

Docket No. 05-1338

IN THE SUPREME COURT OF THE STATE OF GRACE

Kit Politte and Cory Towles,

Petitioners,

v.

Horton Hopkins School District and
Keena Smalls,

Respondents.

MOTION IN OPPOSITION OF SUMMARY JUDGEMENT

BRIEF FOR PETITIONERS

Team Number 3
Counsel for the Petitioners

QUESTIONS PRESENTED

1. Whether Respondent's regulation of Petitioners' webpages violated Petitioners' First Amendment Rights when the webpages were created off-campus and did not cause a substantial or material disruption of the School's operation.
2. Whether a strip search to the under garments of Petitioner Towles was justified under the Fourth Amendment, when the search was based solely upon anonymous tips and an unlabeled picture, where an initial search of his person yielded no indication of any contraband.

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STATEMENT OF THE CASE

The petitioner Corey Towles (“Towles”) is a sophomore at Horton Hopkins High School (“Horton Hopkins”). (R. at 2). Petitioner Kit Politte (“Politte”) is a senior at Horton Hopkins. *Id.* The petitioners challenge the constitutionality of Horton Hopkins’ decision to force them to remove their respective webpages from the website Friendkepedia as a violation to their right to freedom of speech under the First Amendment. (R. at 4). Towles also challenges the constitutionality of a strip search of his person conducted by Horton Hopkins officials as an unreasonable search under the Fourth Amendment, incorporated to apply to the States by the Fourteenth Amendment. *Id.*

In January 2007, the Principal of Horton Hopkins, Keena Smalls (“Smalls”) enacted a zero tolerance drug policy in the school that allowed school officials to conduct random drug tests and search students’ lockers, possessions and clothing. (R. at 1). The policy was enacted in response to multiple incidents of students’ marijuana use on school grounds, and the death of a student from a cocaine overdose in December, 2007. *Id.*

Politte started a school-sponsored club called Drug Use Damages Schools (“DUDS”) in September, 2008. (R. at 2). Soon thereafter, in an effort to alert the community to the identities of the drug dealers and users, Politte created a webpage on Friendkepedia called Fighting All Dealers (FAD). (R. at 2). Politte worked on the webpage at home, using her personal computer. *Id.* As administrator of the site, Polite accepted anonymous tips on potential drug dealers in the area and posted what she felt to be the “strongest” tips. (R. at 2). There are 235 members of Politte’s network stemming from FAD, and 198 of those members are Horton Hopkins students, many of whom are

involved in DUDS. (R. at 2)

Towles attended a student party in October, 2008. (R at 2). Several people at the party were drinking beer and smoking cigarettes. (R. at 3). Towles did not personally witness any illegal drug use at the party. *Id.* After Towles left the party around 11:00, the Hopkinsville police arrived to investigate a noise complaint at 11:30 p.m. *Id.* They cited five students for underage drinking and arrested one student, Frank Conrad (“Conrad”) for possession when they found him holding a joint of marijuana. *Id.* The current controversy began when Politte posted a photograph of Towles taken at the party by an anonymous student, where Towles is sitting with Conrad. *Id.* Politte did not identify Towles but she did caption the photograph in a manner that implicated him in the drug use at the party. *Id.*¹

The next morning, Smalls, acting on phone calls received by parents and police, called Towles, Conrad, and two other students into her office. (R. at 3). All four of the students denied possessing drugs, but upon a search of their personal possessions, one of the students was found to have small quantities of marijuana. *Id.* No drugs were found in Towles’ possession. *Id.* Smalls then asked the students to submit to a strip search, which they refused to do. *Id.* Smalls called a gym teacher into her office and the four students were forcibly strip-searched. *Id.* The strip search turned up a small quantity of marijuana in the jeans pocket of one of the students. *Id.* Again, no drugs were found on Towles’ person or among his possessions. *Id.*

¹ The caption reads: “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” Although Towles is not identified, his face is clearly visible.

After being forced to submit to the search, and in response to his image posted on FAD, Towles created his own webpage, Students Against Defamatory Statements (“SADS”). *Id.* Towles did not work on his webpage at school, but only edited it from his home computer. *Id.* On his webpage, Towles stated that he felt that posting unauthorized pictures of him without his consent amounted to a form of defamation: he further stated that he felt that the school’s search of his person and his possessions was unjust and unreasonable, and he called for his fellow students to “speak out against” what he perceived as an injustice.² (R. at 3-4). After his webpage was created, students began to access both Towles’ and Politte’s pages from home and during their free periods at school. (R. at 4).

Smalls, angry at Towles’ criticism of the administration, and worried about students accessing the webpages during free time at school, ordered Towles and Politte to take down their pages. (R. at 4). *Id.* Both students refused, and were suspended, upon which they brought this action against the school for a violation of their First Amendment Rights. *Id.* Towles also brought suit against the school for subjecting him to an unnecessary and unjustified strip search in violation of his Fourth Amendment Rights. *Id.*

² The webpage reads: “By taking unauthorized photographs of me during a Friday night out with my friends, and then posting inaccurate captions, DUDS, a school organization under the guise of its website FADS, committed a gross invasion of my privacy and defamed me in front of my friends and peers. What we do on our on time for fun is our business. Horton Hopkins school officials committed a far worse injustice when they subjected my friends and me not only to an unreasonable search of our lockers, but also to strip searches. We need to fight this injustice. I call for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment. Let’s speak out against Smalls and the rest of these Hopkins idiots.”

SUMMARY OF THE ARGUMENT

Horton Hopkins violated Towles' and Politte's First Amendment guarantees regarding freedom of speech by ordering them to take down their webpages. Although the Supreme Court has held that students' First Amendment rights at school are not coextensive with those of adults in different settings, Towles' and Politte's speech in this case is properly classified as off campus speech, and therefore the school has much less regulatory authority.

Even if both webpages are categorized as "on-campus" speech, they should not have been subject to censorship in the absence of any material disruption or substantial interference with the educational mission of the school. The school administration did not act in regard to a particularized fear of disruption or protest and therefore did not have the right to regulate the speech.

Horton Hopkins also violated Towles' Fourth Amendment right to be free from unreasonable searches and seizures. Schools generally have the authority to search students' lockers because they have assumed control over the lockers, and to an extent some authority to search students' possessions. However, a strip search of a student must be justified in its inception and reasonable in scope. In this case, the search was not justified at its inception under the prevailing standards for school authority in searching students, nor was it reasonable in scope. Furthermore, the law on this point is clear enough that the school administrators are not justified in claiming qualified immunity for their actions.

I. THIS COURT SHOULD OVERTURN THE LOWER COURT'S HOLDING THAT HORTON HOPKINS WAS WITHIN ITS RIGHTS IN CENSORING TOWLES' AND POLITTE'S WEBPAGES

Because both Towles' and Politte's webpages were created entirely at home, they constitute off-campus speech under the doctrine articulated by the Second Circuit in *Thomas v. Granville*, and the school's regulatory authority is thus limited. *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043, 1045 (2d. Cir. 1979). Even if this Court finds that the webpages are within the school's authority to regulate, under the standard articulated in *Tinker v. Des Moines*, the webpages can only be censored if their contents would "materially and substantially disrupt the work of the school." *Morse v. Frederick*, 127 S.Ct. 2618, 2625 (2007) quoting *Tinker v. Des Moines*, 393 U.S. 503, 513 (1969).

A. Towles and Politte's webpages constitute off-campus speech and thus the school's regulatory authority over that speech is limited

The Supreme Court articulated one of the longstanding principles of First Amendment law regarding school speech in *Tinker*: students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker* at 506. This doctrine was refined by later cases, and the Supreme Court has also stated that the First Amendment rights of students while they are in school "are not automatically coextensive with the rights of adults in other settings." *Bethel School District No. 43 v. Fraser*, 478 U.S. 675, 682 (1986). This is in recognition of the fact that schools, with their responsibility for teaching civil behavior and their educational mission, have the right to discipline students for speech that otherwise be protected. *Fraser* at 681.

However, in the cases that reshaped and refined the *Tinker* holding, the basic factual predicate was that the students were on school premises, and under the school's

authority at the time they spoke, or engaged in other expressive conduct subject to punishment. The Second Circuit has since held that a school's regulatory authority over students' actions does not "reach beyond the schoolhouse gate." *Thomas v. Granville* supra, at 1044-1945. If speech or expression is effectively "off-campus," then school officials do not have the authority to punish students absent a showing that engaging in the forbidden conduct off-campus would cause a "substantial disruption" on-campus. *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446, 455 (W.D.Pa. 2001).

1. The District Court should have determined as a threshold matter whether the school could assume regulatory authority over the webpages as off-campus speech

In *Layshock v. Hermitage School District*, the court stated that the threshold inquiry is whether or not the school actually has the authority to punish conduct off of their campus. *Layshock v. Hermitage School District*, 496 F.Supp.2d 587, 599 (W.D. Pa. 2007). The court held that in order to establish that authority, the school must show "an appropriate nexus" between the off campus speech or conduct and any material or substantial actual disruption at the school. *Id.* Some courts have noted that the limitation on a school's authority to punish or regulate conduct or speech is strictly limited to those times when a student is under the school's direct supervision at the time of the conduct. *Id.* citing *D.O.F. v. Lewisburg Area School Dist. Board of School Directors*, 868 A.2d 28, 34-36 (Pa. Commw. Ct. 2004)(held, student could not be disciplined for drug use at night on a school playground where there was no connection with any school function). The court in *D.O.F.* noted that despite a school's general broad power to determine disciplinary policies, if a school acts outside of its authority in disciplining a student, it is proper for the courts to intervene. *D.O.F.* at 33.

It is clear in this case that the lower court should have determined as a threshold matter whether or not Horton Hopkins had any regulatory authority over Towles' and Politte's webpages, because they were created completely off-campus, and the record does not establish any disruption material or substantial enough for the speech to be effectively considered "on-campus." The court in *Thomas* stated that "our willingness to grant school officials sufficient autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself." *Thomas*, supra, at 1052. Furthermore, on this issue of jurisdiction over off-campus speech, a court will not automatically defer to school officials' conclusions about their authority. *Layshock* at 599. The lower court did not make any determination as to whether or not Horton Hopkins even had the authority to regulate, punish, and censor the student speech in this case. The proper course would have been to examine the nature of the speech, and to determine whether or not there was enough of a connection between the off campus speech and the school for school officials to assume that regulatory authority.

Although the Second Circuit held in *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008), that a student could be punished for a private webpage created off-campus, other courts have followed the reasoning in *Thomas*, and have declined to find that a student may be punished for off-campus online speech or other conduct, even if there is some slight contact with the school or the speech is directed at an audience comprised of fellow students, without an actual substantial disruption. See, e.g., *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004)(student could not be punished for violent artwork created at home where it was brought to school without his knowledge or authorization); *Flaherty v. Keystone Oaks School District*, 247 F.Supp.2d 698 (W.D. Pa.

2003)(Student Handbook policies found unconstitutionally overbroad and vague because school officials could discipline students for webpages containing expression or speech that occurs outside of school premises and that is not tied to school related activity); *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446 (W.D. Pa. 2001)(student could not be punished for email document abusing teacher where there was no evidence of disruption and the speech was out of school); *Klein v. Smith*, 635 F.Supp.1440 (D.Me. 1986)(student could not be punished for rude gesture to teacher off-campus); *Beussink v. Woodland R-IV School District*, 30 F.Supp.2d 1175 (E.D. Mo. 1998)(without showing that student’s private homepage materially and substantially interfered with school discipline or any evidence to support a particularized fear of such disruption, student could not be punished for expression); *Mahaffey v. Aldrich*, 236 F.Supp.2d 779, 785 (E.D. Mich. 2002)(held, school could not punish off-campus online speech where there was no evidence showing that student’s page of people he wished would die materially or substantially disrupted the school’s educational process); *Emmett v. Kent School District*, 92 F.Supp.2d 1088 (W.D. Wash. 2000)(school did not have supervision or control over student’s private webpage, and thus could not punish the speech).

In determining whether or not there is a sufficient “nexus” between a website and a school campus, the court may look at the content of the website, and its “impact on school personnel.” *J.S. v. Bethlehem Area School District*, 569 Pa. 638, 807 A.2d 847, 857-60 (Pa. Commw. Ct. 2002). In *J.S.*, where a student’s threatening webpage upset a teacher so much that she had to quit, and there was testimony that the webpage had “drastically affected morale in the school,” the court found sufficient evidence for a

nexus between the school campus and the off-campus speech. *Id.* In this case, the webpage content is nowhere near as extreme as that in *J.S.*, and there is no indication in the record that morale at school was affected, or that Smalls was so upset over the content of the page that she was forced to resign. The only connection between the campus and the speech on the webpages is that Towles described something that happened to him at school and many students at Horton Hopkins visited Politte's page.

The fact that both webpages had an audience consisting, in part, of Horton Hopkins students is not dispositive. Even if the intended audience for speech is connected to a school, if that speech is outside of the school's supervision and control, then the school has no authority to control the speech. *Emmett v. Kent School District No. 415*, 92 F.Supp.2d 1088, 1090 (W.D. Wash. 2000). In this case, although both Towles and Politte no doubt intended for their fellow students to view the webpages, they didn't affirmatively bring the speech to campus. They did not view or access the pages on-campus, nor did they authorize or ask for any other students to access the pages on campus. In *Doninger*, the court held that the student had intended for students to access her online posting, and that the posting was "purposely designed to come onto the campus." *Doninger*, supra, at 50. There is no such showing in the record for either Towles or Politte: Towles commented on an incident at school, and about his picture on Politte's webpage, and Politte wrote about an issue that concerned the community at large. Neither webpage was purposely designed to come onto campus.

2. Because webpages were off campus speech, they should have been subject to an actual disruption test and afforded a heightened protection

In *Thomas*, supra, the students created a satirical, lewd magazine with articles and

cartoons. *Thomas* at 1045. The students actually used school typewriters to write some of the articles, and stored the magazines in the classroom of a teacher. *Id.* The court classified the activity on school as “de minimis,” and emphasized that most of the content was created at home, and contacts with the school were “scant and insignificant,” and thus the school did not have the authority to regulate the expression. *Id.* at 1050, 1051. Both Towles and Politte had even less contact with the school when creating their webpages: the webpages were created at their respective houses, on personal computers, after school hours. (R. at 2, 3). Neither Politte nor Towles created or edited their webpages at all with school resources or accessed the webpages on school property.

The court in *Layshock* applied *Thomas* to online speech using an “actual disruption” test. In *Layshock*, a student created a satirical “MySpace” account for his school Principal containing vulgar and insulting language. *Layshock*, supra, at 591. The student twice accessed the account from his school, and showed the page to several classmates. *Id.* He also took affirmative steps to make sure that most of the student body at his school would view the page by adding “friends” to the account. *Id.* In response to the webpage, the school considered shutting down the school computers, and actually cancelled some of the computer classes. *Id.* at 593. The court held that without “in-school” conduct that caused a material and substantial disruption of school operations, the student could not be punished for his off-campus conduct. *Id.* At 600-601. In this case, neither Towles nor Politte acted in any manner to cause a substantial or material disruption of school activities on campus. They did not show the webpages to their classmates as did the student in *J.S.*, nor did they access their own pages from school as the student did in *Layshock*.

The lower court incorrectly applied *Doninger* and *Wisniewski* to this case. In *Doninger*, the student wrote a blog posting that contained information about an ongoing controversy at the school that was “at best misleading and at worst [t] false,” and her posting called for direct harassment of a school official. *Doninger*, supra, at 51. In *Wisniewski*, a student created an instant messenger icon that depicted a teacher being shot. *Wisniewski v. Board of Education*, 494 F.3d 34, 40 (2d Cir. 2007). Dealing with the icon, including disciplinary action and the teacher’s refusal to have the student in his class, constituted an actual “disruption” that satisfied the *Tinker* standard. *Id.* In both cases, the off-campus website speech was connected with the campus in such a manner that disruption was inevitable: a threatening icon that would reasonably be brought to the attention of the threatened teacher and administrators to prevent possible future violence, as in *Wisniewski*, or an ongoing controversy regarding a school event, and a direct incitement to harass a school administrator, as in *Doninger*.

This case is far more similar to *Layshock*. There is no evidence of any actual disruption on the campus as a result of Towles’ or Politte’s pages, and any interference with school operations was minimal at most. The record does not establish that there was any material or substantial disruption as a result of either website. Students accessed the webpages in their free time and at home. (R at 4). There is no mention of any class being disrupted, or of any failure to maintain discipline, or any other substantial or material disruption in the school as a whole. The court in *Layshock* stated that “[t]he mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web.” *Layshock* at 597. Where students are using the internet in their free time at school, at computers provided by the school, unless they are viewing

something improper or actually becoming uncontrollable as a result of the internet access, the fact that they are accessing a web page does not constitute a “disruption.”

B. Even if the school had regulatory authority over Towles and Politte when they created the webpages, the lower courts did not correctly apply the *Tinker* test for material and substantial disruption

There is no claim in this case that either webpage was vulgar or lewd, or that it reached a captive audience at a school activity, so the analysis of *Bethel School District v. Fraser* does not apply. Nor is there any claim that the speech was sponsored by the school, or could bear the imprimatur of the school, so the formulation for school-sponsored speech from *Hazelwood v. Kuhlmeier* does not apply.³ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). For a category of speech outside of what is lewd, vulgar, profane, or sponsored by the school, courts will apply the test set forth in *Tinker*. *Saxe v. State College Area School District*, 240 F.3d 200, 214 (3d Cir. 2001). Even if the webpages are not “off-campus” speech as defined by *Thomas*, the school must show that engaging in the speech would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Tinker* at 509. The school may limit student speech based on a fear of disruption, rather than actual disruption, as long as it is particularized, and not an “undifferentiated fear” of a disturbance. *Id.* at 508-509. It is not an acceptable justification under *Tinker* for an official to limit student speech because they do not like the speech, or because they are upset by the content. *Beussink*, supra, at 1180.

³ Although Towles is under the impression that SADS is a school sponsored organization, Horton Hopkins and Smalls make no such claim in the record. While many students involved in the school club DUDS are members of the SADS network, Politte created SADS on her own time, using her own resources, and maintains the website independently of Horton Hopkins.

In this case, Smalls disciplined Towles, and by extension Politte, because she was upset by the content of Towles' webpage. She did not base her actions on any particularized fear of disruption, nor did she articulate precisely what she felt would happen if the pages remained up. As the court noted in *Tinker*: "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* at 509. The most that Smalls can point to in the record to support a fear of disturbance is the fact that the webpages were accessed at school: beyond that, there is nothing that indicates a substantial or material disruption as a result of the content of these webpages that rises to the level necessary to suppress speech under the *Tinker* formulation.

1. Neither Towles' nor Politte's webpages actually undermined discipline in the school or created a material disruption of the school's operations

This case is similar in factual predicates to *Beussink*, where a student created a webpage using vulgar language, criticized his school's administration, and called for other students to communicate with the principal regarding their opinions of the school. *Beussink*, supra, at 1177. The student did not intend for his webpage to be viewed at school, but another student showed his webpage to a teacher without his request, authorization or knowledge. *Id.* at 1177-78. The court applied the *Tinker* standard and found that there was no evidence of substantial disruption of the school, despite students accessing the page from the school grounds. *Id.* at 1180.

Towles' page is similar, as is Politte's: the mere fact that students are invited to contact school officials does not create a disruption *per se*. The record does not establish that Smalls had any sort of particularized, reasonable fear that Towles' or Politte's page

would materially and substantially interfere with school discipline. Towle's page was critical of the administration, but did not use vulgar or misleading language. (R at 3). Students accessed the webpages at school, but the record does not show that doing so actually interfered with classes, or with discipline in the school. In fact, the record only states that students accessed the webpages during their free time at school and at home. (R. at 4). There is no mention of disciplinary authority being undermined, that teachers couldn't control their classes, or that any protests or actual disruption took place as a result of either webpage.

2. The record does not establish any reason for school officials to have a reasonable, particularized fear about the webpages causing disruption

One way that school officials can show a “well-founded expectation of disruption” is if they can illustrate similar incidents arising out of similar speech in the past. *Saxe v. State College Area School District*, supra, at 212. The record does not contain any mention of past incidents arising out of similar speech at Horton Hopkins. Nor was there a direct call to action for a protest or for any other disruption on either webpage. This case is distinguishable from other online speech cases where a webpage did create a reasonable and particularized fear of substantial disruption.

In *Doninger*, the student's speech related to an ongoing controversy at the school, and, by the student's own testimony, almost led to a sit-in. *Doninger*, supra, at 51. The student also called for other students to harass an administrator, in order to “piss her off more.” *Id.* at 50. It is likely that such speech would actually cause a disruption, and easy for an administrator to claim a particularized fear of such a disruption. This case is not similar to *Doninger*; although the content of both webpages related to the schools,

Politte’s postings dealt with drug dealing in the community at large, and Towles commented on an incident that was particular to his own experience. Furthermore, the language that Towles used – “Let’s speak out against Smalls,” – is not deliberately inciting a mass student protest, nor is it misleading. (R. at 3-4). It is a true account of what happened to Towles and his friends, and at most, it calls for students and others associated with the school to comment on an incident that Towles believed was a violation of his rights. There is no call for a sit-in, a walk-out, or any kind of violent protest, only that students engage in communication with school officials. The most hostile word on the webpage is “idiot,” which, although not entirely polite, is not lewd, vulgar or inflammatory. The student speech in *Doninger* was a misleading account of events at school, deliberately designed to inflame the poster’s fellow students: Towles’ speech was truthful, and not an incitement to protest or meant to unnecessarily inflame his fellow students.

There is no evidence that Smalls had any particularized, reasonable fear of disruption, and therefore the school cannot meet the burden necessary to regulate student speech under *Tinker*.

3. As speech relating to Constitutional rights, Towles’ webpage is entitled to even more protection

One notion that the Supreme Court articulated in *Tinker* is the fact that because schools are meant to educate their students and teach them the basics of citizenship, freedom of expression and protection of their constitutional rights is even more important than otherwise, “if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *Tinker* at 507, quoting *West Virginia State Board of Education v. Barnette*, 319 U.S.624, 637 (1943).

More recently, the 9th Circuit held in *Chandler v. McMinnville School District*, 978 F.2d 524, 527 (9th Cir. 1992), that “the schoolroom prepares children for citizenship, and the proper exercise of the First Amendment is a hallmark of citizenship in this country.” *Chandler v. McMinnville* at 527. Where a student is directing speech that is “arguably political” against the school, school officials do not have limitless discretion to suppress that speech. *Chandler* at 531.

In *Chandler*, students wore buttons that read “scab,” in protest of a strike-breakers hired during a teachers’ strike. *Id.* at 526. In this case, Towles wrote content on a webpage protesting what he believed to be a violation of his constitutional rights by school officials. Whether or not his rights were actually violated is beside the point: Towles reasonably believed that Horton Hopkins had abused its power over his person, and he spoke out. It is not a stretch to argue that the First Amendment protections of the constitution are at their strongest when someone is engaging in core political speech against those in authority who wish to suppress that speech precisely because it challenges their authority.

Smalls punished Towles’ speech precisely because it was critical of her actions and the position of the administration in the incident, and punished Politte because Politte’s webpage induced Towles to create his own webpage. However, both students were engaged in the sort of robust debate and discussion that the First Amendment exists to protect: Politte was speaking out against drug-dealing in the community and at the school, and Towles was answering what he felt to be a defamatory charge and speaking out against a perceived injustice. The school needs to justify the decision to censor the webpages by more than the “desire to avoid the discomfort and unpleasantness that

always accompany an unpopular viewpoint.” *Tinker* at 509. The fact that the school did not like what Towles said, without more, is not enough to justify censorship of either page, and the school has not carried its burden of establishing the authority or justification for the violation of Towles’ and Politte’s first Amendment rights.

II. THIS COURT SHOULD OVERTURN THE LOWER COURT AND DETERMINE THAT THE SCHOOL IMPERMISSIBLY VIOLATED THE APPELLEES’ FOURTH AMENDMENT RIGHTS

The Lower Court based its decision on a misapplication of the principles set forth in *New Jersey v. T.L.O.*, and should accordingly be reversed. Under the Supreme Court’s holding in *New Jersey v. T.L.O.*, “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances of the search.” *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985). In *T.L.O.*, the Supreme Court held that courts must consider first whether a search was justified in its inception, and second whether the scope of the search was reasonably related to the circumstances that prompted the search. *Id.* In this case, the search was based simply tips from parents, police, and an anonymous picture with a vague caption, and therefore was not justified in its inception. Additionally, going to the extent of strip searching students without any concrete or individualized suspicion does not meet the standard of a reasonably calculated search. Furthermore, because the search was excessive and beyond the scope of what any reasonable person would consider lawful, Horton Hopkins officials should not be entitled to qualified immunity.

A. The strip search constituted an impermissible violation of the Petitioner’s Fourth Amendment rights

Central to Fourth Amendment rights is the idea that an individual can assert a “reasonable” or a “legitimate expectation of privacy.” *Smith v. Maryland*, 442 U.S. 735,

740 (1979). This Court has determined that a search conducted without a warrant is *per se* unreasonable subject to only a “few specifically established and well-delineated exceptions.” *United States v. Lockett*, 406 F.3d 207, 211 (3d Cir. 2005)(quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). Further, “[i]t is [sic] beyond dispute that “the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers.”” *New Jersey v. TLO* at 334 quoting *Elkins v. United States*, 364 U.S. 206, 213, 80 S. Ct. 1437, 1442, 4 L.Ed.2d 1669 (1960). “[T]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.” *Terry v. Ohio* 392 U.S. 1, 8 (1968).

This Court has carved a narrow exception to student’s Fourth Amendment rights at school under a two prong approach wherein the search has to be “justified at its inception,” and “reasonably related in scope to the circumstance which justified the inference in the first place.” *New Jersey* 469 at 342 citing, *Terry v. Ohio*, 392 at 20. Small’s actions in subjecting Towles to a strip search upon only phone calls and a picture when she had no personal knowledge of the situation falls far outside of the Supreme Court’s narrow exception of warrantless searches permitted under *New Jersey v. T.L.O.*.

1. The search was not justified at its inception because the record does not establish grounds for reasonable individualized suspicion

The search was not justified at its inception. The general rule is that school officials can conduct a search upon reasonable suspicion that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. *State v. Joseph T.*, 336 S.E.2d 728 (W.Va. 1985). Searches not justified at their

inception occur when the school official does not have sufficient evidence of wrongdoing, or evidence individualized suspicion. *Id.* The burden is on the school official to show that the student's conduct is such that it creates a reasonable suspicion that a specific rule or law has been violated. *C.A. v. State*, 977 So.2d 684 (Fla. App. 3 Dist. 2008). In determining reasonableness of a search the court should consider the child's record in school, and the exigency of the situation. *Bellnier v. Lund* 438 F.Supp 47 (D.C.N.Y. 1977).

In *In re J.N.Y.*, the court held that a high school vice principal did not have the reasonable suspicion necessary to search the student's purse, even though vice principal's search was based on information he received from a teacher that the student "had something inappropriate on her." *In re J.N.Y.*, 931 A.2d 685, 688 (Pa. Super. Ct. 2007). The court based its holding, in part, on the fact the vice principal had no idea where teacher had received the information that she provided to him, teacher could not recall names of persons who gave her the information, and, that the vice principal noticed nothing unusual about juvenile's appearance or speech. *Id.*

Warrantless searches conducted not on one's own observation, but upon tips are subject to greater scrutiny. *Florida v. J.L.* 529 U.S. 266 (2000). The Supreme Court has held that anonymous tips have to meet a certain indicia of reliability. *Id.* In determining the reliability of an informant as justification for a search, the totality of the circumstances must be considered. *Phaneuf v. Fraikin*, 448 F.3d 591, 598-99 (2006). Such considerations include analyzing the reliability of the informant and their basis of knowledge. *Id.* Student tips alone are insufficient to give rise to reasonable suspicion. *Phaneuf v. Fraikin*, 448 F.3d 591, 598-99 (2006). See also *In re K.C.B.*, 141 S.W.3d 303

(Tex. App. 2004).(A strip search for marijuana was not justified at its inception upon the anonymous tip of a hall monitor.)

In this case, Smalls' search was not justified at its inception because she failed to meet the threshold of reasonable suspicion. Like in, *Phaneuf.*, supra, Smalls' suspicion was not reasonable because she acted solely on anonymous tips. As The Supreme Court indicated in *Florida v. J.L.*, anonymous tips have to have some indicia of reliability. Here, Smalls acted solely on tips from parents and police, and a picture taken anonymously and posted by someone without knowledge of the circumstances. Like the unjustified search in *In re J.N.Y.*, supra, Smalls needed more than tips in order to proceed with the search. Similar to *In re J.N.Y.*, Smalls had no knowledge of wrongdoing on Towles' part, and at no point did Smalls personally observe Towles with any drugs, nor did she even observe Towles acting in an unusual manner.

In addition to reasonable suspicion, the acting official must have individualized suspicion. *Bellnier v. Lund*, 438 F.Supp. 47 (D.C.N.Y. 1977). It is improper to search a group of students without any reason to suspect one student in particular may have committed an infraction, even if there is evidence wrongdoing has occurred. *Id* In *Redding v. Safford Unified School Dist.*, the Court held that the search of a female student upon a tip from another student was not justified in its inception, even though the female had previously been in trouble for alcohol. *Redding v. Safford Unified School Dist. No. 1*, 531 F.3d 1071 (9th Cir. 2008). The court wrote “[t]his is nothing more than “guilt by association, certainly too thin of a reed for such a substantial intrusion into expectations of privacy.” *Id.* at 1084.

Further, in *Burnham v. West*, the court held that a middle school principal and

teachers did not have sufficient individualized suspicion to make general search of students for portable radios and marijuana. *Burnham v. West*, 681 F.Supp. 1160 (E.D.Va. 1987). The court made its determination even though the principal knew some students had radios in their possession and had received reports concerning scent of marijuana in hallways while students were in class. *Id.* See also, *People v. Taylor*, 625 N.E.2d 785 (Ill. App. 1993)(The Illinois Appellate court suggested that the reasonable suspicion standard should be that of the standard in *Terry v. Ohio*, requiring an examination the reliability of the information indicating that a search is necessary.)

Under *Belliner*, looking at other factors involved in the search like exigency of the circumstances and Towles' prior record, the search becomes even less justified. *Belliner*, supra at 52. Here Towles was an honor student and an active participant of the student body as a member of the basketball team. His only indiscretion was tardiness, which can not be reasonably correlated to drug use. In order to have reasonable individualized suspicion, Smalls should have had strong evidence of wrongdoing to counterbalance Towles' excellent academic record. On the contrary, the evidence Smalls had indicating Towles may have had drugs, was weak, vague, and attenuated at best.

The picture Smalls saw did not have drugs in it, nor did it provide any indication that Towles had drugs or might be in the possession of drugs. Further, the picture was placed anonymously, again giving Smalls no indication of its reliability. Smalls does not meet the burden set forth in *In re K.C.B.* of acting on information that is either reliable, or reasonably based on first hand information. *In re K.C.B.* supra at 307. Therefore, Smalls' suspicion was unreasonable.

It is also improper for Smalls to conclude that simply because Towles had been at

a party with drugs, or had friends who may have been associated with drugs, he personally had any contact with drugs. Smalls' actions demonstrate exactly the same guilt-by-association prohibited in *Redding v. Safford Unified School district*. *Redding*, supra, at 1084. In this case there was absolutely no individualized suspicion whatsoever. As the lower court aptly concluded, "Absolutely nothing in the record demonstrates a likelihood that Towles himself possessed drugs on school grounds." (R. at 11).

As in *Burnham v. West*, Smalls was required to have more than an idea that some member of the group of boys might have drugs. To the contrary, Smalls ordered the search because she had a vague notion that Towles or any of his friends might have been in contact with drugs. Therefore, Smalls did not have the requisite individualized suspicion necessary to search Towles.

Respondents can not reasonably justify their action for the purposes of school safety. The Supreme Court has consistently held that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000). There is nothing "special" in the need of law enforcement to detect evidence of ordinary criminal wrongdoing, even in communities where crime is on the rise. *Id.* See also *Spencer v. Bay City*, 292 F.Supp.2d 932 (E.D. Mich. 2003)(Holding that there is "nothing special" about preventing crime, which justifies a warrantless search, even in a community which has a lot of crime.)

Here, the threat was not grave. There is no evidence on the record whatsoever that the situation at hand was an emergency. Therefore, any argument that the school acted for safety reasons is simply not tenable under the law. Smalls may have been under pressure

from school parents, but as the Supreme Court articulated in *City of Indianapolis*, motivation to prevent crime alone does not justify the interference with constitutional rights. *City of Indianapolis*, supra, at 42. Minor instances of other drug use at the school do not justify Smalls' impermissible violation of Towles' Fourth Amendment rights. Therefore, no amount of crime prevention motivation possible could justify Small's actions.

2. The strip search was unreasonable in scope because it was highly intrusive

Even if this Court were to conclude that Appellants' search was justified in its inception, Smalls failed to reasonably tailor the search to discover evidence. "[T]he measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, supra, at 341-342. Additionally in *T.L.O.*, the Supreme Court acknowledged the necessity of a causal link between an initial search, and a more intrusive secondary search. *Id.* In *Redding v. Stafford Unified Sch. Dist.*, the court held that a school official was not justified in proceeding to a strip search after not immediately finding any contraband on a student. *Redding*, supra, at 1084. The court held that the search was not justified, due to the possible unreliability of the informant, coupled with the fact that the official could have taken other courses of action prior to proceeding with the search, like going to the girl's parents, or trying to find additional evidence of wrongdoing elsewhere. *Id.* at 1083. See also *Phaneuf*, 448 F.3d at 598-99. ("While there is concern that students will be motivated by malice and falsely implicate other students in wrongdoing, that type of situation would be analogous to the anonymous tip. Because the tip lacks reliability, school officials would be required to

further investigate the matter before a search or seizure would be warranted.”); *Kennedy v. Dexter*, 129 N.M. 436 (N.M. 2000)(Holding strip search without individualized suspicion or clear evidence of wrongdoing is a violation of the fourth amendment.)

The search must also be reasonable under the totality of the circumstances. In *Beard v. Witmore Lake School District*, the court held that searches of male high school students in which students had to remove shirts and lower pants and underwear, were not reasonably related evidence that some money had been stolen, and thus were unreasonable in violation of Fourth Amendment. *Beard v. Whitmore Lake School Dist.* 402 F.3d 598 (C.A.6 Mich. 2005). The court wrote that students had significant privacy interest in their unclothed bodies, and the school's interest in recovering money not weighty, especially since there was no reason to suspect any particular student was responsible for the alleged theft. *Id.*

In *Cornfield v. Consolidated High School Dist. No. 230*, the court discussed the legality of a strip search in social context. *Cornfield v. Consolidated High School Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993). The court also wrote, that it is appropriate to consider a child's age, as children after children go through puberty, they become more body conscious. *Id.* at 1321. Therefore, there is more potential for trauma and emotional damage when strip searching a teenager. *Id.*

A Supreme Court Justice has written that strip searches are “the greatest personal indignity” officials can visit on an individual. *Bell v. Wolfish*, 441 U.S. 520, 594 (1979). (Stevens, J., dissenting). The Seventh Circuit in particular has articulated the intrusiveness of strip searches, writing, ‘as the intrusiveness of a student intensifies, so too does the standard of Fourth Amendment reasonableness.’ *Cornfield*, 991 F.2d 1316,

1321. This Court has recognized that “even a limited search of the person is a substantial invasion of privacy.” *New Jersey v. T.L.O.*, supra at 740, citing *Terry v. Ohio*, supra, at 20.

Even in its mildest form, the strip search has been characterized as “a violation of any known principle of human decency.” *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (C.A. Tex 1982). “[T]he fourth amendment applies with its fullest vigor against any intrusion on the human body.” *Id.* at 487. The Court in *Cornfield* articulated that heightened justification is necessary prior to searches of the person writing, “What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search.” *Cornfield* at 1321. The Second Circuit has also held that more evidence than would be reasonably necessary is required given the gravity of a strip search holding that school officers need reasonable rather than probable cause. *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980).

Here, even though any inference of wrongdoing was based on vague and unreliable information at best Smalls nevertheless subjected all four boys to a strip search. *Redding* and *Kennedy* provide clear guidance that strip searches are only justified upon a showing of concrete and individualized suspicion. Here, Smalls’ investigation was based on second hand and unreliable information at its inception. In her unjustified initial search, Smalls found a small amount of marijuana in one of the individual’s lockers. At most, Smalls was justified in further interrogation of this boy.

T.L.O. and *Redding* show that Smalls, must have had a causal nexus between the initial and secondary search, and should have considered alternate action prior to conducting a search as serious as a strip search. Here, with respect to the three boys

initially not found to be in possession of marijuana, there was no indication that Smalls needed to search the boys any further. Additionally, there was no exigency. As in *Redding*, Smalls had ample time to try alternate action, like contacting the boys' parents prior to performing her drastic search.

Given the gravity and severity of a strip search as recognized by the Supreme Court, and numerous others including *Horton* and *Cornfield*, Smalls was not justified in going any further. Like in *Beard*, the threat that the boys were in a possession of a small amount of marijuana did not justify the severity and potentially traumatic consequences of such a search.

While there is a consent exception to strip searches, it is unequivocally clear that none of the boys consented to the search. (R. at 3). See generally *Anable v. Ford*, 653 F.Supp. 22 (W.D. Ark. 1985). Therefore, Small's search was unquestionably unjustified at its inception given the contraband at issue, the fact that it was openly protested by the boys, and the lack of any exigent circumstances.

B. Horton Hopkins is not entitled to qualified immunity because no reasonable person would have considered the strip search reasonable under existing law

Horton Hopkins argues that even if this Court were to find that their actions impermissibly violated Towles' Fourth Amendment Rights, it is not liable due to the defense of qualified immunity. *Saucier v. Katz* set forth the traditional standard for determining if a governmental official is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In *Saucier*, the Supreme Court held that determining whether school officials have qualified immunity requires a two prong analysis comprising, (1) looking at the facts in the light most favorable to the injured party, the court must

determine whether the injured party suffered a constitutional violation; and (2) if the injured party's constitutional rights were violated, the court must determine if the right was "clearly established." *Id.* at 201-203.

The Supreme Court recently revised its standard for the determination of qualified immunity in *Pearson v. Callahan*. *Pearson v. Callahan*, 2009 U.S. LEXIS 591 (Jan. 21, 2009). In *Pearson*, the Supreme Court did not overrule *Saucier*, but rather determined that judges, at their discretion, can use a more flexible approach in the determination of granting qualified immunity. *Id.* The Supreme Court stated that the *Saucier* standard is often appropriate, especially in cases where the application is straightforward and judicial resources would not be wasted in applying the *Saucier* analysis. *Id.* Here, the case law strongly indicates that a clearly established constitutional right was violated, and therefore, application of the *Saucier* standard would continue to be appropriate even under the Supreme Court's revised holding in *Pearson*.

1. Smalls' actions violated a constitutional right because the strip search was not reasonable under established law

Horton Hopkins violated a constitutional right when it preformed a strip search on Towles. School officials violate constitutional rights when they perform searches neither justified in their inception nor justified in scope. *Kennedy v. Dexter*, *supra*. In *Kennedy v. Dexter*, the court held to strip searches to the undergarments violated a clearly established constitutional right. *Id.* at 442. In *Cornfield*, the court similarly held that a strip search to the undergarments violates a constitutional right. The court wrote, "[m]oreover, a highly intrusive search in response to a minor infraction would similarly not comport with the sliding scale advocated by the Supreme Court in *T.L.O.*" *Cornfield* at 1320.

As in *Kennedy*, Smalls conducted a search unjustified in its inception and impermissible in scope, in violation of Small's constitutional rights. Under the sliding scale analysis in *T.L.O.*, her highly intrusive search simply was not justified given the circumstances. Therefore, Smalls is not entitled to qualified immunity.

2. The rule was clearly established at the time of the strip search

Students' Fourth Amendment right to be free from unreasonable searches in school setting was "clearly established" at time of searches at issue. "In order to determine whether a right is clearly established, it is not necessary that the Supreme Court has directly addressed the issue, nor does the precise action or omission in question need to have been held unlawful." *Burnham v. Ianni*, 119 F.3d 668, 677 (8th Cir.1997). In the absence of binding precedent courts should look to circuit and state court decisions to determine the established law. *Id.*

While the Supreme Court has not spoken to the issue of strip searching school children, it has consistently upheld the importance of protecting Fourth Amendment Rights. See generally *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). In *Tinker v. Des Moines*, the Supreme Court stated that students do not shed their constitutional rights at the school house gates. *Tinker* at 506. The States Supreme Court has recognized that an inquiry into whether official conduct violates "clearly established" law "depends substantially upon the level of generality at which the relevant legal rule is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Fourth Amendment rights are vital to American citizens, making them subject to general knowledge. *Schneckloth*, 412 U.S at 218.

Some jurisdictions have held that strip searches, due to their grossly intrusive

nature are clearly prohibited. In *Konop for Konop v. Northwestern School Dist.*, the court held that a principal ordering strip searches for allegedly stolen money was in violation of the students fourth amendment rights and not objectively reasonable for purposes of qualified immunity. *Konop for Konop v. Northwestern School Dist.*, 26 F.Supp.2d 1189 (D.S.D. 1998). In *Konop*, the court concluded that under the *Saucier* standard, there was simply no way a reasonable person would not consider a mandatory strip search to not to be a violation of constitutional rights. See also, *Kennedy v. Dexter* 129 N.M. 436 (Holding that right to be free from strip searches to the undergarments “clearly established”).

Just like in *Konop* and *Kennedy*, Towles’ constitutional right to be free from strip searches was clearly established at the time of the incident. Under *Saucier*’s objectively reasonable standard as adopted in *Konop*, given the intrusive nature of a strip search, and the general knowledge of Fourth Amendment rights, there is simply no way a reasonable person could conclude that a strip search to the undergarments was objectively reasonable. Therefore, under the appropriate *Saucier* standard, Horton Hopkins should not be entitled to qualified immunity for the unjustified and highly intrusive search.

CONCLUSION

For the foregoing reasons the decision of the Badger County District Court should be reversed. This Court should find that Horton Hopkins violated Towles' and Politte's First Amendment rights by forcing them to remove their webpages from Friendkepedia, and that Horton Hopkins officials violated Towles' Fourth Amendment rights by subjecting him to an unreasonable strip search.

CERTIFICATION

We, members of Evan A. Evans Competition Team #3, Zoe Plerhoples and Katherine Robinson, do hereby certify that our brief was prepared in compliance with Evan A. Evans's Competition rules, and that the work product herein is our own.

Signed,

/s/ Zoe Plerhoples
Zoe Plerhoples

03/02/09
Date

/s/ Katherine Robinson
Katherine Robinson

03/02/09
Date