

No. 05-1338

IN THE
Supreme Court of the State of Grace

MS. KIT POLITTE AND MR. CORY TOWLES,

Petitioners,

v.

HORTON HOPKINS SCHOOL DISTRICT AND MS. KEENA SMALLS,

Respondents.

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

BRIEF FOR THE RESPONDENT

*Team No. 28
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QUESTIONS PRESENTED

- I. Does a school district's decision regulating student speech by removing webpages, performed to eliminate a potential substantial disruption to school activities, violate the First Amendment guarantee of free speech?

- II. Does a search of a student's belongings and person conducted on school premises and based on a reasonable suspicion, violate the Fourth Amendment right of a student, as applied to school officials via the Fourteenth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
RELEVANT CONSTITUTIONAL PROVISIONS	viii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. THE BADGER COUNTY DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT HORTON HOPKINS SCHOOL DISTRICT AND PRINCIPAL SMALLS	5
II. THE SCHOOL ADMINISTRATOR’S PUNISHMENT OF STUDENTS WHOSE WEBPAGES FELL UNDER SCHOOL JURISDICTION DOES NOT INFRINGE ON STUDENT FIRST AMENDMENT SPEECH PROTECTION.....	7
A. Petitioners’ Webpages Created a Reasonable Belief of Impending Substantial Disruption of School Activities and are Therefore Properly Subject to School Disciplinary Action.....	9
B. Even if this Court Finds Petitioner Towles’ Webpage did not Reasonably Forecast Substantial Disruption, it was Reasonably Interpreted as Promoting Illegal Drug Use, and is Therefore Subject to School Disciplinary Measures.....	13
C. Even if this Court Determines that no Reasonable Forecast of Material Disruption Occurred, the Disciplinary Action did not Impermissibly Infringe on Petitioner Politte’s First Amendment Right Because her Webpage Properly Fell Under the Editorial Control of Educators as School Sponsored Speech	15
1. Horton Hopkins High School has not intentionally created a public forum, and inaction cannot be treated as such as a result of inaction	16
2. The demand for removal of the webpage was a permissible exercise of editorial control over school sponsored speech	18
3. The demand for removal was reasonably related to legitimate pedagogical concerns	20
III. THE SEARCH OF PETITIONER’S WALLET, BOOK BAG, AND PERSON DID NOT VIOLATE PETITIONER’S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.....	21

A. The Search of Petitioner’s Personal Belongings and Clothing was Reasonable Because the Search was Both Justified at its Inception and Reasonable in Scope Based on the Nature of the Infraction..... 22

1. The search of Petitioner’s belongings and person was justified at its inception because Principal Smalls possessed reasonable grounds for suspecting the search would recover evidence that the student was violating or had violated the law or school policy..... 23

2. The search of Petitioner’s belongings and clothing was reasonable in scope in light of the objectives of the search and the Petitioner’s sex, age and the nature of the infraction..... 26

B. Principal Smalls was Entitled to Qualified Immunity in Enforcing a Facially Valid Strict, Zero-Tolerance Drug Policy under Law that was not Clearly Established at the Time of the Act..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

UNITED STATES SUPREME COURT

Anderson v. Creighton, 43 U.S. 635 (1987)..... 29

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 6

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)8, 10, 15, 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)..... 6

Cornelius v. NAACP Legal Defense & Educ. Fund Inc., 473 U.S. 788 (1985)..... 16

Delaware v. Prouse, 440 U.S. 648 (1979) 22

Epperson v. Arkansas, 393 U.S. 97 (1968)..... 8

First Nat’l Bank of Ariz. v. Cities Service Co., 391 U.S. 253 (1968) 6

Florida v. J.L., 529 U.S. 266 (2000)..... 24

Gitlow v. New York, 268 U.S. 652 (1925)..... 7

Griffin v. Wisconsin, 483 U.S. 868 (1987)..... 21

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 28

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)..... passim

Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961) 7

Malley v. Briggs, 475 U.S. 335 (1986)..... 29

Morse v. Frederick, 127 S.Ct. 2618 (2007) passim

New Jersey v. T.L.O., 469 U.S. 325 (1985)..... 22, 23, 26

Pearson v. Callahan, 129 S.Ct. 808 (2009) 28

Perry Educ. Assn. v. Perry Local Educators’ Assn., 460 U.S. 37 (1983)..... 16

Reno v. ACLU, 521 U.S. 844 (1997) 8

Saucier v. Katz, 533 U.S. 194 (2001) 28, 29

<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974)	29
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	21
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 503 (1969).....	
.....	8, 9, 10, 11, 12
<i>United States v. Cortez</i> , 449 U.S. 411 (1981)	21
<i>Vernonia Sch. Dist. 47J v. Acton</i> , 515 U.S. 646 (1995).....	8, 13, 22
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981).....	17

UNITED STATES COURT OF APPEALS

<i>Beard v. Whitmore Lake School District</i> , 244 Fed.Appx. 607 (2007).....	22, 27, 28, 29
<i>Boucher v. School Board of School District of Greenfield</i> , 134 F.3d 821 (1998).....	11, 12
<i>Cornfield v. Consolidated High Sch. Dist.</i> , 991 F.2d 1316 (7th Cir. 1993).....	26, 27, 30
<i>Doninger v. Niehoff</i> , 527 F.3d 41 (2008).....	11, 12
<i>Hosty v. Carter</i> , 412 F.3d 731 (2005).....	17, 18, 19
<i>In re D.D.</i> , 554 S.E.2d 346 (2001).....	23
<i>McBride v. Village of Michiana</i> , 100 F.3d 457 (6th Cir. 1996)	29
<i>McGuire v. Reilly</i> , 260 F.3d 36 (2001)	10
<i>Pace v. Capobianco</i> , 283 F.3d 1275 (11th Cir. 2002)	29
<i>Phaneuf v. Fraikin</i> , 448 F.3d 591 (2d Cir. 2006).....	30
<i>Pluet v. Frazier</i> , 355 F.3d 381 (2004)	6
<i>Redding v. Safford United Sch. Dist. No. 1</i> , 531 F.3d 1071 (9th Cir. 2008).....	30
<i>Reynolds v. City of Anchorage</i> , 379 F.3d 358 (2004).....	26
<i>Thomas v. Board of Education</i> , 607 F.2d 1043 (1979).....	11, 20
<i>Williams v. Ellington</i> , 936 F.2d 881 (1991).....	24

Wisniewski v. Bd. of Educ. of Weedsport Central School District, 494 F.2d 39 (2007)..... 11

Zamora v. Pomeroy, 639 F.2d 662 (1981)..... 25

CONSTITUTIONAL PROVISIONS & STATUTES & RULES

42 U.S.C. 1983 5

U.S. CONST. amend. I..... 7

FED. R. CIV. P. 56(c)..... 6

FED. R. CIV. P. 56(e)..... 6

RELEVANT CONSTITUTIONAL PROVISIONS

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 search and seizure, shall not be violated . . .

U.S. Const. amend. IV.

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

Nor shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The Horton Hopkins School District (“District”) has seen a substantial rise in student drug use in the last five years. (R. at 1.) Last year, Principal Smalls suspended twenty-five students illegal substance use on school grounds. (*Id.*) This year, the school administration has caught fifteen students smoking marijuana on school grounds. (*Id.*) This increased drug use culminated in the December 2007 student death of a seventeen year old female student from a cocaine overdose. (*Id.*)

In response to the significant threat of drug use, the District implemented a strict, zero-tolerance Drug and Alcohol Use Policy (“Policy”) in January 2007. (R. at 1.) The Policy allows school officials to conduct searches of lockers, desks, and students’ personal property. (*Id.*) It requires a suspicion of drug use or possession of illegal substances on school property. (*See* App. A at 15).

In September 2008, Petitioner Politte, a senior, started Drug Use Damages Schools (“DUDS”), a school-sponsored club. (R. at 2.) DUDS was intended to curb drug use within the student body. (*Id.*) The organization has approximately 130 student members. (*Id.*) Petitioner Politte also created a network webpage on Friendkepedia, Fighting All Dealers (“FAD”), to inform the community about suspected drug activity. (R. at 2.) Petitioner Politte posted the “strongest” anonymous tips of drug activity received from members of the Friendkepedia webpage. (*Id.*) Petitioner Politte’s FAD page had 235 members, including all 130 DUDS members. (*Id.*)

On October 3, 2008, Petitioner Corey Towles (“Towles”) attended a party at the home of Jeff Tweegs (“Tweegs”), another District student who had been suspended in September 2008 for smoking marijuana. (R. at 2.) Petitioner Towles attended this party hoping he would meet

other students, including members of the baseball team, in effort to increase his chances of becoming a member of the team. (*Id.*) Prior to the party, rumors circulated that marijuana would be present. (*Id.*) Petitioner Towles stated that he observed students smoking cigarettes and drinking beer but claims he saw no drug use. (R. at 3.) While responding to noise complaints, law enforcement cited five students for underage drinking and one student, Frank Conrad (“Conrad”) for possession of marijuana. (*Id.*)

On October 4, 2008, Petitioner Politte received an e-mail, including a photograph of Towles sitting with two other students, John Thomson and Conrad who was smoking. (R. at 3.) Petitioner Towles’ face was clearly visible in the photograph. (*Id.*) Petitioner Politte posted the photograph on the FAD webpage with the caption: “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (*Id.*) The following day, Principal Smalls received calls from several concerned parents who had viewed the photograph on the FAD page. (*Id.*) Principal Smalls also received a call from law enforcement officials informing her of the citations that were issued to students at the party. (*Id.*)

After viewing the FAD webpage, Principal Smalls questioned Towles, Conrad, Thomson and Tweegs individually. (R. at 3.) All four students denied possessing drugs. (*Id.*) Pursuant to District policy, Principal Smalls conducted a search of each student’s locker and book bag and recovered a small baggie of marijuana in Conrad’s locker. (*Id.*) Principal Smalls then requested the students submit to an individual search. (*Id.*) All of the students, including Towles, refused to be searched. (R. at 3.) The gym teacher, Mr. Jim Waters, conducted an individual search of each boy in private. (*Id.*) Each student was instructed to remove his outer clothing, which Mr. Waters then searched. (*Id.*) Mr. Waters did not touch any of the students. (*Id.*) During the

search, a small amount of marijuana was discovered in Thomson's pocket. (R. at 3.) No drugs were found in Petitioner Towles possession. (*Id.*)

Subsequent to Politte's webpage posting and Towles' search at the school, Petitioner Towles created a Friendkepedia network page entitled Students Against Defamatory Statements ("SADS"). (R. at 3.) Towles criticized the posting on FAD's webpage as an invasion of his privacy and an act of defamation. (R. at 4.) Additionally, Towles claimed the Hopkinsville School District had committed a "far worse injustice when they subjected my friends and me not only to an unreasonable search of our lockers, but also to strip searches." (*Id.*) Petitioner Towles called on students to "let our school administrators know that we will not tolerate this kind of treatment" and to "speak out against Smalls and the rest of these Hopkins idiots." (*Id.*)

Students started accessing the websites from school. (R. at 4.) In response, Principal Smalls' demanded both Politte and Towles shut down their webpages. (*Id.*) Both students refused and Principal Smalls subsequently suspended Politte and Towles until they agreed to take down their pages. (*Id.*) Principal Smalls justified the suspensions as necessary for "keeping discipline and order at school" and "preventing what she saw as a potential for student protest." (*Id.*)

Towles and Politte brought suit in Badger County District Court challenging the school's requirement to remove their respective webpages as a violation of their right to free speech under the First and Fourteenth Amendments. (R. at 4.) Towles additionally challenged the school's search of his person as an unreasonable search. (*Id.*) The district court granted respondents' Motion for Summary Judgment on both the First and Fourth Amendment issues. (*Id.*) The district court held that Horton Hopkins School District was entitled to demand that students shut down their Friendkepedia pages because the District could reasonably forecast a disruption. (R.

at 6.) Additionally, the district court held that the search of Towles' person and personal belongings constituted a permissible search under the Fourth Amendment. (*Id.*)

The State of Grace Court of Appeals affirmed the district court's ruling on summary judgment. (R. at 9.) The court of appeals, in addressing the First Amendment, held that the District and Principal Smalls lawfully regulated the viewing of students' webpages in order to prevent possible disruptions during school hours. (*Id.*) The court, in addressing the Fourth Amendment, affirmed the district court's ruling on different grounds. The court of appeals concluded that the search was unreasonable but held the District was entitled to qualified immunity because the legality of the search was not clearly established at the time that school administration searched Petitioner Towles. (*Id.*)

SUMMARY OF ARGUMENT

The district court properly granted summary judgment because the demand for removal of webpages did not infringe on Petitioner's First and the reasonable personal search does not violate Petitioner's Fourth Amendment rights. First, the district court properly granted summary judgment because Petitioners did not show a genuine issue of material fact under *Celotex Corp. v. Catrett*. (Part I) Petitioner's reliance on mere existence of factual dispute is not enough to overturn a proper grant of summary judgment under, *Anderson v. Liberty Lobby, Inc.*.

Second, the district court properly determined the demand for removal of Petitioners' webpages did not violate Petitioners' First Amendment Speech Rights. The district court properly concluded that Principal Smalls reasonably forecast a substantial disruption would be created by Petitioners' webpages if those pages remained active. (Part II.A) In addition to a forecast of substantial disruption, Petitioner Towles' webpage could reasonably be viewed as promoting illegal drug use and was subject to school disciplinary measures. (Part II.B)

Petitioner Politte’s webpage was properly under school editorial control as expressive speech in a school sponsored activity. (Part II.C) Editorial control is proper where a school has not opened its facilities as a public forum. (Part II.C.1) A school may regulate expressive speech in school sponsored activities. (Part II.C.2) The removal of webpages was reasonably related to legitimate pedagogical concerns. (Part II.C.3)

Finally, the personal and bag search of Petitioner Towles did not violate his Fourth Amendment protections. The district court properly reviewed the search under *New Jersey v. T.L.O.* (Part III) The search of Petitioner’s clothing and person by school officials were justified. (Part III.A) Under *T.L.O.*, the search was justified at its inception (Part III.A.1) and in its scope. (Part III.A.2) Although incorrect in its application of *T.L.O.*, the appellate court properly held that qualified immunity extended to Principal Smalls. (Part III.B) Therefore, this court should affirm the decision of the district court and hold Principal Smalls’ action constitutional as applied to Petitioners.

ARGUMENT

I. THE BADGER COUNTY DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT HORTON HOPKINS SCHOOL DISTRICT AND PRINCIPAL SMALLS.

The Badger County District Court correctly granted Respondents’ Motion for Summary Judgment because no genuine issue of material fact exists as to the essential elements of Petitioners’ case. A First Amendment claim under 42 U.S.C. 1983 requires “[e]very person who . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .” 42 U.S.C. § 1983 (2000). Rule 56(c) of the Federal Rules of Civil Procedure states that summary judgment is properly granted “if the pleadings, depositions, answers to interrogatives, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c).

In reviewing an order for summary judgment under Rule 56(c), the United States Supreme Court applies a *de novo* standard. *See Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004). The Court has held that Rule 56(c) “mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party moving for summary judgment, after informing the court of the basis for its motion does not have to provide any supporting affidavits to negate the opponent’s claim. *Id.* at 323.

Under *Celotex* and Rule 56(e), the nonmoving party bears the burden of proof that there is a genuine issue of material fact as shown through the pleadings and other supporting documents. 477 U.S. at 323; *See* FED. R. CIV. P. 56(e). A nonmoving party may not rest on his or her allegations to reach the jury without “any significant probative evidence tending to support the claim.” *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968). Rather, under summary judgment standards, “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The Seventh Circuit Court of Appeals has determined that “a plaintiff’s own uncorroborated testimony is insufficient to defeat a motion for summary judgment.” *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 939 (7th Cir. 1997).

Here, Petitioners' failed to show a genuine issue of material fact exists that would allow them to succeed on the merits of their claim. Resting solely on their on their allegations of wrong doing, Petitioners' neither argue against the right nor the justification of the school official to enforce disciplinary measures. (R. at 4.) Therefore summary judgment was properly granted in this case.

II. THE SCHOOL ADMINISTRATOR'S PUNISHMENT OF STUDENTS WHOSE WEBPAGES FELL UNDER SCHOOL PURVIEW DOES NOT INFRINGE ON STUDENT FIRST AMENDMENT SPEECH PROTECTION.

The Badger County District Court correctly held that the required removal of Petitioners' webpages did not infringe on First Amendment rights to freedom of expression because a call to disruption of normal school activities is not protected speech under the First Amendment. Even if this court finds that the call to disruption could be protected by the First Amendment, the required removal of webpages does not violate those rights because the actions were taken based on a reasonable belief that the speech would cause material disruption or substantial disorder within the school.

The First Amendment of the United States Constitution states "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. As applied to the states through the Fourteenth Amendment,¹ the First Amendment grants constitutional free speech protections. However, the Court "reject[ed] the view that freedom of speech . . . [is] absolute[]." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961) (citation omitted). However, the U.S. Supreme Court noted that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school."

¹ *Gitlow v. New York*, 268 U.S. 652 (1925).

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995). (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).)

Even in light of the retention of freedom of speech and expression, the Supreme Court has repeatedly recognized that “the constitutional 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). Online speech is subject to the same protections under the First Amendment as print media. *Reno v. A.C.L.U.*, 521 U.S. 844 (1997). In the context of a school, “the Court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

Determining whether school disciplinary action violates First Amendment free speech protection requires three inquiries. First, under the *Tinker* standard, the school official must demonstrate facts that might reasonably lead “school authorities to forecast substantial disruption of or material interference with school activities.” *Tinker*, 393 U.S. at 514. The conduct may occur either inside or outside the classroom. *Id.* at 513. Conduct or speech that meets this standard is “not immunized by the constitutional guarantee of free speech.” *Id.* If the speech forecasts a substantial disruption, prohibition of that speech does not impermissibly infringe on First Amendment speech protection. *Id.* at 740.

Second, if the Court finds no facts to satisfy the test under *Tinker*, it must determine whether the speech at issue “was reasonably viewed as promoting illegal drug use” to students. *Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007)². If the speech can be reasonably considered as

² Although traditionally the United States Supreme Court has applied *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and its test of vulgar, lewd, or plainly offensive speech as the second prong of this analysis, *Bethel*

promoting drug use, prohibition of the speech does not impermissibly infringe on First Amendment speech protection. *Id.* at 2629.

Third, if this Court finds no facts to satisfy either the *Tinker* or *Morse* tests, it can determine whether the actions of school officials were an exercise of editorial control. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). In determining editorial control, the standard is whether educators were “exercising editorial control over the style and content of student speech in school-sponsored expressive activities” and whether that control was “reasonably related to legitimate pedagogical concerns.” *Id.* at 273.

Here, Petitioners’ webpages do not fall under the protection of the First Amendment. Petitioner Towles’ webpage’s call to protest served as a reasonable forecast of “material disruption of or substantial disorder with school activities,” and therefore falls within the scope of school authority. *Tinker*, 393 U.S. at 514. Even if this Court finds that *Tinker* does not apply to Petitioner Towles, his webpage could reasonably be viewed as a promotion of illegal drug use to students and therefore was subject to disciplinary action. Politte’s webpage would have continued to cause a “material disruption of or substantial disorder with school activities.” *Id.* Even if this Court finds Petitioner Politte is unaffected by *Tinker*, her webpage is “student speech in school-sponsored expressive activities,” and Respondent was properly “exercising editorial control over the style and content” of that speech. *Hazelwood*, 484 U.S. at 273.

A. Petitioners’ Webpages Created a Reasonable Belief of Impending Substantial Disruption of School Activities and are Therefore Properly Subject to School Disciplinary Action.

The Badger County District Court correctly held that the demand to shut down Petitioner Towles’ webpage did not impermissibly infringe on First Amendment free speech protection

does not apply in the case at bar because no language exists in either website that could reasonably be viewed as vulgar, lewd, or plainly offensive.

because Petitioner’s call to protest reasonably forecasts a substantial disruption of school activities. The Supreme Court acknowledged that when speech occurs in a school environment, First Amendment rights may be circumscribed “in light of the special characteristics of the school environment.” *Morse*, 127 S. Ct. at 2626-27. School officials may not act solely on a “desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S. at 738.

Speech in schools espousing controversial or unpopular views “must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.” *Bethel*, 478 U.S. at 681. The articulated standard under *Tinker* allows school officials to prohibit student speech when the official reasonably forecasts a substantial disruption or material interference with school activities. *Tinker*, 393 U.S. at 514. Regulation of protected speech requires balancing of individual First Amendment interests and state responsibilities “to preserve and protect other rights.” *McGuire v. Reilly*, 260 F.3d 36, 42 (1st Cir. 2001).

Petitioner Towles’ call for student activities speaking out against the disciplinary measures levied against him by Principal Smalls reasonably led Respondents to forecast a substantial disruption or material interference with the activities at Horton Hopkins and therefore falls outside the scope of the First Amendment. *See Tinker*, 393 U.S. at 503. The *Tinker* Court found that wearing armbands to protest the Vietnam War was a protected statement because it was “silent, passive expression of opinion, unaccompanied by any disorder or disturbance.” *Id.* The Court dealt with conduct intended to carry a message “entirely divorced from actually or potentially disruptive conduct.” *Id.* at 505. While the Court has never directly dealt with a free speech case involving students’ internet speech, lower appellate courts have offered some persuasive arguments on the subject.

The Seventh Circuit Court of Appeals applied the *Tinker* standard to cases of students writing off-campus where their work found its way onto school grounds. *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821 (1998). The Seventh Circuit indicated that a school could properly take action where a student made “a call to action detrimental to the tangible interests of the school.” *Id.* at 828.

The Second Circuit Court of Appeals similarly recognized that off-campus conduct could forecast substantial disruption within a school. *Thomas v. Bd. of Educ. of Granville Cent. Sch. Dist.* 607 F.2d 1043, 1052 (2d Cir. 1979) (*See* footnote 17). . The court determined that a student’s IM icon, an instant messaging identification picture, created and distributed off campus could reasonably forecast a substantial disruption to school activities. *Wisniewski v. Bd. of Educ. Of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007) Students were not insulated against school discipline because the activity occurred off campus or under First Amendment protections. *Id.* In *Doninger*, the a posting encouraging student responses was not protected from disciplinary action simply because it was created off campus. *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

Here, Petitioner Towles’ webpage posting is not speech protected under the First Amendment because it was a call to action encouraging a substantial disruption of school activities. Petitioner’s post requested action from the student body as a “call for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment” asking students to “speak out against Smalls and the rest of these Hopkins idiots.” (R. at 4.) Petitioner’s words are unlike the expression in *Tinker* which was characterized as “a silent, passive expression of opinion.” *Tinker*, 393 U.S. at 508. Petitioner does not claim this is an expression of political significance that could survive under the *Tinker* standard. Rather,

Petitioner's call to action represented an active expression of opinion, designed to rally students to disruptive action.

The Second Circuit in *Doninger* dealt with a similar set of circumstances where a student indicated that if students wished "to write something or call [school officials] to piss her off more. im [sic] down." *Doninger*, 527 U.S. at 45. The *Doninger* court found that this call to action could reasonably be seen as forecasting substantial disruption and would allow a school official to take disciplinary action. *Id.* at 53. Here, Petitioner Towles' call to action was substantially more direct. Petitioner's commentary was imperative and not permissive, as in *Doninger*. As in *Boucher*, the off-campus communication was specifically designed to reach members of the school community. *Boucher*, 134 F.3d at 828-29.

It was foreseeable that Petitioner's post would reach school grounds, similar to *Doninger* and *Wisniewski*. In fact, the district court noted that students began accessing Petitioner's webpages during school hours only after hearing of the call to action. (R. at 4.) Because of the call for protest and student access during school hours, the district court properly held that Principal Smalls could reasonably forecast future disruption at school. (R. at 6.)

Petitioner Politte's webpage set into motion a series of events that, if allowed to continue, would likely have caused a substantial disruption to school activities. The demand to remove the webpage did not impermissibly infringe on Petitioner's First Amendment free speech rights. The lower court notes that Petitioner Politte's webpage "induced Towles to create his own webpage, and therefore contributed to any potential disruption." (R. at 6.) Under *Tinker*, a school official need only show a reasonable forecast of a substantial disruption or interference with school activities on an invasion of the rights of others. *Tinker*, 393 U.S. at 513.

Petitioner Politte's webpage created a reasonable forecast of substantial disruption by implicating three members of the Horton Hopkins High School student body of drug possession and dealing without substantial proof of the offenses. (R. at 3.) Had Principal Smalls merely demanded the removal of Petitioner Towles' webpage, the root of the forecasted disruption would continue in Petitioner Politte's webpage. Petitioner Towles' webpage was created in part in response to Petitioner Politte's original post. (R. at 3-4.) Petitioner Politte's webpage was reasonably designed to reach on campus with its ties to the school sponsored DUDS organization, similar to the off campus speech of *Doninger* and *Wisniewski*.

Petitioner Politte's webpage was in essence a call to action, detrimental to the orderly workings of the school as in *Boucher*. The posting goaded responses similar to that of Petitioner Towles. Because Petitioner Politte's webpage had the effect of stirring others to disruptive action and infringed on the rights of others, the demand to remove the webpage did not impermissibly infringe on Petitioner's First Amendment free speech rights.

B. Even if this Court finds Petitioner Towles' Webpage did not Reasonably Forecast Substantial Disruption, it was Reasonably Interpreted as Promoting Illegal Drug Use, and is Therefore Subject to School Disciplinary Measures.

Even if this Court finds that Petitioner Towles' webpage did not forecast substantial disruption to school activities, the district court correctly held that the demand to shut down his webpage did not infringe his First Amendment rights because the webpage reasonably promoted illegal drug use. This Court has recognized that deterring illegal drug use by students is an "important-indeed, perhaps compelling" interest. *Vernonia*, 515 U.S. at 661. In *Vernonia*, the Court further noted "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Id.* at 662.

Recognizing the state interest in deterring drug use by schoolchildren, the Court in *Morse* held that student speech may be restricted where it is “reasonably viewed as promoting illegal drug use.” 127 S.Ct. at 2629. In *Morse*, a student unfurled a fourteen foot banner reading “BONG HiTS 4 JESUS” at an Olympic Torch rally held during school hours. *Id.* at 2622. School officials confiscated the banner and disciplined the student. *Id.* The Court deemed the confiscation appropriate where the banner was directed at students in the presence of school officials, even though the banner was not on school property. *Id.* at 2629. The Court determined the danger of school acquiescence in promotion of illegal drug use “extends well beyond an abstract desire to avoid controversy.” *Id.*

Petitioner Towles’ webpage treads upon the precipice of promoting illegal drug use, and therefore the disciplinary measures and demand to take down the webpage do not trample First Amendment protected speech. As in *Morse*, the speech at issue here does not directly state that students should use illegal drugs. The Court determined the banner in *Morse* might reasonably be viewed as promoting illicit drug use in absence of any other viable interpretation afforded by Frederick. *Id.* at 2624-25. The physical banner in *Morse* was pointed in the direction of students and television cameras. Here, Petitioner’s webpage is no less a promotion for drug use unfurled in the direction of students and the general public, during school hours.

Although the *Morse* banner was more concise, Petitioner promotion of drug use occurs in the context of his webpage posting. Petitioner indicates that “unauthorized photographs” were taken “during a Friday night out” with friends. (R. at 3.) Petitioner then declares that “[w]hat we do on our own time for fun is our business” and that he was subject to injustice by a search of his person and locker for drugs. (R. at 4.) The following facts are undisputed. “[D]uring the week prior to the Friday night party, rumors circulated at the school that some students would

bring marijuana to the party.” (R. at 2.) Further, when police arrived to break up the party, that police cited students for underage drinking and marijuana possession. (R. at 3.) Finally, a photograph was taken of Petitioner Towles at the party with the student cited for marijuana possession. (R. at 3.)

Acting on less information and a substantially wider nexus between the banner and its promotion of drug use, the Court upheld the disciplinary actions of school officials in *Morse*, 127 S.Ct. at 2624-2629. When viewed in the totality of the circumstances including the party, rumors about drug possession at the party, actual drug possession, and the search of Petitioner for drugs on the Monday following the party, the webpage’s statement could be reasonably seen as promoting illegal drug use to any student who attended Horton Hopkins High School. As a result the webpage fell under the purview of Respondent Smalls to react with a demand to remove the webpage under the *Morse* standard.

C. Even if this Court Determines that no Reasonable Forecast of Material Disruption Occurred, the Disciplinary Action did not Impermissibly Infringe on Petitioner Politte’s First Amendment Right Because her Webpage Properly Fell Under the Editorial Control of Educators as School Sponsored Speech.

The district court correctly held that the demand for removal and subsequent disciplinary action did not impermissibly infringe on Politte’s First Amendment right to free speech because Petitioner’s webpage was properly subject to editorial control by educators as school sponsored speech. The court recognized in *Hazelwood* that “a school need not tolerate student’s speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.” *Hazelwood*, 484 U.S. at 266 (quoting *Bethel*, 478 U.S. at 685).

The *Hazelwood* Court created a three part test to determine whether speech may be properly subject to school editorial control. First, the court must determine whether the school

has intentionally created a public forum. *Hazelwood*. 484 U.S. at 267. Second, educators must have exercised “editorial control over the style and content of student speech in school-sponsored expressive activities.” *Id.* at 273. Finally, the editorial control must be “reasonably related to legitimate pedagogical concerns.” *Id.* Petitioner’s webpage is so closely linked to a school sponsored organization, it constitutes expressive activities to which editorial control may be applied. Since editorial control is reasonably related to maintaining the school’s educative mission and ensuring against disruption at school, Petitioner’s webpage does not fall within the protective shield of the First Amendment.

1. Horton Hopkins High School has not intentionally created a public forum, and inaction cannot be treated as such as a result of inaction.

Horton Hopkins High School is not a public forum and thus retains the right to prohibit speech in conflict with its educative mission. Schools may be considered public forums only where by policy or practice the facilities have been opened to indiscriminate use by the general public. *Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 47 (1983). In *Perry*, the Court dealt with a school mail system which was not a public forum even though occasionally used to transmit public organization materials. *See Id.*, 460 U.S. at 55. The *Perry* Court found that “public property which is not by tradition or designation a forum for public communication” may be limited for its intended purposes “as long as regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose speaker’s views.” *Id.* at 46. The Court further clarified the standard set forth in *Perry* with an opinion stating the “government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius v. NAACP Legal Def. & Educ. Fund Inc.*, 473 U.S. 788, 802 (1985).

In *Hazelwood*, the Court noted that if school facilities have been reserved for their intended purposes, “no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.” 484 U.S. at 267. However, First Amendment protections were applied to student groups on a university campus, only after the court determined that the school had an open forum policy. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). The Seventh Circuit has acknowledged *Hazelwood* as extending to university newspapers, including editorial review by university administration of the newspaper. *Hosty v. Carter*, 412 F.3d 731, 733 (2005). The *Hosty* court applied the *Hazelwood* standard and found the issue in that case turned on the existence of a public forum which prohibited school officials from exercising editorial control. *Id.* at 736. The court recognized that subsidizing speech does not necessarily determine whether the speech is subject to or outside First Amendment protections, but rather the issue lies with whether the speech occurred in a public forum. *See Id.* at 737.

Here, Horton Hopkins High School did not open their facilities as a public forum and therefore Petitioner Politte’s activities were subject to editorial control reasonably related to legitimate pedagogical concerns. The record is relatively silent on the actions of Horton Hopkins High School when it comes to interactions with school organizations or matters related to the question of opening a public forum. Petitioner started the Drug Use Damages Schools (DUDS) organization as a school sponsored club. (R. at 2.) DUDS members were allowed to organize school assemblies and post flyers. (R. at 2.) The record is silent as to whether prior consent was required by Horton Hopkins school officials for posting flyers and the scheduling assemblies. The record is also silent as to Horton Hopkins school’s official position on student organization

webpages. Under *Cornelius* and the record below, Horton Hopkins has not created a public forum through its inaction or by allowing limited discourse of selected student organizations.

The court below correctly reasoned that the removal of webpages was predicated on an effort to minimize disruption of the normal function of Horton Hopkins. (R. at 6.) The clear lack of action by Horton Hopkins officials in creating a public forum places the case at bar outside the ambiguity of *Hosty* and *Widmar*. In *Hosty* it where it was unclear whether the conflicting action taken by school officials constituted creation of a public forum, *Widmar* outlines the application of free speech protection in light of public forum policies.

2. The demand for removal of the webpage was a permissible exercise of editorial control over school sponsored speech.

Petitioner Politte's creation of a webpage so closely related to school sponsored organizations and concerning students at Horton Hopkins High School places that webpage within the editorial control of educators as being school sponsored speech. A school is well within its right to dissociate itself from speech that is wholly outside its mission or values or speech that is "inadequately researched" or "biased or prejudiced." *Hazelwood*, 484 U.S. at 271. In *Hazelwood*, students argued that withholding student articles from publication of the school paper was violative of First Amendment free speech protections. *Id.* at 263-64. The Court determined that the school's removal of articles from the school paper was properly within the editorial control of the school. There the school official was seeking to separate the school from speech that poorly researched and biased or prejudiced against others. *Id.* at 274-75.

The Seventh Circuit noted in *Hosty* that the *Hazelwood* standard for editorial control would apply when the school had not created a traditional or designated public forum, inviting members of the community to speak. *Hosty*, 412 F.3d at 736-37. The *Hosty* court was dealing with a summary judgment motion and found that a trier of fact could reasonably see the school

paper at issue as operating in a public forum and therefore outside of the editorial control of the school. The court noted that school funding was not required in order to determine the public forum issue or the application of the First Amendment. *Id.* at 735-36.

Here, Petitioner Politte's webpage was subject to school editorial control because the webpage was inextricably tied to her student organization. Petitioner Politte started a school sponsored club to curb student drug use. (R. at 2.) The 130 members of the organization posted flyers and scheduled assemblies to support a drug free lifestyle and discuss the perils of student drug use. (R. at 2.) After a September 10th assembly, organized by DUDS, Petitioner created her Friendkepedia webpage, FAD,. (R. at 2.) Petitioner promoted the webpage at the September 15th meeting of DUDS, and all 130 members of the organization were members of the FAD webpage. (R. at 2.) Finally, Petitioner Politte acted as both the head of DUDS and the administrator of the FAD webpage. (R. at 2.) Petitioner's webpage falls under school editorial control because, as in *Hazelwood* and *Hosty*, the FAD webpage was closely linked to a school sponsored activity. Although the school sponsored activities in *Hazelwood* and *Hosty* were student newspapers, a webpage linked to a student organization is no less representative of the school than an official newspaper.

In *Hazelwood*, each member of the Journalism II class was a member of the school paper. 484 U.S. at 262. Although not all of the members of the class contributed to each issue, they were nonetheless members and responsible for its preparation and publication. Here, every member of Petitioner's school sponsored organization was a member of the FAD webpage. The mission of both organization and webpage were nearly identical. Though not all members would post information published on the webpage, members were responsible for submitting information to be posted. (R. at 2.) Since, as in *Hazelwood*, editorial control is not limited to

formatting changes and Petitioner's webpage falls within the realm of school sponsored speech, the demand to remove the FAD webpage did not violate Petitioner's First Amendment free speech rights.

3. The demand for removal was reasonably related to legitimate pedagogical concerns.

Respondent's demand for removal of Petitioner Politte's webpage was reasonably related to legitimate pedagogical concerns because the webpage was inadequately researched and biased. Petitioners' combined webpages represented a reasonable forecast of substantial disruption. In *Hazelwood*, the Court recognized that "a school . . . may refuse to disseminate student speech that does not meet those [high] standards." 484 U.S. at 271-72. In addition, the Court noted the need for schools "to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process." *Bethel*, 478 U.S. at 686. The *Bethel* Court upheld school disciplinary measures in response to a student speech which was found to be lewd, disruptive to school activities, and inappropriate for the maturity level of the audience. *Id.* at 685-86. Indeed, regarding disciplinary matters, it has been stated that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Thomas*, 607 F.2d at 1057 (opinion concurring in the result).

Here, Petitioner Politte's webpage was biased, inadequately researched, and posed a foreseeable disruption to the educational process. Politte posted a caption associated with the photograph of Towles posing the question, "Are Horton Hopkins students becoming drug dealers?" (R. at 3.) Though the fact that police found drug use at the party is undisputed the question posed has no demonstrable basis in fact. (R. at 3.) The record is silent as to whether the marijuana found in Tweegs' house, Conrad's locker, or on Thomson's person was intended for distribution. The stated goal of Petitioner's webpage and student organization show a bias on

the part of Petitioner which would be reason enough for the school to dissociate itself from the webpage. As the lower court noted “Politte’s webpage induced Towles to create his own webpage, and therefore contributed to any potential disruption.” (R. at 6.) The foreseeable disruption that spurred Principal Smalls to demand the removal of Petitioners’ webpages would have only been temporarily averted with the removal of Petitioner Towles’ webpage alone. In order to circumvent the threat of disruption to school activities, Principal Smalls was compelled to demand the removal of both webpages lest Petitioner Politte’s webpage create more disruption as a result of claims against other students. Because Petitioner Politte’s webpage represented inadequately researched and biased speech, likely to cause further potential for disruption, Principal Smalls did not violate Petitioner’s First Amendment rights in demanding its removal or subsequent punishment.

III. THE SEARCH OF PETITIONER’S WALLET, BOOK BAG, AND PERSON DID NOT VIOLATE PETITIONER’S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.

The Badger County District Court properly held that the search of the Petitioner was reasonable under the Fourth Amendment. (R. at 6-8). As the district court indicated in its opinion, “a search is not reasonable unless it is conducted pursuant to a judicial warrant issued after the government demonstrates probable cause.” (R. at 6.) However, the Supreme Court carved out an exception when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). This exception allows for searches based on “reasonable suspicion,” which may not rise to the level of probable cause. *Terry v. Ohio*, 392 U.S. 1 (1968). Reasonable suspicion is defined as “a common-sense conclusion about human behavior upon which practical people-including government officials-are entitled to rely.” *U.S. v. Cortez*, 449 U.S. 411, 418

(1981). The Supreme Court determines a reasonable search by weighing the legitimate state or governmental interest advanced by the search and the intrusion upon the individual. *See Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

A. The Search of Petitioner’s Personal Belongings and Clothing was Reasonable Because the Search was Both Justified at its Inception and Reasonable in Scope Based on the Nature of the Infraction.

The Fourth Amendment provides a protection against the invasion of a citizen’s privacy against unreasonable searches and seizures by government actors, including public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). Under *T.L.O.*, the Supreme Court enunciated a two-prong analysis to determine the reasonableness of a search of a student’s belongings or persons while on school property. 469 U.S. at 326.

Principal Smalls was not required to obtain consent from the students in order to conduct the search of their belongings and persons. The Sixth Circuit held that “when there is reasonable suspicion, school authorities may conduct the search without such consent.” *Beard v. Whitmore Lake Sch. Dist.*, 244 F. App’x. 607, 609 (6th Cir. 2007). In *Beard*, the school subjected students to personal searches by teachers after another student reported a theft of money. All four students, including the Petitioner, refused to participate in the search of their clothing. (R. at 3.) However, based upon the Sixth Circuit Court of Appeals holding in *Beard*, Principal Smalls was not required to obtain the consent of the students based upon the reasonable suspicion that existed to conduct the search of their belongings and their clothing.

The Supreme Court applied this “reasonable suspicion” exception and a similar weighing process to educational environments. *T.L.O.*, 469 U.S. at 341-42. The Badger County District Court and the State of Grace Court of Appeals properly applied the appropriate standard for

determining the reasonableness of the search as created in *T.L.O.* The Supreme Court in *T.L.O.* created a two-prong analysis to determine whether the search was reasonable under the Fourth Amendment. First, whether the search is justified at its inception. *Id.* at 341. Second, whether the search was reasonable in scope in light of the student’s sex, age and the nature of the infraction. *Id.* at 342. While the lower courts are correct in holding that any search of any person should not be taken lightly, the standard applied in a school environment is not the same standard applied to adults outside the schoolhouse gates. The Badger County District Court correctly held that the Horton Hopkins School District met both prongs of the standard set forth in *T.L.O.* (R. at 6-8.)

- 1. The search of Petitioner’s belongings and person was justified at its inception because Principal Smalls possessed reasonable grounds for suspecting the search would recover evidence that the student was violating or had violated the law or school policy.**

The first prong of the *T.L.O.* analysis considers whether the search of Petitioner was “justified at its inception.” *T.L.O.*, 469 U.S. at 341. A search is held to be justified at its inception “when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *Id.* at 341-42. In *T.L.O.*, school administration discovery of rolling papers following the search of a female student’s purse for possession of cigarettes. *Id.* at 324-25. The Supreme Court applied the two-prong test to determine reasonableness and determined that reasonable suspicion existed to search the student’s purse after a teacher observed the student smoking cigarettes in a school restroom. *Id.* at 325. Subsequent to the creation of the *T.L.O.* standard all fifty jurisdictions have adopted the two-prong test for reasonableness for searches and seizures involving educational environments. *In Re D.D.*, 554 S.E.2d 346, 350 (N.C. Ct. App. 2001).

The District and Principal Smalls formulated reasonable suspicion based upon tips received from intelligence regarding the presence of drugs at the party as well an anonymous posting of a photograph of a student smoking taken on the evening of October 3, 2008. (R. at 3). Ordinarily, anonymous tips are insufficiently reliable to justify an investigatory stop or a *Terry* stop. *See Florida v. J.L.*, 529 U.S. 266 (2000). In *J.L.*, the Court considered the anonymous tip offered by a telephone caller regarding a juvenile wearing a plaid shirt at a bus stop carrying a firearm. *Id.* The Court indicated that not all anonymous tips are *per se* unreliable. *Id.* It held that in situations where there is a diminished expectation of privacy, such as schools or dangerous situations, the requirement of reliability might be lessened and the need to further investigate to corroborate the tip may not be required. *J.L.*, 529 U.S. at 274.

The Sixth Circuit has applied the *T.L.O.* analysis to a situation where a female student reported to the principal that two female students were using drugs on school property. *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991). Additional evidence in *Williams* existed to confirm the intelligence provided by the student. *Id.* School administrators searched Williams' person, locker, books and purse but produced no evidence of drugs. *Id.* The Court held that school's actions were justified under *T.L.O.*, in light of the item sought, a small vial containing alleged narcotics, in conducting the intrusive strip search. *Id.* at.887.

Principal Smalls received intelligence that marijuana would be present at Tweeg's party prior to the party and information about the posting on the FAD webpage. (R. at 3.) In the photograph Conrad was smoking. *Id.* While not necessarily required, the District obtained additional information that served to corroborate both tips received.

The party host, Tweegs, had previous contact with school administration for possession of marijuana on school property and had been recently suspended. (R. at 2.) Conrad was cited

by local law enforcement at the October 3, 2008 party for possession of marijuana. While Petitioner attended the party and claims not to have seen drug use at the party, he did observe other illegal activity including alcohol and tobacco consumption. (R. at 3.) The four students were questioned about their possession of illegal substances and all four students denied possessing any illegal substance. *Id.* These tips coupled with the Conrad and Tweegs prior disciplinary contact with the District and contact with law enforcement served as the principal basis for the search of all four students, including the Petitioner.

Prior to the search of the students' belongings or persons Principal Smalls conducted a search of the four students lockers. (R. at 3.) The Court held that a search of a student's locker was reasonable and permissible because of the school's joint control of the locker. *Zamora v. Pomeroy*, 639 F.2d 662, 670 (10th Cir. 1981). Although Petitioner does not contest the search of his locker, a small baggie of marijuana was found in Conrad's locker. (R. at 4) (*See* Footnote 2.)

As required under *T.L.O.*, prior to searching the four students' personal belongings, including Petitioner's wallet and book bag, Principal Smalls possessed reasonable grounds for suspecting that the search of the personal belongings would turn up evidence that either the law or the rules of the school, had been violated. The recovery of marijuana in Conrad's locker increased the level of suspicion justifying the intrusive nature of the search. While nothing was recovered in Petitioner's book bag or wallet, Principal Smalls required a search of all four student's clothing. (R. at 3.) This suspicion that evidence would be recovered was based upon the prior confiscation of marijuana in the locker of Mr. Conrad and the reasonable grounds that served as a basis for the searches of Petitioner's wallet and book bag.

2. The search of the Petitioner’s belongings and clothing was reasonable in scope in light of the objectives of the search and the Petitioner’s sex, age and the nature of the infraction.

The second prong of the *T.L.O.* analysis asks whether the search of Towles was “reasonably related in scope to the circumstances which justified the interference in the first place.” *T.L.O.*, 469 U.S. at 341-42. The Supreme Court concluded that a search of a student would be permissible in scope when measures adopted are reasonably related to objectives of the search and not excessively intrusive in light of the sex of the student and the nature of the infraction. *Id.* “The application of the Fourth Amendment to warrantless strip searches had been developed largely in cases involving such searches in prisons and in schools.” *Reynolds v. City of Anchorage*, 379 F.3d 358, 362 (6th Cir. 2004). [Congress] “has provided billions of dollars to support state and local drug-prevention programs . . . and required that schools receiving federal funds . . . certify that their drug prevention programs ‘convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful.’” *Morse*, 127 S.Ct. at 2628 (quoting 20 U.S.C. § 7114(d)(6) (2000)).

The search of Petitioner’s belongings and the subsequent search of Petitioner was not excessively intrusive in light of the sex and age of the Petitioner and was reasonably related to the objectives of the search. The Seventh Circuit addressed the consideration of age in determining the reasonableness of the search. *Cornfield v. Consolidated High Sch. Dist.*, 991 F.2d 1316 (7th Cir. 1993). Between the ages of seven and fourteen, a search may not be reasonable according to the guideposts proffered in *Cornfield*. *Id.* at 1320. The court elaborated that a child under seven or a person over fourteen may not have the emotional scarring experienced by someone between the two guideposts. *Id.* The student in *Cornfield* had been a participant of a behavioral disorder program and had been observed by a teacher’s aide to be

“crotching” drugs. *Id.* at 1319. However, the Court found that the search was reasonable based upon the fact that the search was conducted by male personnel in the privacy of the boys’ locker room. *Id.* at 1323. Additionally, in that search the male administration did not physically touch the student or subject him to a body cavity search nor did they make him suffer the indignity of standing naked before them. *Cornfield*, 991 F.2d at 1323.

Based upon the Seventh Circuit’s determination in *Cornfield*, the search of Petitioner was not excessively intrusive in light of his age and sex. The search of his clothing was conducted by a male gym teacher in a private area where other students could not observe the search. (R. at 3.) Petitioner was sixteen years of age at the time of the search, identical to the age of the student in *Cornfield*. (R. at 2; *Cornfield*, 469 U.S. at 1319). The gym teacher in the search of Petitioner did not make physical contact with any of the students involved the search. (R at 3.) Rather, the male gym teacher asked the students to remove their clothing and while the students remained in their undergarments, the teacher searched the clothing. *Id.* The students were not required to stand naked before the gym teacher during the search of their clothing. *Id.*

Further, the search of the Petitioner was reasonable based upon the nature of the infraction. Principal Smalls ordered the search of Petitioner’s person in an attempt to recover marijuana. (R. at 3.) In *Beard*, the Sixth Circuit held that a search of a students’ person was unreasonable since it was conducted in an effort to recovered stolen money. *Beard*, 244 F.App’x. at 605. Ultimately, the *Beard* court concluded that “a search undertaken to find money serves a less weighty governmental interest than a search undertaken for items that pose a threat to the health or safety of students, such as drugs or weapons.” *Id.*

The search of Petitioner’s person was conducted in an effort to curb an on-going drug problem in the District. The District over the past five years has seen increased drug use in the

student population. (R. at 1). In the last year, the District suspended 25 students for illegal drug use on school grounds. *Id.* Paramount to the growing number of students, the District suffered the death of a female seventeen year old student. *Id.* This student was similar to the Petitioner in her prevalent involvement in school athletics. *Id.*

B. Principal Smalls was Entitled to Qualified Immunity in Enforcing a Facially Valid Strict, Zero-Tolerance Drug Policy under Law that was not Clearly Established at the Time of the Act.

In the alternative, the Respondents urge that qualified immunity should be applied because the law regarding the search of Petitioner was not clearly established. The pivotal question here is whether a reasonable principal could have believed that a search of the Petitioner's person was lawful in light of clearly established law and the information at hand. The Court of Appeals properly held that precedent did not provide sufficient guidance to determine whether a search of Petitioner's person would be constitutional. (R. at 10.) The Supreme Court has recently held that qualified immunity is no longer mandatory but may be used if appropriate. *Pearson v. Callahan*, 129 S.Ct. 808 (2009). Under the concept of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Supreme Court utilizes a two-part analysis to determine whether an actor is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, the Court must consider whether taken, in a light most favorable to the party asserting the injury, the facts alleged showed Principal Smalls' conduct violated a constitutional right. If this Court finds a violation of the Fourth Amendment rights, it must move to the second inquiry.

The second step in the qualified immunity analysis is “whether the right was clearly established.” *Saucier*, 533 U.S. at 201. The Court in *Saucier* considers in determining a clearly established right, “whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted.” *Id.* at 195-96. In *Malley*, the Court held “if officers of reasonable competence could disagree on the lawfulness of the conduct, then immunity should be recognized.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The progeny of *T.L.O.*, illustrates that reasonable school administrators could disagree about the lawfulness of the conduct of searching a student’s person. Specifically, the Sixth Circuit Court of Appeals held that “*T.L.O.* is useful in guiding us in determining the law in many different kinds of circumstances but that is not the kind of clear law necessary to have clearly established the unlawfulness of the defendants’ actions.” *Beard*, 244 F. App’x. at 607 (quoting *Pace v. Capobianco*, 283 F.3d 1275, 1283 (11th Cir. 2002)).

Coupled with the lack of clear guidance under *T.L.O.* the Supreme Court indicated in *Scheuer*, that “public interest requires decisions and action to enforce laws for the protection of the public. . . . It is better to risk some error and possible injury from such error than not to decide or act at all.” *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974). Ultimately, the determination for this Court is focused upon the “intensively fact-specific question whether in light of the circumstances confronting the governmental decisionmaker, a reasonable official could have believed his or her conduct was lawful.” *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

In considering the existence of guiding legal principles the court must first look to United States Supreme Court cases and then decisions from other circuits to determine if a right has been clearly established. *McBride v. Village of Michiana*, 100 F.3d 457, 460 (6th Cir. 1996).

While *T.L.O.* provides a two part analysis to determine the reasonableness of a search conducted at school, the appellate circuits are divided regarding a consistent determination regarding searches of students' persons. *See generally Cornfield*, 991 F.2d 1316; *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006); *Redding v. Safford United Sch. Dist. No. 1*, 531 F.3d 1071 (9th Cir. 2008) (Cases that provide mixed outcomes based upon the application of the two-prong *T.L.O.* analysis.)

Principal Smalls satisfies the qualified immunity inquiry. She represents the type of public servant that qualified immunity doctrine was designed to protect. She is the custodian of the entire student population, responsible for student safety and well-being. Principal Smalls was confronted with a photographic evidence, phone calls, and information from law enforcement concerning students engaged in illegal activity. (R. at 2-3.) Principal Smalls made a reasonable, on the spot judgment to enforce the strict, zero-tolerance drug and alcohol policy. (R. at 1.) The law was not clearly established to allow Principal Smalls to make a clear determination that a constitutional violation would occur if she exercised her authority to search the Petitioner's person. Since the law was not clearly established at the time that Principal Smalls made her determination, qualified immunity applies.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the State of Grace Court of Appeals.

Respectfully submitted,

Team No. 28

Counsel for Respondent

Dated March 2, 2009.