

**IN THE
SUPREME COURT OF THE STATE OF GRACE**

KIT POLITTE AND CORY TOWLES,
Petitioners,

v.

HORTON HOPKINS SCHOOL DISTRICT AND KEENA SMALLS,
Respondents

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

BRIEF FOR THE PETITIONERS

TEAM NO. 23
Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether a school official's decision to suspend high-school students for failing to remove two webpages that were created entirely off school grounds violates the students' First Amendment guarantee of freedom of speech, applied to the states by the Fourteenth Amendment?
2. Whether the law clearly establishes that a strip search of a high school student on school grounds to find contraband, conducted without individualized suspicion that he possessed contraband, violates his Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment?

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CONSTITUTIONAL PROVISIONS INVOLVED

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.

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

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

STATEMENT OF THE CASE

Keena Smalls has been principal of Horton Hopkins High School (“Horton Hopkins”), a public school in Hopkinsville within the State of Grace, for the past twenty years. (R. at 1). In January of 2007, the school district enacted a strict, zero-tolerance drug policy. (R. at 1). This policy allows school officials to drug test students and to conduct searches of lockers, desks, and students’ personal property, such as clothing and book bags, while at school. (R. at 1). If school officials discover a student possesses illegal drugs, the school officials must suspend the student for a minimum of three days. (R. at 1-2).

In September of 2008, an eighteen-year-old Horton Hopkins senior, Kit Politte, began a school-sponsored club, Drug Use Damages Schools (“DUDS”). (R. at 2). Politte hoped this club would help curb drug use within the student body by promoting a drug-free lifestyle to students through the use of flyers and assemblies. (R. at 2). On September 10, 2008, Politte, from her home, used her personal computer to create a network webpage on Friendkepedia, a social networking website that allows users to create personal networks of acquaintances. (R. at 2). Politte’s webpage, Fighting All Dealers (“FAD”), asked community members to submit information about potential drug dealers. (R. at 2). Politte monitored the e-mail tips and posted only the “strongest” tips on the FAD page. (R. at 2). Politte promoted her webpage at a DUDS meeting that took place at Horton Hopkins after school hours. (R. at 2).

Corey Towles, a Horton Hopkins sophomore, transferred to Horton Hopkins, from the State of Disarray. (R. at 2). At his previous school, Towles was an honor student, played on the junior varsity baseball team, and with the exception of two detentions for tardiness his freshman year, had no disciplinary problems. (R. at 2). On October 3, 2008, Towles attended a house party at the home of Jeff Tweegs, a Horton Hopkins junior and captain of the baseball team. (R.

at 2). Towles hoped to increase his chances of making the Horton Hopkins baseball team by attending this party because he would be able to meet some of the baseball players. (R. at 2).

Towles arrived at the party around 9 p.m. and left by 11 p.m. (R. at 3). Towles saw no drug use at Tweegs' home. (R. at 3). Towles spent most of his time at the party outside throwing a football with other sophomores. (R. at 3). After Towles had left the party on October 3, Tweegs' neighbors called the police complaining of noise at the house. (R. at 3). Though the police cited several students for underage drinking, only one, Frank Conrad, was cited for drug possession. (R. at 3).

The next day, Politte, who was not at the party, received an e-mail with a photograph of Towles sitting with Conrad and another sophomore, John Thomson, outside of Tweegs' home. (R. at 3). In the photograph, Conrad is smoking a cigarette. (R. at 3). Politte posted the photograph onto FAD attributing it to "an anonymous Horton Hopkins student" with the caption, "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" (R. at 3).

On October 5, Principal Smalls received calls from several concerned parents who had viewed the photograph on the FAD webpage. (R. at 3). The Hopkinsville Police also called Smalls to alert her about the students they cited at Tweegs' party. (R. at 3). After viewing the photograph on the FAD webpage, Smalls called Towles, Conrad, Thomson, and Tweegs individually into her office for questioning. (R. at 3). All four students denied possessing drugs. (R. at 3). Smalls searched their lockers and book bags. (R. at 3). She found a small baggie of marijuana in Conrad's locker. (R. at 3). Without any further investigation, Smalls asked each of the boys to submit to a search of their persons individually, in the presence of a faculty member. (R. at 3).

Despite Towles' and the other three students' refusals to be searched, a gym teacher conducted a strip search of each boy. (R. at 3). The teacher made each boy strip to his undergarments and then searched of all the clothing pockets. (R. at 3). During the search, the gym teacher found a small amount of marijuana in Thomson's jeans pocket, but found no drugs in Towles' possession. (R. at 3).

Towles created his own Friendkepedia webpage, Students Against Defamatory Statements ("SADS"), in response to the FAD webpage and the school's search. (R. at 3). Towles edited his webpage at home from his personal computer. (R. at 3). His webpage contained a statement expressing his frustration with having his photograph posted on FAD with an inaccurate caption, and criticizing the Horton Hopkins school officials' improper search of his person. (R. at 3-4). Towles called for other students to speak out against Smalls' and other Hopkins officials' treatment of students in similar situations. (R. at 4).

After students heard about Towles' webpage, they began to access both FAD and SADS pages from their home computers, and also from the school computer labs and library during their free time and after school hours. (R. at 4). Smalls demanded that both Politte and Towles shut down their webpages. (R. at 4). When both students refused, Smalls suspended Politte and Towles until they agreed to take down the webpages. (R. at 4). Smalls admitted to being angry about Towles' criticisms of the school administration's actions dealing with the drug problem on school grounds, but claimed her main concern was keeping discipline and order at school and preventing the potential for student protest. (R. at 4).

Petitioners Towles, along with his parents, and Politte, filed this action in Badger County Court pursuant to 42 U.S.C. § 1983, alleging that Horton Hopkins High School's requirement that they take down their respective websites violated their rights to free speech under the First

Amendment, as incorporated by the Fourteenth Amendment to the United States Constitution. (R. at 4). Petitioner Towles further alleged that Horton Hopkins school officials' search of his person constituted an unreasonable search and seizure under the Fourth Amendment, as incorporated by the Fourteenth Amendment to the United States Constitution. (R. at 4).

The Badger County District Court granted Respondents' motion for summary judgment on both counts, finding no violation of Petitioners' constitutional rights. (R. at 5). The Court first held that the demand to shut down the webpages was valid under the *Tinker* standard because Principal Smalls could reasonably forecast that the webpages would cause a future disruption at school. (R. at 6). The court also found that Smalls had sufficient suspicion to justify a search of Towles' person, and that the method used to search was not excessively intrusive; therefore, there was no violation of the Fourth Amendment. (R. at 7-8).

The State of Grace Court of Appeals affirmed the District Court's grant of summary judgment. (R. at 12). The majority Court agreed that the Respondents did not violate Petitioners' First Amendment rights because the school official's suppression of student speech met the *Tinker* standard. (R. at 9-10). A dissenting judge would have held that the webpages were outside the school's authority because Petitioners created them using their home computers. (R. at 12-13). The Court did find a Fourth Amendment violation, ruling that Smalls had insufficient information to justify a search of Towles' person. (R. at 10-11). Despite this, the Court held that the Respondents were entitled to qualified immunity because the law regarding student strip searches was not clearly established at the time of the search. (R. at 12).

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Court of Appeals for the State of Grace and deny Respondents' motion for summary judgment on both counts. First, the school did not have

the authority to regulate Kit Politte and Corey Towles' constitutionally protected speech.

Second, the school's warrantless search of Corey Towles violated his Fourth Amendment right to be free from unreasonable searches.

Keena Smalls and the Horton Hopkins School District violated Kit Politte and Corey Towles' First Amendment right to freedom of speech when they attempted to regulate the students' off-campus internet speech. Ms. Smalls, as principal of Horton Hopkins, suspended both Kit Politte and Corey Towles from school until they agreed to remove the webpages. (R. at 4). Because the websites were not likely to "materially and substantially disrupt the work and discipline of the school," the First Amendment protects the students' internet speech. *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969). Further, school officials do not have the authority to punish students for internet speech that was created from their homes, entirely off-campus.

The Respondents conducted a search of Towles' person that violated his Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment. Nearly twenty-five years ago, the U.S. Supreme Court held that school officials must have reasonable suspicion before conducting a search of a student. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). To be reasonable, a search must be justified at its inception, and reasonable in its scope. *Id.* at 341-42.

The search of Towles was neither justified at its inception nor reasonable in its scope. It is unreasonable for school officials to rely on an anonymous tip without first verifying the authenticity of the tip as a basis for the search. *Alabama v. White*, 496 U.S. 325, 331-32 (1990). Although a less invasive search may have been reasonable, the extremely invasive search of Towles' person that took place was not.

The doctrine of qualified immunity does not permit the Respondents to avoid the consequences of their unconstitutional actions. Qualified immunity is not available when state officials are on notice that their actions violate a clearly established right. *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled on other grounds by Pearson v. Callahan*, 129 S.Ct. 808 (2009). *T.L.O.* clearly established a student’s right to be free of unreasonable strip searches at school. In addition, federal case law decided after *T.L.O.* has clarified that school officials require individualized suspicion to conduct a strip search of a student.

ARGUMENT

I. THE RESPONDENTS VIOLATED PETITIONERS POLITTE AND TOWLES’ FIRST AMENDMENT RIGHTS WHEN THEY ATTEMPTED TO REGULATE PETITIONERS’ INTERNET SPEECH CREATED OFF-CAMPUS.

The First Amendment right to Freedom of Speech is among the most fundamental and personal rights and liberties that the Fourteenth Amendment protects from invasion by the state. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570 (1942). The United States Supreme Court acknowledged the importance of the right to freedom of speech in *Terminiello v. City of Chicago*, noting, “[t]he right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.” 337 U.S. 1, 4 (1949). Justice Brennan, speaking for the Court, said, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). This Court reviews a grant of summary judgment *de novo*, drawing all factual inferences in favor of the non-moving party. *Phaneuf v. Fraikin*, 448 F.2d 591, 595 (2d Cir. 2006). The Court's task is not to resolve disputed issues of fact, but to determine whether there exists a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986).

A. The suspension of Petitioners Politte and Towles for refusing to remove their websites that was a violation of the right to freedom of speech because the websites were not likely to materially and substantially disrupt the work and discipline of the school and the websites were created entirely off of school grounds.

The U.S. Supreme Court has continued to make it clear that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (citing *Tinker*, 393 U.S. at 506). However, the Court has recognized that the rights of students in public school are not automatically coextensive with the rights of adults in other settings. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Nevertheless, school officials do not possess absolute authority over their students. *Tinker*, 393 U.S. at 511. Students, both in school and out of school, are ‘persons’ under the Constitution and are possessed of fundamental rights that the State must respect. *Id.*

1. The websites of Kit Politte and Corey Towles were protected speech under the *Tinker* standard because the websites were not likely to materially and substantially disrupt the work and discipline of the school.

The U.S. Supreme Court in *Tinker* held that school officials may not suppress student expression unless the officials reasonably conclude that it will “materially and substantially disrupt the work and discipline of the school.” *Tinker*, 393 U.S. at 513. The Court noted that the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” or “an urgent wish to avoid the controversy which might result from the expression” are insufficient to justify infringing on students’ First Amendment rights. *Id.* at 509-510. In *Saxe v. State College Area School District*, now-Justice Alito explained that expression may not be prohibited simply because society finds the idea offensive or disagreeable. 240 F.3d 200, 209 (3d Cir. 2001). Further, the government may not prohibit student speech based solely

on the emotive impact that its offensive content may have on a listener, but the school must point to a “well-founded expectation of disruption.” *Id.* at 212.

Later Supreme Court decisions have further addressed student-speech issues. Under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), a school may categorically prohibit lewd, vulgar, or profane language on school property. Under *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260 (1988), a school may regulate school-sponsored speech on the basis of a legitimate pedagogical concern. Speech that falls outside of these categories is subject to *Tinker’s* general rule that it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others. *Saxe*, 240 F.3d at 214.

The district court and the court of appeals erroneously concluded that Petitioners’ websites were not protected speech and Respondents could properly suppress the speech on the basis that school officials concluded that the websites created “a risk of substantial disruption under *Tinker*.” (R. at 10). The district court granted Respondents’ motion for summary judgment on the freedom of speech issue, concluding that Respondents prevail under the *Tinker* standard because the Respondents demonstrated that they could reasonably “forecast” a disruption from the websites. (R. at 6). However, the facts do not support such an inference by the Respondents. Petitioner Politte created the FAD website in September of 2008. (R. at 2). The record does not indicate that this website caused any disturbance. Further, even after Towles posted the SADS website to express a contrary message than that of FAD, the record does not show that the Respondents could reasonably “forecast” a disruption caused by the websites. *See Saxe*, 240 F.3d at 214. Both Politte and Towles created their webpages from home using their personal computers. (R. at 2, 3). Although Horton Hopkins students began to access the websites from school computers, there was no disruption in the ability of school officials to

operate the high school. In fact, the students only used the school computers to access Politte’s and Towles’ websites during their free time during the day and after school hours. (R. at 4). Principal Smalls claimed that she worried that the websites were causing too much of a disturbance and interrupting other students’ education. (R. at 4). Under *Tinker*, school officials may not suppress speech simply because they do not like it or out of an “undifferentiated fear or apprehension.” *Tinker*, 393 U.S. at 508. Principal Smalls admitted that she was angered by Towles’ criticism of the school administration. (R. at 4). She wanted to prevent what she saw as a “potential for student protest.” (R. at 4). The Supreme Court recognized that any word spoken, either in class or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. *Tinker*, 393 U.S. at 508. However, the United States “Constitution says we must take this risk . . . it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.” *Id.* at 508—09.

The First Amendment protected Petitioners’ speech on their websites and there is at least a genuine issue of material fact as to whether the Respondents have met the *Tinker* standard to lawfully regulate student speech. Therefore, this Court should reverse the ruling of the Court of Appeals of the State of Grace that the Respondents did not violate the Petitioners’ right to free speech.

2. Keena Smalls did not have the authority, as principal of Horton Hopkins High School, to suspend Kit Politte and Corey Towles from Horton Hopkins for websites each created entirely off of school grounds.

The U.S. Supreme Court has not directly addressed the scope of a school’s authority to regulate expression that does not occur on school grounds or at a school-sponsored event.

Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008). The U.S. Supreme Court case of *Morse v. Frederick* involved school officials who punished a student for a banner that proclaimed: “Bong HiTS 4 Jesus” during a time when students were released from school to go across the street to view the Olympic torch relay. 127 S. Ct. 2618 (2007). Despite the five separate opinions in *Morse*, the Justices unanimously agreed that *Morse* involved school-related speech; therefore, *Morse* is not controlling to the instant issue because the Petitioners’ speech took place from their homes, entirely off-campus. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007) (holding that a student was entitled to summary judgment when school officials punished him for creating a parody profile of the principal of his high school on an online social networking site). Other courts, relying on U.S. Supreme Court decisions, have concluded that “school officials’ authority over off-campus expression is much more limited than expression on school grounds.” *Id.* at 596, quoting *Killion v. Franklin Reg. Sch. Dist.*, 136 F. Supp. 2d 446, 453 (W.D. Pa. 2001).

Schools are not authorized to become censors of the internet merely because the internet may be accessed at school. *Layshock*, 496 F. Supp. 2d at 597. In *Thomas v. Board of Education, Granville Central School District*, a case involving student suspensions for printing a sexually explicit magazine almost entirely off school grounds, the Second Circuit Court of Appeals explained that “because school officials ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.” 607 F.2d 1043, 1050 (2d Cir. 1979). The First Amendment protects student expression that takes place off-campus even though administrators could reasonably foresee that the expression would be distributed in school. *Id.*

Recently, the Second Circuit in *Doninger v. Niehoff* upheld a school's decision to bar a student from running for senior class office based on a derogatory blog posted by the student on an independent website, in which she expressed her opinion about the school's supposed cancellation of an upcoming event. 527 F.3d at 44. The Court identified three factors that the court particularly relied upon when reaching the conclusion that the student's off-campus online posting "foreseeably create[d] a risk of substantial disruption within the school environment" and could be regulated. *Doninger*, 527 F.3d at 50. First, the language used on the posting was plainly offensive and potentially disruptive of efforts to resolve a controversy. *Id.* The posting recommended others call the "douchebags" in the central office to "piss [them] off more." *Id.* The second, and more significant factor, was that the post was "at best misleading and at worst false" information. *Id.* Lastly, the court reasoned that the punishment for the online communication related to the student's ability to participate in extracurricular activities, as opposed to a suspension from school. *Doninger*, 527 F.3d at 52.

The facts of the instant case differ significantly from those in *Doninger*. First, the language that Politte and Towles used on their webpages was not plainly offensive. Politte's website contained no offensive language and had photographs with captions, such as "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" (R. at 3). On his website, Towles merely expressed his frustration about his photo being posted on the internet with a caption that suggested he may have been involved with illegal drugs. (R. at 4). The worst language Towles used made reference to "the rest of these Hopkins idiots." (R. at 4). The language used by Towles and Politte on their websites is different than the language used by the student in *Doninger* in that neither Towles nor Politte used plainly offensive language, and their websites fall within the protections of the First Amendment.

Also in *Doninger*, the court concluded that another reason justifying the school's punishment of off-campus conduct was because the information spread electronically was "at best misleading and at worst [t] false." *Doninger*, 527 F.3d at 50. The information on Politte and Towles' websites was not intentionally false or misleading. Politte's website aimed to raise awareness of drug use in the community and to help police arrest local dealers. (R. at 2). Politte monitors the tips she receives, and only posts what she considers to be the "strongest" tips. (R. at 2). Towles' website did not contain false or misleading information. His page stated his dissatisfaction with his picture being taken without his consent, posted on the internet and the invasions of his privacy that resulted from the incident. (R. at 3-4). Unlike the student in *Doninger*, neither Towles nor Politte posted material they knew to be false or misleading.

The last justification given in *Doninger* was that the punishment only affected the student's ability to participate in extra-curricular activities. *Doninger*, 527 F.3d at 52. The Respondents in this case have suspended both Towles and Politte from school until they take down their websites. (R. at 4). An indefinite suspension is a much more serious punishment and is not analogous to denial of participation in a student body organization. For these reasons, the court of appeals' reliance on *Doninger* is misplaced, as the circumstances surrounding the incident are distinguishable from the present case.

An earlier Second Circuit case highlights the reluctance of the court to permit school officials the unfettered ability to punish student conduct that happens outside of school and supports a narrow application of *Doninger*. The Second Circuit recognized that courts cannot endorse allowing school administrators to punish students for expression that took place off school property because the "First Amendment will not abide the additional chill on protected expression that would inevitably emanate from such a practice." *Thomas v. Bd. of Educ.*,

Granville Cent. Sch. Dist., 607 F.2d at 1051. The Court then explained that “experience teaches that future communications would be inhibited regardless of the intentions of well meaning school officials.” *Id.*

Accordingly, the Respondents did not have the authority to punish Towles and Politte’s protected speech that was created completely off of school grounds. Allowing school officials to sanction the off-campus activities of students could lead to situations where school officials can require a student to attend detention for watching an adult movie in the living room of his home. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d at 1051. The Second Circuit held that while these activities are “certainly the proper subject of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon.” *Id.* There are also concerns about the exercise of such authority by school officials because the short duration of most sanctions imposed by school officials, for example a five-day suspension, insulates the process from effective review by the courts. *Id.* at 1052. The student has little chance to challenge the school administration’s exercise of authority.

The Respondents improperly infringed on Petitioners’ rights to freedom of speech when it punished them for speech that took place entirely off-campus, outside the domain of their authority to regulate student behavior. Thus, the Respondents violated Petitioners’ rights to free speech when it punished them for speech that took place off-campus and the grant of summary judgment in favor of the Respondents should be reversed.

II. THE SEARCH OF PETITIONER TOWLES VIOLATED HIS CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHTS BECAUSE IT WAS NEITHER JUSTIFIED AT ITS INCEPTION NOR REASONABLE IN ITS SCOPE, AND RESPONDENTS ARE THEREFORE NOT ENTITLED TO QUALIFIED IMMUNITY.

The Fourth Amendment of the United States Constitution guarantees the right of all citizens to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .” by the Federal government. U.S. Const. amend. IV. The Fourteenth Amendment extends this guarantee to searches performed by state officers. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). For purposes of the Fourth Amendment, state officers include public school officials. *T.L.O.*, 469 U.S. at 336-37. The strip search of Corey Towles, ordered by Respondent Keena Smalls in her position as principal of Horton Hopkins High School, violated his Fourth Amendment right to be free of unreasonable searches of his person. Petitioners incorporate by reference the standard of review as set forth in Assignment of Error I.

A. The strip search of Corey Towles was unreasonable under the *T.L.O.* standard because it was neither justified at its inception nor reasonable in its scope.

The U.S. Supreme Court has firmly stated that students do not “shed their constitutional rights . . . at the schoolhouse gate.” *Tinker*, 393 U.S. at 506. Nor do students waive all privacy rights in their clothing or possessions merely by bringing these items onto school grounds. *T.L.O.*, 469 U.S. at 339. It is true that the duty of public school officials to maintain order in the schools creates a “special need,” which exempts them from the requirement to show probable cause sufficient to obtain a warrant before searching students. *Vernonia*, 515 U.S. at 653. Nevertheless, a search of students conducted by school officials is not legitimate unless the search is reasonable under the circumstances. *T.L.O.*, 469 U.S. at 341.

The test for the reasonableness of a school search has two prongs. The search must first

be “justified at its inception”; secondly, officials must conduct it in a manner “reasonably related in scope to the circumstances which justified the [search] in the first place.” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The Court of Appeals of the State of Grace found that the “strip search” of Petitioner Towles violated his Fourth Amendment rights because it failed to meet the *T.L.O.* standard. (R. at 10-11). This Court should uphold the Court of Appeals’ ruling.

1. The search of Towles was not justified at its inception because school officials lacked reasonable suspicion that he possessed drugs.

A search of a student is not justified at its inception unless school officials have a reasonable basis to suspect that the search will turn up evidence of a past or ongoing violation of school rules. *T.L.O.*, 469 U.S. at 342. To establish reasonable suspicion, school officials must consider “all the circumstances” surrounding a proposed search. *Id.* at 341. Here, Smalls could not reasonably have believed there was enough evidence of drug possession to justify the search of Towles. Towles has never had disciplinary action taken against him regarding drug possession or use at school. (R. at 2). Nor has he been tied to drug activity outside of school. (R. at 11). While he was photographed at a party where drugs were present, there is no evidence that he used drugs at the party; nor is he using drugs in the photograph. (R. at 3).

In addition, the photograph in question was supplied to the FAD network by an anonymous tipster. (R. at 3). Absent indicia of reliability of an anonymous tip (or the tipster), it is unreasonable for a state official to take action based on an anonymous tip. *Alabama v. White*, 496 U.S. 325, 329 (1990). In *White*, the U.S. Supreme Court upheld a reasonable suspicion stop based on an anonymous tip, but only because the police had sufficiently corroborated the tip. *Id.* at 331-32 (noting that a suspect exited an apartment building, entered a specific vehicle, and drove to a motel, just as the tipster indicated she would). In comparison, nothing in the record of

this case indicates that Smalls made any attempt to locate the anonymous tipster or verify his/her reliability. Instead, she moved straight to a search of Towles and his belongings. (R. at 3). Her assumption that his presence at the party meant that he possessed or used drugs was nothing more than a case of guilt by association. *See Redding v. Safford Unified Sch. Dist.*, 531 F.3d 1071, 1084 (9th Cir. 2007) (finding Petitioner’s friendship with another student who possessed drugs insufficient to establish suspicion that Petitioner possessed drugs).

Certainly, “uncorroborated tip[s] no doubt justif[y] *additional inquiry and investigation* by school officials,” but school officials should conduct that investigation before moving to invasive searches of students. *Phaneuf*, 448 F.3d at 598-99 (emphasis added). At the very least, Smalls could have checked with Towles’ parents to see if they had any suspicion that Towles was using drugs. *See Williams by Williams v. Ellington*, 936 F.2d 881, 882 (6th Cir. 1991) (after receiving tip that two students had drugs on their person, principal discussed the matter with the students’ parents before conducting a search). Due to Smalls’ failure to first investigate, this Court should find that the search of Towles was unjustified at its inception.

i. A strip search requires greater suspicion to be justified at its inception than does a less invasive search.

Although a limited search of Towles’ belongings may have been justified¹, this does not mean that the school district had justification to search Towles’ person. Not all searches are equal in their level of intrusion, and, accordingly, “as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness.” *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993). Moreover, suspicion sufficient to justify a minimally intrusive search, e.g. of a locker or backpack, may not prove reasonable to

¹ Towles does not concede that Smalls had reasonable suspicion to search even his book bag. However, given the issue certified, and the fact that both courts below focused solely on the search of Towles’ person, Towles limits his objection to the search of his person.

justify a more invasive search. *Id.* Here, two searches occurred: one of Towles' locker and book bag, the other of Towles' person. The U.S. Supreme Court's decision in *T.L.O.* supports the position that two separate searches occurred. In *T.L.O.*, a high school principal searched a student's purse based on a report from a teacher that she had been smoking in the bathroom. 469 U.S. at 328. Upon finding rolling papers used to smoke marijuana, he searched the purse more thoroughly and found both marijuana and drug paraphernalia. *Id.* The Court found that discovery of rolling papers justified the second, more invasive search. *Id.* at 347.

Unlike in *T.L.O.*, the initial search of Towles' locker and backpack did not provide justification for a more invasive search. No drugs were found in either. (R. at 3). The lack of evidence that Towles possessed drugs at the time, together with the absence of drug offenses in his past, should have lead Smalls to avoid a second, more invasive search of Towles' person. This is especially so given the school district's official policy of "balanc[ing] the likelihood the student possesses drugs against the risk of infringing the student's individual rights." (R. at App. A). Despite this, and over Petitioner Towles' objections, a gym teacher required Towles to remove all of his clothing except his underwear and stand virtually naked while the teacher searched through his clothes. (R. at 3). This was a strip search. *Amaechi v. West*, 237 F.3d 356, 465 & n. 15 (4th Cir. 2001)(noting that the states uniformly classify as a strip search a search that allows inspection of a person in his underwear).

Courts recognize that strip searches are humiliating and embarrassing experiences, "regardless how courteously and professionally conducted." *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982). School officials do deserve some deference regarding the steps they take to prevent drug use at school. *T.L.O.*, 469 U.S. at 741-42. Even so, the intrusive and embarrassing nature of a strip search requires a high level of suspicion to justify such a search. *Phaneuf*, 448

F.3d at 596.

An invasive search may be justified when school officials have reason to believe a specific student is concealing drugs in his clothing. *Cornfield*, 991 F.2d at 1324 (upholding strip search of a student because school officials had noticed an unusual bulge in the crotch of his pants). In the present case, there was no such individualized suspicion. Granted, Smalls ordered a search of only the students who appeared in the photograph and the student at whose house the party occurred. (R. at 3). But the photograph established only that the students in the photograph were present at the party. Using this logic, Respondents could justify a strip search of every single Horton Hopkins High School student who attended the party. The Supreme Court has permitted mass, suspicionless searches of students, but in the context of drug-testing participants in school activities, not on facts like those in this case. *See Vernonia*, 515 U.S. at 664-65 (upholding urine testing of every student athlete); *Bd. Of Educ. Of Pottawatomie County v. Earls*, 536 U.S. 822, 838-39 (2002) (allowing urine testing of every participant in school activities). In a case similar case to this one, the Sixth Circuit Court of Appeals held unreasonable under the Fourth Amendment the strip search of an entire gym class, conducted because someone allegedly stole money. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604-06 (6th Cir. 2005).

It was therefore wholly unreasonable for Respondents to conduct a strip search of Towles based on the very limited evidence available to Smalls. Accordingly, this Court should uphold the ruling of the Court of Appeals of the State of Grace that the strip search of Towles was not justified at its inception.

2. Even if justified at its inception, the strip search of Towles was unreasonable in its scope.

Before school officials may search a student, they must make sure that the methods they

use are reasonably related to the objectives of the search. *T.L.O.*, 469 U.S. at 342. They must also make sure a search is not overly invasive, taking into account the age and sex of the student, as well as the nature of the suspected infraction. *Id.* The strip search of Towles did not comply with these guidelines and is therefore unreasonable in its scope.

At the time of the search, Towles was sixteen years old. (R. at 2). Teenagers are “extremely self-conscious about their bodies; thus the potential impact of a strip search was substantial.” *Cornfield*, 991 F.2d at 1323. Courts recognize “the psychological trauma intrinsic to a strip search.” *Redding*, 531 F.3d at 1085-86 (collecting cases from the Circuit Courts of Appeal that acknowledge the negative impact of a strip search). Studies show that adolescents are more self-conscious about their bodies than young children, and therefore “may experience strip searches as more humiliating and embarrassing than other victims.” Steven F. Shatz, et. al, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 17-18 (1991) [hereinafter *Strip Search of Children*].

School officials do have a valid interest in keeping drugs out of schools. But *T.L.O.* requires officials to balance their interests against the rights of students. *T.L.O.*, 469 U.S. at 338-39. The school acknowledges this duty in its student handbook, which states that the school will take into account the “likelihood” of drug possession before conducting a search that may violate a student’s rights. (R. at App. A). In Towles’ case, it was not at all likely that he possessed drugs on the day the search occurred. He had no history of drug use. (R. at 2, 11). Nor did Smalls find drugs in his locker or book bag. (R. at 3). Although she did find marijuana in another student’s locker, (R. at 3), this only made it more likely that this other student had drugs on his person, not that Towles did.

Despite the small likelihood that Towles possessed drugs, Smalls chose to subject this

sixteen-year-old boy to a strip search anyway. This search could well have a long-lasting psychological impact on Towles. *Strip Search of Children*, 26 U.S.F. L. Rev. at 18 (“School-age children need a measure of privacy to mature in a healthy manner, and threats to that privacy function as threats to their self-esteem.”). In ordering such a search, Smalls ignored the U.S. Supreme Court’s instruction that “the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.” *T.L.O.*, 469 U.S. at 343. This Court should therefore find that the search of Towles’ person was unreasonable in scope, and thus violated his Fourth Amendment rights.

B. Respondents are not entitled to qualified immunity in this case because it was clearly established, at the time of the strip search of Towles, that the search violated his Fourth Amendment rights as applied to the states by the Fourteenth Amendment.

When state officials violate a citizen’s constitutional rights, a suit for damages is often the only “realistic avenue for vindication” of those rights. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). The doctrine of qualified immunity permits state officials to avoid the consequences of their unlawful actions, but only if they were not on notice that those actions were unlawful at the time they acted. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). A state official is on notice that his or her actions violate a constitutional right if that right is clearly established at the time of the violation. *Saucier*, 533 U.S. at 202.²

This does not mean that officials may avoid liability for their unlawful actions unless a case already exists with the same facts. Rather, a right is clearly established if the contours of

² When considering qualified immunity, a court must consider both whether a violation of a constitutional right occurred, and if so, whether that right was clearly established, though courts may consider these prongs in whichever order they find most prudent. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009) (overruling requirement in *Saucier* that courts must consider whether a violation occurred before deciding whether it was clearly established).

that right are such that a reasonable officer would know his or her actions violate that right, in the light of pre-existing law. *Hope*, 536 U.S. at 739. The U.S. Supreme Court has upheld convictions “despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.” *United States v. Lanier*, 520 U.S. 259, 269 (1997).

In this case, the Court of Appeals of the State of Grace held that Respondents were entitled to qualified immunity because it was not clearly established that the strip search of Towles violated his constitutional rights. (R. at 11-12). In so doing, the Court failed to take into account that *T.L.O.* set a clear standard for assessing the constitutionality of student searches. The Court also failed to recognize the growing body of federal law regarding strip searches of students, which put Respondents on notice that their actions violated Towles’ rights. This Court should find that Respondents are not entitled to qualified immunity, and overturn the Court of Appeals’ holding to the contrary.

1. The standard set forth in *T.L.O.* clearly establishes Towles’ Fourth Amendment right to be free of unreasonable strip searches at school.

Twenty-three years before the events in this case, the U.S. Supreme Court decided *T.L.O.*, in which it set clear guidelines for permissible student searches. 469 U.S. at 742-43. Searches must be “justified at [their] inception” and “reasonabl[e] . . . in scope.” *Id.* The Court also provided guidance for both of these prongs. A search is not justified at its inception unless officials have a reasonable belief that the proposed search will reveal evidence of present or past violations of school rules. *Id.* at 743. A search is reasonable in its scope only when the search method is “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* at 743.

Unless the *T.L.O.* standard is meaningless, it must clearly establish the law in some situations. For example, if there is a school rule against chewing gum on campus, the Fourth Amendment would not permit a strip search of a student suspected of carrying gum. *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 831 (11th Cir. 1997) (Kravitch, J., dissenting). Neither are all searches for drugs reasonable under *T.L.O.* If a school official receives a tip that a student has drugs in his locker, a search of anything other than the locker is unreasonable if the student has had no opportunity to remove the drugs. *Redding*, 531 F.3d at 1104 (Hawkins, J., dissenting).

In addition, the Ninth Circuit Court of Appeals has explicitly held that *T.L.O.* clearly establishes a student's right to be free of unreasonable strip searches. *Id.* at 1089. In *Redding v. Safford Unified School District*, a principal received a tip that a student, Savana Redding, had brought prescription medication onto school grounds. 531 F.3d at 1075. After Savana denied having the drugs, the principal searched her backpack. *Id.* When this first search failed to produce any drugs, the principal ordered the school nurse to strip search Savana. *Id.* No additional steps were taken to determine the likelihood that she possessed drugs. During the search, Savana had to strip to her underwear, pull her bra to the side to expose her breasts, and pull her underwear forward at the crotch. *Id.* Again, no drugs were found. *Id.*

The Ninth Circuit first found that this search violated both prongs of the *T.L.O.* standard. The search was not justified at its inception because the principal took no steps to verify the tip before proceeding to a strip search and simply assumed Savana possessed drugs because one of her friends did. *Id.* at 1083-84. The search was also unreasonable in scope because the psychological impact of a strip search on a teenage girl outweighed the school's interest in finding drugs, given the limited evidence. *Id.* at 1085-86. Next, the Ninth Circuit held that, at

the time of the search, despite the lack of precedent “precisely on all fours,” *T.L.O.* established Savana’s right to be free of such an overly intrusive strip search. *Id.* at 1087-89.

Redding is very similar to the case at bar. After a minimally invasive search of his backpack failed to reveal drugs, Respondents subjected Towles to a strip search. (R. at 3). Respondent Smalls made no further investigation before proceeding to the search of Towles’ person. Towles, like Savana, had to strip to his underwear. (R. at 3). One difference is that in *Redding*, a student had specifically stated that Savana had given her drugs, 531 F.3d at 1076, while in the instant case, no one had told Smalls that Towles had drugs on campus. Instead, Smalls relied on the photograph supplied by an anonymous source that merely places Towles at a party. (R. at 3). Thus, the search of Towles was even less reasonable than the search of Savana.

Respondents may point to cases from other circuits where courts held that the standard in *T.L.O.* does not clearly establish that a strip search violates a student’s Fourth Amendment rights. *See, e.g., Jenkins*, 936 F.2d at 825. Despite this, Respondents’ argument that Towles’ Fourth Amendment rights were not clearly established falls short. The Ninth Circuit decided *Redding* in July of 2008, three months before the events which took place in this case. (R at 2-3) (the party took place on October 3, 2008, the strip search the following day). The national media widely publicized the Ninth Circuit’s decision. *See, e.g., Strip-searched Girl Wins Appeal*, Los Angeles Times, July 12, 2008 (*available at* <http://articles.latimes.com/2008/jul/12/nation/na-strip12>). Plus, *T.L.O.* is itself over twenty years old. *T.L.O.*, 469 U.S. at 325 (decided in 1985).

For these reasons, this Court should find that Towles’ Fourth Amendment right to be free from unreasonable strip searches at school was clearly established as of October of 2008. This Court should therefore overturn the Court of Appeals of the State of Grace’s holding to the contrary.

2. Federal case law at the appellate and district court level clearly established by October of 2008 that the strip search of Towles violated his Fourth Amendment rights because school officials lacked individualized suspicion of Towles.

In determining whether a constitutional right was clearly established, courts first look to decisions of the U.S. Supreme Court, and then to decisions of the federal circuit courts and lower courts within the circuits. *Beard*, 402 F.3d at 606. In the years since *T.L.O.*, federal courts have ruled on numerous cases involving student strip searches. These cases have painted an increasingly clear picture of exactly when a strip search of a student is constitutionally permissible. Even if this Court finds *T.L.O.* insufficient to clearly establish Towles' Fourth Amendment rights, subsequent federal case law made it clear by October of 2008 that the strip search of Towles was impermissible because school officials lacked individualized suspicion.

Because school officials in *T.L.O.* had individualized suspicion before conducting the search of a student, the Supreme Court declined to rule on whether individualized suspicion is required. *T.L.O.*, 469 U.S. at 342 n. 7. The U.S. Supreme Court has since held that individualized suspicion is not required for officials to drug test students who participate in school activities. *Vernonia*, 515 U.S. at 665-66. But, *Vernonia* dealt with testing urine discreetly collected from students, not strip searches.

Conversely, federal circuit and district courts have rendered numerous rulings on the constitutionality of student strip searches. In *Cornfield v. Consolidated School District No. 230*, the Seventh Circuit upheld the strip search of a student because school officials reasonably believed he was hiding drugs in the crotch of his pants. 991 F.2d at 1323. On the other hand, in *Thomas ex rel. Thomas v. Roberts*, the Eleventh Circuit held that strip searches of an entire fifth grade class to find missing money violated the Fourth Amendment because they “were conducted without individualized suspicion.” 261 F.3d 1160, 1169 (11th Cir. 2001) (*vacated on*

other grounds by Thomas v. Roberts, 536 U.S. 953 (2002)). The Sixth Circuit has also held that strip searches conducted without individualized suspicion violate the Fourth Amendment.

Beard, 402 F.3d at 605-06 (involving strip searches of an entire gym class).

Further, student tips are not sufficient to create individualized suspicion. The Second Circuit found unreasonable a strip search conducted based on a student tip because officials did nothing to corroborate the tip—they merely assumed the student was reliable. *Phaneuf*, 448 F.3d at 598. The Second Circuit requires individualized suspicion even in the context of juvenile detention facilities. *N.G. ex rel S.C. v. Connecticut*, 382 F.3d 225, 234 (2d Cir. 2004) (although strip search upon entry to facility was valid, multiple searches were unreasonable absent individualized suspicion). The Ninth Circuit also finds strip searches based on uncorroborated tips unreasonable. *Redding*, 531 F.3d at 1083. Federal district courts have reached the same conclusion. *See, e.g., Fewless by Fewless v. Bd. of Educ. of Wayland Union Sch.*, 208 F. Supp. 2d 806, 817 (W.D. Mich. 2002) (strip search unreasonable when based solely on a student’s tip that another student was hiding drugs in his “butt crack”).

As more and more courts determine that the constitutionality of school strip searches turns on individualized suspicion, the right of students to be free from suspicionless strip searches must at some point become clearly established. Total factual similarity between cases is not required to clearly establish a right. *Hope*, 536 U.S. 730, 741 (“expressly reject[ing] a requirement that previous cases be ‘fundamentally similar’”). To hold otherwise would mean that “any school official would receive one ‘bite of the apple,’ regardless of the nature of the conduct.” *Konop for Konop v. Northwestern Sch. Dist.*, 26 F. Supp. 2d 1189, 1195 (D. S.D. 1998).

In this case, Respondents lacked individualized suspicion to strip search Towles. The

only evidence against Towles was his presence at a party. (R. at 2-3). He had no prior drug history. (R. at 2, 11). Neither a search of his locker nor of his backpack revealed drugs. (R. at 3). Although the photo of Towles is arguably a tip, Smalls did not take the steps necessary to corroborate the tip. She should certainly have done so because the tip was anonymous. (R. at 3). The tip was not given to Smalls, but rather to a third party who was not a school official. (R. at 3). Thus, when the strip search occurred, school officials had no individualized suspicion that Towles possessed drugs. Because case law has established that individualized suspicion is necessary to strip search students, this Court should find that Respondents violated Towles' Fourth Amendment rights when Smalls ordered the strip search.

CONCLUSION

For the foregoing reasons, this Court should reverse the holdings of the Court of Appeals and District Court and deny Respondents' motion for summary judgment on both counts.

Respectfully Submitted,

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