2412, 2416 (1990). As the State of Grace Court of Appeals noted in its opinion, "Student tips alone are insufficient to support a constitutionally permissible strip search." (R. 10), *Phaneuf*, 448 F.3d 598-99, ("While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search"); *Williams by Williams v. Ellington*, 936 F.2d 881, 888 (6th Cir. 1991). Smalls should have investigated further before undertaking the search, as the "tip" provided no information as to whether Towles possessed drugs or was hiding them in a place where a strip search would reveal them. *See T.L.O.,* 469 U.S. at 346 (recognizing distinction between reasonable places to search-such as purses-and other, less reasonable places). Smalls could have talked to Towles' teachers, parents, or other students to determine whether a strip search would be appropriate. If any of these sources had indicated that Towles was acting in a manner to suggest he was under the influence of drugs, or someone had seen him with drugs that day, then Smalls would have been able to corroborate the "tip". The only corroboration that Smalls received was a denial from Towles and a fruitless search of his locker, neither of which bolstered the "tip's" reliability. *See Redding*, *v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1083 (9th Cir. 2008).

In *Phaneuf,* the Second Circuit struck down as unjustified a strip search of an eighteen year-old girl as unjustified with facts far more favorable to the school officials than those present here. *Phaneuf*, 448 F.3d 592. There, a disinterested student provided a tip to a teacher that Phaneuf, a student with a history of disciplinary problems, planned to stuff marijuana down her pants that day to take along with her on the senior class picnic. *Phaneuf,* 448 F.3d at 593.

Although the school had a specific tip that the student was currently hiding drugs where only a strip search could discover them, the Second Circuit determined that a student tip, even when not seeking to shift blame, justified only further inquiry and not a "step as intrusive as a strip search." *Id.* at 599. The circumstances of this case provide even less justification than those rejected in *Phaneuf,* considering the supposed "tip", its content (including no information that Towles currently possessed drugs), and the history of good behavior of the student in question.

The District Court's tip analysis purported to list several independent facts corroborating the so called tip. The court cited the following facts as sufficient corroborative evidence to justify the search: (1) Frank Conrad had been cited at the party for marijuana possession, and Jeff Tweegs had been suspended from school for marijuana use; (2) Towles himself had attended a party that was rumored to be a drug party; and (3) before conducting a personal search of the students, Principal Smalls found a baggie of marijuana in Conrad's locker. (R. 7). As the Court of Appeals mentioned below, guilt by association, evidence found after the search began, and a non-existent history of drugs cannot be used to justify the search. (R. 11), *citing Redding* 531 F.3d at 1084; *Phaneuf*, 448 F.3d at 597.

Absent the kind of physical evidence and observations that justified the searches in *T.L.O.* and *Cornfield*, the primary justification for the search in this case is that Towles was associated with the other students, and therefore was likely to have drugs. As was the case in *Redding*, "[t]his is nothing more than "guilt-by-association," certainly too thin of a reed for such a substantial intrusion." *Redding* 531 F.3d at 1084; *See also Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 178 (1951) ("The technique is guilt by association-one of the most odious institutions of history.... Guilt in our system is personal."). Under the sound reasoning of

Redding, it is clear that Towles' minor acquaintance with the other boys did not justify a search under these circumstances.

The standard for measuring the defendants' reasonable suspicion is clearly set forth in Phaneuf. The key facts are those known to the school officials *prior* to the search. *Phaneuf*, 448 F.3d at 597, *citing Florida v. J.L.,* 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."); *United States v. Swindle,* 407 F.3d 562, 568 (2d Cir.2005) ("The settled requirement is, of course, that reasonable suspicion must arise before a search."); *DesRoches v. Caprio,* 156 F.3d 571, 577 (4th Cir.1998) ("[W]hether any given search was justified at its inception must be adjudged according to the circumstances existing at the moment that particular search began."). Finding marijuana in Thomson's jeans during the search does not justify the strip search after it began, especially with regard to Towles, as it was not his jeans. The school officials did not find one iota of evidence implicating Towles during the permissible search of his locker. This produced no additional evidence for a search Towles' wallet or backpack, and certainly not a strip search. As *Redding* made clear, the drugs found in Conrad's locker and on Thomson's person cannot be attributed to Towles and cannot be the basis for his subsequent searches. Similarly, the others boys' history cannot be attributed to Towles.

2. The search was unreasonable in scope because it was excessively intrusive.

The scope of a search must: (1) be fitted to the objectives of the search, (2) consider the age and sex of the accused, and (3) consider the nature of the infraction. *Cornfield*, 991 F.2d at 1320. In this case, a strip search was not fitted to the objective of trying to find marijuana, and too intrusive considering Towles age and the nature of the infraction, and therefore was in violation of Towles rights.

Many cases have read *T.L.O.* to require that "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search." *Cornfield*, 991 F.2d at 1321. *See also Tarter v. Raybuck*, 742 F.2d 977, 982 (6th Cir. 1984), cert. denied, 470 U.S. 1051 (1985). While the innuendo implicating Towles as a drug user may have justified some initial investigation by the Respondents, it does not justify searching his wallet, backpack, or person. These searches were excessively intrusive in light of the age and sex of the plaintiff and the nature of the infraction.

In *T.L.O.,* the Court found that a search was reasonable in its scope because if the student had cigarettes, "her purse would be the obvious place in which to find them." *T.L.O.*, 469 U.S. at 347. There, The school employee conducted a more thorough search of the purse after noticing rolling papers, an indicator that the student may have marijuana. *T.L.O.*, 469 U.S. at 341. In Cornfield, the Court found that the search was justified in its scope because it was the "least intrusive way to confirm or deny [the officials'] suspicions," was conducted "in the privacy of the boys' locker room", and did not involve any physical contact. *Cornfield*, 991 F.2d at 1323.

Assuming *arguendo* that there was reasonable suspicion to search Towles' locker, backpack, and wallet, the search should have ended there. Instead, Towles and the other three students were forced to strip to their undergarments. (R. 3). Unlike *T.L.O.*, where the school officials searched obvious places to find the cigarettes in question, the Respondents in this case had searched those obvious places to no avail. A student would almost certainly keep marijuana in a pocket, backpack, or locker, rather than hidden where only a strip search could reveal it. The Respondents claim to have only searched the pockets of the boys after they stripped. *Id.* This defies all logic and reason, as a search of a pocket could have easily been achieved while

the students were still clothed. It is true that a search does not have to employ the least intrusive means, "because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Bd. of Educ. v. Earls*, 536 U.S. 822 (2001), (quoting *United States v. Martinez- Fuerte* , 428 U.S. 543, 556-57 (1976)). Still, the search must be reasonably related in scope to the circumstances that justified the search. *T.L.O.*, 469 U.S. at 341. The Respondents clearly thought a search of the students' pockets was sufficient, since they did not search Towles any further. There was no reason to undertake a strip search if the search was going to be limited to the pockets of the students.

The District Court maintained below that this search was proper in scope because the school offícals were looking for small bags of marijuana. The Court cited *Williams,* 936 F.2d at 887, which held that because school officials were searching for "a small vial containing suspected narcotics," their "personally intrusive" search of the student's person was not unreasonable. *Id*. In *Williams*, a student made a specific and reliable accusation that a student had drugs at school, describing particularly what it was and how small the vial of drugs was. A teacher had also observed erratic behavior consistent with drug use. Here, there was not a description of whether Towles had drugs or if they were in small, big, or any other kind of bag. As such, there is no indication that a strip search was reasonable.

Additionally, the case at hand is vastly different from *Cornfield*. There, the student visibly had a bulge in his underwear, justifying a strip search for the drugs reasonably thought to be hidden there. In *Fewless v. Board of Ed.*, 208 F.Supp. 2d 806 (W.D. Mich., 2002), the Court observed that "[a] strip search which has no hope of achieving its purported aim is not reasonable in scope." Since the Respondents lacked any reasonable idea of what they were searching for, the search of Towles' person, backpack, and wallet all exceeded any reasonable scope.

B. Respondent Smalls is not entitled to qualified immunity because she violated Towles' clearly established rights.

When considering a question of governmental immunity, a court must determine whether constitutional rights have been violated, and whether that right was clearly established. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). A court does not have to address both of these steps if either would determine the case. *Pearson v. Callahan*, 2009 U.S. LEXIS 591 (Jan. 21, 2009). However, the State of Grace Court of Appeals chose to apply both steps of the *Saucier* test by ruling that Towles indeed suffered a constitutional injury before determining whether his right was clearly established. (R. 12). The Court of Appeals erroneously ruled that Towles was not protected from a strip search by clearly established law.

Qualified immunity is based on "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (U.S. 1974). Only when the rights of the plaintiff are clearly established will courts ignore qualified immunity. *Saucier*, 533 U.S. 202. To be "clearly established," a reasonable government official must know "that his conduct was unlawful in the situation he confronted." *Id.* The Court of Appeals correctly determined the process for examining whether a right is clearly established. (R. 12.) Courts first look to U.S. Supreme Court precedent, and then to circuit court decisions. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (citing *McBride v. Village of Michiana*, 100 F.3d 457, 460 (6th Cir. 1996)).

The Court of Appeals ignored the Supreme Court *T.L.O.* standard by moving directly to Circuit Court cases. It is apparent under the clear standard of *T.L.O.*, requiring that a search be justified at its inception, that the Respondents should have known that they had no justification in

searching Towles from the beginning. As the Court of Appeals points out, "[a]bsolutely nothing in the record demonstrates a likelihood that Towles himself possessed drugs on school grounds." (R. 11) It is entirely inconsistent for the Court of Appeals to decide first that the Respondents could not possibly have had a reason to search Towles, and then determine that it was unclear whether a search would be permissible. The Respondents had absolutely *no* evidence implicating Towles, and as such, qualified immunity should be rejected here.

The Court of Appeals cited *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 825 (11th Cir. 1997) and *Beard*, 402 F.3d at 607, arguing that the *T.L.O* test did not give enough guidance to school officials. (R. 12.) In *Jenkins,* the court granted qualified immunity because students in that case specifically alleged that the students had stolen a teacher's property and hid it on their person. *Jenkins*, 115 F.3d at 822. *Jenkins* set forth the principle that the "law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing' violates federal law." *Jenkins*, 115 F.3d 823, *citing Lassiter v. Alabama A & M Univ.,* 28 F.3d 1146, 1149 (11th Cir.1994). According to the Court of Appeals own decision, it was extremely obvious that the Respondents should not search Towles person. There was no eyewitness claiming that he had drugs that day. (R. 3.) He was not acting intoxicated. *Id.* He did not have a history of drug problems. *Id.* There was only a photograph of him sitting next to someone who had a history of drug use. *Id.* Principal Smalls did not drag every person who knew Conrad into her office that day, and she should not have violated Towles rights. She was under pressure from parents who had seen the ambiguous photograph online and in the aftermath of a drug related student death. She was determined to find drugs that day, despite the lack of evidence.

According to *Beard*, an immunity analysis "must be undertaken in light of the specific

context of the case, not as a broad general proposition. Accordingly, cases cast at a high level of generality will only be sufficient to clearly establish the unlawfulness of the defendants' actions where the conduct at issue is obviously a violation based on the prior cases." *Beard*, 402 F.3d at 607 (internal citations omitted). At first blush, *Beard* seems to place a weighty burden on Towles. There are no factually identical facts that Towles can point to established that the law is clearly established. However, this is one of the cases *Beard* mentions, where the conduct at is obviously a violation of constitutional law. Any reasonable person knows that just because someone is seen sitting near an alleged drug user does not mean that the person is likely to have drugs on their person. This is precisely the odious institution of guilt by association rejected by *Redding*, and it should not serve as the basis for qualified immunity. *Redding,* 531 F.3d at 1084.

Other cases granting immunity in school searches had much more helpful facts to the school officials. This is not a case like *Williams*, where there was a reliable tip implicating the student, as well as attempts to corroborate the accusations. 936 F.2d at 883. Unlike *Cornfield*, there is no obvious physical sign that Towles was hiding drugs, and Towles did not appear high when questioned. (R. 3); *Bridgman v. New Trier High Sch. Dist. No. 203,* 128 F.3d 1146 (7th Cir. 1997). As the Court of Appeals noted, cases like *Redding*, *Phaneuf, Beard, N.G.. v. Connecticut,* 382 F.3d 225, 234 (2d Cir. 2004), and *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir.1980) all decline to permit strip searches in most situations. An examination of the above cases illustrate the difficulty of determining whether the school officials should have known they were violating a right. However, under a totality of the circumstances, the Respondents had no right to strip search Towles, and therefore, they cannot be granted immunity.

Courts of appeals have regularly held unconstitutional student strip searches based on an uncorroborated tip that the student possessed drugs. *See, e.g., Phaneuf v. Fraikin*, 448 F.3d at

591; *Bilbrey ex rel. Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984); *Doe v. Renfrow*, 631 F.2d at 92. Additionally, guilt by association cannot be the basis of any search. *Redding* 531 F.3d at 1084. This extremely intrusive search was also unreasonable in scope, since it was not tailored to any reasonable search objective. *See Fewless*, 208 F.Supp. 2d at 806. As in *Bilbrey*, this supposed anonymous "tip" was not specific to what drugs Towles might have or where on his person they would be. *Bilbrey*, 738 F.2d 1462 . It could not be corroborated, and as such, clearly violated Towles' rights. Granting a qualified immunity defense on such meager facts as the one before this court would make a mockery of *T.L.O.* and the Fourth Amendment. The Respondents should have known that they had no justification for searching Towles, and that they exceeded any reasonable scope. As such, their defense of qualified immunity should be denied.

1. The Court of Appeals erred in failing to consider the scope of the search, because it is additional evidence that the law clearly established the illegality of the search.

The State of Grace Court of Appeals ruled that since the defendants' search of Towles was not justified at its inception, there was no need to address whether the search was unreasonable in its scope. However, the Court of Appeals also ruled that the defendants were entitled to qualified immunity because the constitutionality of the search was not clearly established at the time of the search. Without a ruling on this second prong of the T.L.O. test, the court cannot say with certainty that the law was vague as to the constitutionality of the search. If the search was clearly unreasonable in scope, and the defendants should have been aware of this fact, than it would be impossible for a court to grant them qualified immunity. The Court of Appeals should have examined all aspects of this case before making an immunity determination. Although they are permitted to apply the *Saucier* two-step test in any order, once the Court of Appeals began its analysis of Towles rights, it should have concluded that analysis

before addressing immunity. This case should be remanded for a finding on the reasonableness of the scope of the search if this Court finds that defendants are otherwise entitled to immunity.

2. Horton Hopkins School District is liable for the actions of Principal Smalls, as she acted pursuant to the District's drug policy in her search of the students.

Under *Monell v. Dept. of Social Services of New York*, a school board such as Horton Hopkins, may not be held liable under section 1983 simply because they employed Principal Smalls. 436 U.S. 658, 694, (1978). Rather, municipal liability attaches only "when execution of a government's policy or custom, (when) made by its lawmakers…inflicts the injury that the government as an entity is responsible under § 1983.".*Id.* Furthermore, plaintiffs cannot claim municipal liability unless they can demonstrate that the enforcement of its policy was the "moving force" behind the constitutional violation. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, (1985).

The Horton Hopkins School District's Drug and Alcohol Policy states "[w]hen 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." (Appendix A). As the official policy of the school district, the policy is certainly an official pronouncement of the municipal bodies. Additionally, Principal Smalls acted pursuant to this policy because she subjectively suspected that Towles had drugs, although this suspicion was unreasonable. She was well aware of the policy, as she requested it. The District Court even found that the searches were done, "per the school's drug policy." (R. 3). There is no evidence that Smalls had conducted searches such as these prior to the policy, and she moved for its creation so she would have a justification for precisely this kind of search. However, the search was not justified at its inception or reasonable in scope, and Respondents are not entitled to qualified immunity. As such, the School District should be held liable for

Principal Small's actions.

CONCLUSION

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

Respectfully Submitted,

Team No. 21
Counsel for Petitioners

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