

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

Kit Politte and Cory Towles,

Petitioners,

Docket No. 05-1338

v.

Horton Hopkins School District
and Keena Smalls,

Respondents.

RESPONDENTS' BRIEF

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF GRACE**

Team #30

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether Respondents' attempt to regulate students' Internet speech created off-campus was a violation of Plaintiffs' First Amendment rights.

The Court of Appeals held that Respondents' regulation of off-campus student speech was permissible in light of the need to prevent disruption during school hours.

2. Whether Respondents' warrantless search of Petitioner Towles on school premises violated Towles' Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment.

The Court of Appeals held that the search of Petitioner Towles was not justified at the inception, and was therefore an unreasonable search in violation of the Fourth Amendment.

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CONSTITUTIONAL PROVISIONS OR STATUTES INVOLVED

U.S. Const. amend. IV.

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

U.S. Const. amend. XIV, § 1.

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

U.S. Const. amend. XIV, § 5.

“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

42 U.S.C. § 1983 (Westlaw 2009 through Pub. L. No. 111-4)

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

STATEMENT OF THE CASE

This case comes before the Supreme Court of the State of Grace on writ of certiorari to the Court of Appeals of the State of Grace. This case came before Badger County District Court, Judge Sally Pearson, in the October 2008 Term. Judge Pearson granted Defendant-Respondents' motion for summary judgment. On writ of certiorari, the Court of Appeals upheld the grant of summary judgment in a 2-1 opinion written by Presiding Judge Harding. Judge Evans filed an opinion dissenting with respect to the grant of summary judgment on the First Amendment issue.

Petitioner-appellants Kit Politte ("Politte") and Cory Towles ("Towles") are students at Horton Hopkins High School ("HHHS") in Hopkinsville, Grace. HHHS has recently experienced a rise in drug-related disciplinary incidents. On September 10, 2008, Petitioner Kit Politte created a network webpage on social networking site Friendkipedia, directed towards all Hopkinsville Friendkipedia users. The webpage, entitled Fighting All Dealers ("FAD"), called for community members to submit information "outing" drug dealers at HHHS. FAD claims 198 members at HHHS.

On October 2, 2008, Towles attended a party at the home of Jeffrey Tweegs ("Tweegs"), an HHHS student. Tweegs had been suspended from HHHS in September for using marijuana on school grounds. Towles left the party at 11:00 p.m. At 11:30 p.m., Hopkinsville police raided the party and cited several students for underage drinking; HHHS student Frank Conrad ("Conrad") was also cited for possession of marijuana in the form of a marijuana cigarette.

On October 4, 2008, Politte posted a picture of Conrad smoking in Tweegs backyard, as Towles and HHHS student John Thomson ("Thomson") sat with him. The picture was

labeled, “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” The following day, HHHS principal Keena Smalls (“Smalls”) was contacted by the Hopkinsville police about the citations for drug and alcohol use at the party. Responding to the police notice and calls from parents, Smalls called Towles, Conrad, Thomson and Tweegs to her office. Pursuant to HHHS policy, she conducted searches of the four students’ lockers and book bags, finding a bag of marijuana in Conrad’s locker. Smalls then had a male HHHS teacher conduct individual strip searches of the students. Each student was brought separately into a private room, where they would then strip down to their underwear under the teacher’s observation. At no time did the teacher touch the students; he merely searched their clothing after they removed it. As a result of the search, marijuana was found in Thomson’s pocket.

After the search, Towles created a Friendkipedia page entitled “Students Against Defamatory Statements” (“SADS”) from his home computer. The webpage accused FAD and an associated student organization of defaming him and invading his privacy. SADS denounced the searches as unreasonable and unjust and encouraged HHHS students to protest similar applications of the drug policy. Students began to access both the FAD and SADS pages from school computers during the school day. Smalls believed that the clashing webpages were causing a disturbance and interrupting other students’ education, and she demanded both Politte and Towles take them down. Both students refused and were suspended until they agreed to take the webpages down.

SUMMARY OF THE ARGUMENTS

Regulation of student webpages was Constitutionally permissible both under the *Tinker* framework and the framework set forth under *Morse*, *Fraser*, and *Kuhlmeier*. The *Tinker* test is to be applied in light of the totality of the circumstances surrounding the speech. The regulation of student speech must be evaluated in light of the significant, ongoing drug problems at HHHS. Incitement to insubordination and language intending to humiliate teachers have been held to reasonably pose a risk “substantial and material disruption” of the educational environment. Speech need not take place on campus in order to pose such a risk; it may be regulated when directed at the school community from off-campus if it foreseeably creates a risk of substantial and material disruption. School officials need not wait for an actual disruption to occur before regulating speech; student speech may be regulated when it is determined that it poses a risk of material and substantial disruption.

The search did not violate Towles right to be free from unreasonable search and seizure under the Fourth Amendment. Probable cause is not an irreducible requirement of the Fourth Amendment; searches in school need only be based on the lesser standard of reasonable suspicion. Under *New Jersey v. T.L.O.*, searches in school are reasonable if they are justified at the inception and reasonably related in scope to the original justification.

A school official’s search of a student is justified at its inception where there are reasonable grounds to suspect that the search will uncover evidence of either a violation of the law or of a school rule. Reasonable suspicion does not require a particular quantum of evidence; it is a common-sense determination based on the totality of the

circumstances. Reasonableness is a sliding scale that takes into account the governmental interest in conducting the search. The prevalence of drug use at HHHS created a heightened government interest in conducting the search in this case. The totality of the circumstances surrounding the party, including the photograph apparently showing Towles in close proximity to drug use, created a reasonable grounds for Smalls to suspect that a search would uncover evidence of drug possession. The search was reasonably related in scope to the original grounds for Smalls' suspicions.

ARGUMENTS

I. HOPKINS' REGULATION OF INTERNET SPEECH DID NOT VIOLATE TOWLES' FIRST AMENDMENT RIGHTS.

Since the seminal student speech case *Tinker v. Des Moines* was decided in 1969, the United States Supreme Court has passed down a series of decisions which have increasingly distanced the Supreme Court from its holding in *Tinker* regarding the regulation of student speech. In *Tinker* the United States Supreme Court held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). By comparison, in *Morse v. Frederick*, the United States Supreme Court, affirming prior holdings in *Hazelwood v. Kuhlmeier* and *Bethel v. Fraser*, held that cases regarding the regulation of student speech need not conduct *Tinker's* "substantial disruption" analysis. *See, e.g., Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007)(declining to conduct "substantial disruption" analysis and noting that "[w]hatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker*); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)(disagreeing with the notion that there is "no

difference between the First Amendment analysis applied in and that applied in *Fraser*”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)(declining to conduct substantial disruption analysis but upholding the suspension of a student for the use of “vulgar” speech in a school auditorium). In his concurrence Justice Thomas explained the significance of *Morse*, noting that:

“We continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not... I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't -- a standard continuously developed through litigation against local schools and their administrators.”
Morse at 2634.

The United States Supreme Court has not yet specifically addressed Internet speech in schools. However, as a result of the *Kuhlmeier*, *Fraser*, and *Morse* decisions, courts deciding student speech regulation cases have utilized both the “substantial disruption” framework of *Tinker*, the arguably less factually “demanding” framework used by *Kuhlmeier*, *Fraser*, and *Morse*, and even a combination thereof. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008) (applying *Tinker*); *Boroff v. Bd. of Educ.*, 220 F.3d 465 (6th Cir.2000); *Saxe v. Area Sch. Dist.*, 240 F.3d 200, 216 (3d Cir.2001)(finding *Fraser* and *Kuhlmeier* to be narrow exceptions to *Tinker*); *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Commw. Ct. 2000)(conducting analysis under both *Tinker* and *Fraser*).

The framework set forth in *Morse* represents the Supreme Court’s first revisit of *Tinker* in roughly the last 20 years. *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *J.S. ex rel. H.S. v. Bethlehem Area School Dist.*, 807 A.2d 847, 863 (Pa. 2002)(noting that, as of September 25, 2002, the Supreme Court had not revisited *Tinker*

for 15 years). As the Supreme Court’s most recent and timely statement of law in the area of school regulation of student speech, the instant case should be governed by the methodology utilized in the *Morse, Fraser, and Kuhlmeier* line of cases. However, even if the instant case is analyzed under the more traditional “substantial disruption” analysis of *Tinker*, the court should find that Hopkins’ regulation of Towles’ internet speech was constitutional. Because the *Tinker* framework arguably requires a more factually “rigorous” analysis the instant case will first be analyzed under *Tinker* and then under *Morse, Fraser, and Kuhlmeier*.

A. Hopkins’ regulation of Towles’ speech was constitutional under the framework of *Tinker v. Des Moines*.

In order for Hopkins’ regulation of Towles’ speech to be constitutional under *Tinker*, Towles’ creation of the SADS webpage must have caused HHHS school administrators to form a reasonable belief that the page would cause a “material” and “substantial” disruption to the discipline and work of HHHS. *Tinker* at 514. Courts have stated that *Tinker* analysis must consider not only the nature of the student speech which was regulated but also the totality of relevant facts surrounding that speech, including the circumstances confronting school officials at the time the speech was made. *Pinard v. Clatskanie School Dist.*, 446 F.3d 964, 976 (9th Cir. 2006); *See also, Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008)(noting that the court must examine the “special characteristics” in place at the school environment at the time of the regulated speech); *Tinker* at 505(“First Amendment rights, *applied in light of the special characteristics of the school environment*, are available to teachers and students.”); *Barr v. Lafon*, 538 F.3d 554 (Tenn. 2008)(upholding a ban on students wearing shirts bearing an image of the confederate flag

based on school circumstances involving, inter alia, altercations between white and African American students and violent graffiti.)

As was noted briefly, Towles' website was posted in the context of what may fairly be called a marijuana and cocaine drug-use epidemic at HHHS. For the last five years, drug use has been significantly increasing at HHHS. During the 2006-2007 school year 25 students were arrested for on-campus drug use. In December 2007 the captain of the volleyball team ("Smith") died from a cocaine overdose. Despite Smith's death, drug use at HHHS actually *increased*; during the very first two months of the 2007-2008 school year alone, 15 additional students were apprehended using illegal drugs on school grounds. During this same period police arrested students off campus both for illegal alcohol use and for marijuana use, and a photo of party-goers in the act of smoking circulated student ranks. In reaction HHHS administrators instituted the "zero tolerance policy." While HHHS administrators believed the policy to be necessary, the zero-tolerance rule was also controversial and arguably placed the HHHS administration on tenuous and uncertain grounds with students.

In this context Towles posted the SADS website. Towles' website literally called out to "all Hopkins students" and solicited these students to personally take action against Smalls. Towles' website defamed Smalls by calling Smalls an "idiot." Further, after HHHS officials conducted several routine student drug searches according to the school's "zero-tolerance" policy, Towles misrepresented the drug searches as being abusive, when, in fact, Horton's drug searches were fully justified in response to rapidly growing drug use which was literally risking killing students and had already resulted in the death

of one student. Towles' website was accessed throughout the school day and after school in school computer labs and in the library.

The risks that Towles' website posed to the discipline and order in the instant case can be compared to those in *J.S. v. Bethlehem. Bethlehem* at 847. In *Bethlehem*, an eighth grade student created a website which contained threatening and derogatory comments towards at least five teachers, including, for example, a request that the reader donate \$20 to hire a hitman against a "Mrs. Fulmer". *Id.* at 851. Another page included a cartoon drawing of Fulmer missing her head with hand-drawn blood "dripping" in the drawing. *Id.* at 851. Although J.S. was only an eighth grade student, the website targeted at least 5 total school officials, the website was created entirely off school grounds, and visitors to the website had to click on a "disclaimer" before entering the website, the fallout from the website was tremendous. *Bethlehem* at 674. Two teachers – Fulmer and Spaight – were unable to complete the school year, Fulmer alone having to hire three substitute teachers in her stead. *Id.* at 869. Students expressed anxiety about the website. *Id.* at 869. Some students visited counselors. *Id.* at 869. The website was a so-called "hot" topic of conversation, parents voiced concerns for school safety, and among staff there was a general feeling of low morale and helplessness, such that it felt as if someone had "died" at the school. *Id.* at 869.

The total and complete disruption which occurred as a result of violent cartoon drawings and writings of an 8th grader illustrates the power that students have over the functioning of educational process. While Towles' speech in the instant case lacked the violent drawings and speech existing in *Bethlehem*, Towles' speech has some similarities with *Bethlehem* in that, like J.S., Towles targeted a staff member: Principal Smalls. Like

J.S., Towles insulted Smalls in a website accessed by the entire student body throughout the day and after school. Towles was labeled an “idiot” and as such the target of public humiliation. If a violent cartoon drawing of an 8th grader was enough to literally shutdown several classrooms requiring many substitute teachers, then it is safe to presume that publicly targeting and humiliating Smalls would pose a significant risk of disruption – especially in the midst of the Hopkins administration already being on uncertain footing with students because of its zero-tolerance drug policy.

As a result of Towles’ website Hopkins could reasonably fear a variety of disruptions: Smalls missing school, students expressing anxiety about the website, parents voicing concerns over the website humiliating the most prominent figure in the school, the website being a “hot” topic of conversation and distraction in class, a lowered morale among staff feeling targeted by students, a risk that, in the volatile environment of the zero-tolerance drug policy where students flagrantly disobeyed school drug rules, students might stage a walkout or protest the school’s drug policy.

Similarly, the court in *Doninger v. Niehoff* upheld the suspension of a high school student’s away-from-school posting on an independent blog upon which the student called school officials “douchebags” and asked others to contact the superintendent to “piss her off more.” *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008). The court concluded that the language used in this internet speech foreseeably created a risk of substantial disruption. *Id.* at 45. The instant case is similar in that it involved Towles calling a school official a vulgar name and, like in *Doninger*, calling on other students to speak out or contact that official.

The risk of a disruption in the instant case is also comparable to the situation in *Wildman v. Marshalltown*. *Wildman v. Marshalltown*, 249 F.3d 768 (8th Cir.2001). In *Wildman*, a high school basketball player was upset by her coach's failure to promote her to the varsity team. She distributed a letter to her teammates, containing the following language: "It is time to give him back some of the *bullshit* that he has given us.... We deserve better then [sic] what we have gotten. We now need to stand up for what we believe in!!!" *Id.* at 770. The court in *Wildman* upheld the dismissal of the player from the basketball team, holding that her communication constituted a potential "significant disruption" to the school environment. *Id.* at 771.

Wildman was discussed 6 years later in *Lowery v. Euverard*, which reiterated that *Wildman* was dismissed from her team because her call to "stand up for what we believe in," in the context of the letter, was a call for Wildman's teammates to commit insubordination. *Lowery v. Euverard*, 497 F.3d 584, 591 (Tenn. 2007). The court in *Lowery* specifically rejected the proposition that Wildman was excused from her team due to Wildman's use of the word "bullshit" in her letter. Just as the coach in *Wildman* was held to have permissibly concluded that a call by a student to "stand up for what we believe in" constituted insubordination, Smalls reasonably concluded that Towles' calling Smalls an "idiot" and asking for "all" other students to "speak out" against Smalls also created an unreasonable risk of insubordination – especially in the midst of HHHS' drug crisis.

Admittedly, there are a limited number of court cases which involve the regulation of internet-based student speech critical of school staff. However, in non-internet based cases, courts have generally held upheld school actions to suspend or

otherwise punish students who insult or commit insubordination against school officials. For example, in *Lopez v Williams* the court upheld the suspension of several students who, in a conversation with an assistant principal, said “I hate you” and told him that the students were tired of listening to him, that it was his turn to listen to them, and that the students were going to tell him what was to be done. *Lopez v Williams*, 372 F Supp 1279 (1973, SD Ohio)(aff’d 419 US 565)(“[E]vidence established that the various school administrators had acted to restore order and discipline in their schools”). *See also*, *Wooster v. Sunderland*, 27 Cal.App. 51, 52 (1915) (upholding the expulsion of a student who gave a speech before the student body that criticized their school for having an unsafe building “because of the possibility of fire,” nothing that the speech “was intended to discredit and humiliate the board in the eyes of the students, and tended to impair the discipline of the school” *Id.*, at 55); *Deskins v. Gose*, 85 Mo. 485, 487, 488 (1885) (holding that “rule which forbade the use of profane language [and] quarrelling” “was not only reasonable, but necessary to the orderly conduct of the school.”)

Some might argue that the risk of disruption to discipline and school work posed by Towles’ website was theoretical or speculative. However, current case law does not actually require that a student cause a disruption before that student’s speech can be reasonably regulated. *See, e.g., Lowery*, 497 F.3d at 592 (“*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. Nor does *Tinker* “require certainty that disruption will occur.”); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir.2001) (“forecasting disruption is unmistakably difficult to do.”); *D.B. v. Lafon*, 217 Fed. Appx. 518, 523 (6th Cir.2007)(upholding a rule banning clothing bearing the likeness of the confederate flag based on a history of racial tension in the school).

Current case law also supports the notion that Towles' speech could be constitutionally regulated by Horton Hopkins despite the fact that Towles' website was created and hosted off the school campus and even if Towles' website were considered "off-campus" speech. For example, the court in *Morse* upheld the suspension of a student who unfurled a banner held to advocate for the illegal use of drugs even though this banner was, in fact, held by students *across the street* from official school property. *Morse* at 2629. See also *Wisniewski* at 34 (upholding suspension of a student for instant messages critical of school staff transmitted via a computer off of school grounds); *Layshock v. Hermitage School Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007), certificate of appealability denied, 2007 WL 3120192 (W.D. Pa. 2007) (upholding the suspension of a student who posted a fake Myspace page created off campus which included vulgar language directed at the student's principal); *Beussink v. Woodland R-IV School District*, 30 F.Supp.2d 1175 (E.D.Mo.1998) (holding that a website created off-campus constituted "on-campus speech" where students accessed the website in the school library and on school computers).

Where student speech occurs off campus but has an affect on the school environment, some courts have conducted a "nexus" test, holding that the off-campus speech can rightly be considered "on-campus" if there exist sufficient ties between the student speech and the school environment. See *Bethlehem* at 865. The court in *Bethlehem* held that the website created by J.S. constituted on-campus speech even though it was created off of the school campus based on a variety of factors including: 1) the website was accessed at school; 2) other students observed the website; 3) faculty members and school administration accessed the website at school; 4) the website was

held to be intended for the audience of the school district at issue in *Bethlehem*; 5) staff members of the *Bethlehem* school district were discussed on the website – all factors contributing to the likelihood that the website in *Bethlehem* would circulate on school property. *Bethlehem* at 865.

In the instant case, Towles website was admittedly created off-campus. However, Towles website was accessed at school throughout the day by numerous students and faculty, in the library during and after school. Towles' website was clearly written and directed for the audience of HHHS. As in *Bethlehem*, a member of the school staff of HHHS – Smalls – was discussed in Towles' website. As in *Bethlehem*, each of these factors would contribute to the likelihood that Towles' website would circulate on the school grounds of HHHS. Accordingly, if this court deems that Towles' website constituted "off-campus" speech, this court should nonetheless affirm the authority of HHHS to regulate that speech according to the above precedent. Alternatively, this court should find that a sufficient "nexus" existed between Towles' website and the HHHS campus that Towles' speech may rightly be considered to be "on-campus" speech.

Finally, when analyzing the instant case, it is important that this court apply deference to the judgment of HHHS administrators that Towles' website posed a significant and material risk of disruption of the school work and discipline. The Supreme Court has stated several times that, as a general rule, "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308 (1975)(Overruled on other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)); *See also Bd. of Educ. v. McCluskey*, 458 U.S. 966 (1982); *Fraser* at 676 ("The determination of what manner of

speech in the classroom or in school assembly is inappropriate properly rests with the school board”). The constitution does not compel "school officials to surrender control of the American public school system to public school students." *Id.* at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

More recently, courts have stated that *even when freedom of expression is involved* they review schools' decisions in connection with the safety of their students with deference. *Cuff ex rel. B.C. v. Valley Cent. School Dist.*, 559 F.Supp.2d 415 (S.D.N.Y. 2008); *See Also J.S. ex rel. H.S. v. Bethlehem Area School Dist.*, 807 A.2d 847, 868 (Pa. 2002)(holding that “[g]reat deference should be given to their determination, as courts must not become embroiled in micromanaging school officials' administration of the institution's daily affairs”).

The above positions do not obviate the need for judicial review when constitutional violations are alleged; rather, these cases instruct *how* a reviewing court should conduct its review. The decisions of School administrators are not to be reviewed in a neutral “vacuum” but instead should be given a degree of deference in the exercise of judgment calls which are inherent in the role of running any school.

This court should, on a broader level, grant deference to HHHS insofar as its regulation of Towles’ speech falls squarely within a realm of traditionally protected school actions. Courts considering school speech regulation have typically held that, far from allowing students unbridled free speech rights, schools are in fact charged with, and even expected to, inculcate in students lessons of how to communicate in a manner which is respectful, mature, and – essentially – befitting of the adults and members of society which all young men and women eventually will become. The free speech rights of

students in public school are not automatically coextensive with the rights of adults in other settings. *Morse* at 682; *Doninger v. Niehoff* at 199 (“although students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, the constitutional rights of students are not automatically coextensive with the rights of adults in other settings”).

Schools are expected to teach young men and women to become adults. For example, in *Fraser* the Supreme Court upheld the suspension of a student for making a speech in a school assembly which included extended sexual innuendo. The Court reasoned that “[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the “work of the schools.” *Fraser* at 683 (citing *Tinker* at 508); *See also Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)(noting that the “essence” of the objectives of public education are the “inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.”) Moreover, according to the Supreme Court, this process of educating the youth for future citizenship “is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order...inescapably, like parents, they are role models.” *Fraser* at 683.

In the instant case, Horton’s actions to regulate Towles’ website fall squarely within the charge that the Supreme Court has leveled upon the American school system. According to the reasoning of the United States Supreme Court set forth in *Fraser*, the “true work” of Horton Hopkins includes helping teach students what methods of communication are appropriate and which are not. *Fraser* at 683. The Supreme Court’s claim that schools “inescapably, like parents...are role models” echos the court’s view

that schools are not merely *permitted* to regulate defamatory and insubordinate student speech like Towles – the public *expects* schools to do so. *Fraser* at 683. Finally, should this court find that the regulation of Towles’ website falls *outside* of the charge prescribed to public schools, this court should respect the Supreme Court’s repeated statements in cases such as *Strickland*, *Fitzgerald*, and *Fraser*: “The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.” *Strickland* at 308; *Fitzgerald* at 800; *Fraser* at 676.

B. Hopkins’ regulation of Towles’ speech was constitutional under the framework set forth under *Morse v. Frederick*, *Hazelwood v. Kuhlmeier* and *Bethel v. Fraser*.

This court should hold that Smalls reasonably concluded that Towles’ website constituted a material and substantial risk to work and discipline at HHHS. However, if the court finds that Smalls’ actions do not meet the “substantial disruption” test under *Tinker*, this court should find that, nonetheless, HHHS Constitutionally regulated Towles’ website under the framework set forth under *Morse v. Frederick*, *Hazelwood v. Kuhlmeier* and *Bethel v. Fraser*.

The primary difference between school speech regulation cases relying upon *Tinker* and those relying on *Morse*, *Kuhlmeier*, and *Fraser*, is that the latter cases do not require proof of a “substantial and material disruption” in order to justify the regulation of student speech without running afoul of the First amendment. For example, *Morse* notes that the *Fraser* case stood for the principle that “the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the “substantial disruption” analysis prescribed by *Tinker*.” *Morse* at 2626.

Each of the above cases must be examined to identify the threads which motivated the Court to deviate from the traditional *Tinker* student speech regulation

framework. Recall that *Morse* upheld the suspension of a student holding a “Bong hiTS 4 Jesus” sign, understood to advocate illegal drug use. *Morse* at 2629. *Fraser* upheld the suspension of a student who made use of extended sexual innuendo in a speech at a school function. *Fraser* at 686. *Kuhlmeier* upheld censorship of a story in a student newspaper which accused the recently-divorced father of the student author as not “spending enough time with my mom, my sister and I” as well as of spending too much time playing cards “with the guys.” *Kuhlmeier* at 263.

At the simplest level, these cases could be broken down into three categories: speech advocating illegal drug use (*Morse*); speech of a sexual nature (*Fraser*); and school sponsored speech (*Kuhlmeier*). Yet, these cases all have deeper themes as well which are crucial to identify – because it is precisely these themes which cause courts, on a wider scale, to deviate from *Tinker*. According to the court in *Bethlehem*, the theme at the root of *Fraser* is “the unique needs of the school setting and concern for the school's education mission.” *Bethlehem* at 868. By comparison, *Morse* sought to identify a danger – in *Morse* that of drug use – which went beyond, as *Tinker* noted, “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Morse* instead emphasized that the “danger” being regulated was “far more serious and palpable” while still not requiring proof that a student advocated inviting “imminent” lawless action before the school could regulate speech. *Morse* at 2629. In *Kuhlmeier*, the principal emphasized how he thought the student's parents “should have been given an opportunity to respond to the [students’] remarks or to consent to their publication” and that “article's references to sexual activity and birth control were inappropriate for some of the younger students at the school.” *Kuhlmeier* at 263.

These findings can be applied in a variety of ways to the instant case. First, *Morse*, *Fraser*, and *Kuhlmeier* collectively stand for the principle that the Supreme Court has authorized deviations from *Tinker* on the basis that the specific “special circumstances” of the particular case allow the school to regulate student speech. *Morse* at 2627 (“what was made clear in *Tinker*, *Fraser*, and *Kuhlmeier*: Student speech rights are “applied in light of the special characteristics of the school environment.” *Tinker*, 393 U.S. at 506; *Fraser*, 478 U.S. at 682; *Kuhlmeier*, 484 U.S. at 266.)

Accordingly, should the court in the instant case choose not to use the framework in *Tinker*, this court could justify Hopkins’ regulation of Towles’ website by the particular circumstances involved in this case: HHHS’ extreme drug problem, the tension between the students and the administration, and the inflammatory nature of Towles’ website.

The court could alternatively use the reasoning employed by the Supreme Court in *Kuhlmeier* which endorsed school censorship of speech believed by the administration of the school to be “inappropriate” for younger students at the school. *Kuhlmeier* at 263. Here the court could hold that defaming the individual charged with the care of the school and calling on “all students” for insubordination sends an inappropriate message to younger students – justifying the regulation of Towles’ website.

Finally, the court could make use of the reasoning in *Morse*. In *Morse* the court justified speech regulation on the basis of identifying a so-called “serious” and “palpable” danger. *Morse* at 2629. Should the court in the instant case not employ *Tinker*, this court should find that the drug problem at Horton – a problem so significant that students are regularly using drugs *on campus* and a student recently died from overdose, constitutes a

“serious” and “palpable” danger. The court should find that under the circumstances the danger of students reading Towles’ website, protesting the school administration, rebelling, or losing respect for Principal, the school, or its rules, has created an extraordinary need to maintain a respectful school environment while Hopkins works to lessen cocaine and marijuana use at and outside of school and ameliorate its drug problem.

II. THE SEARCH DID NOT VIOLATE TOWLES’ FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.

The search of Towles’ book bag and person was justified at its inception and reasonable in its scope, and did not violate Towles’ Fourth Amendment right to be free from unreasonable search and seizure. It is not the case that minors not lose their Constitutional rights merely by virtue of being on school grounds. *Tinker*, 393 U.S. at 506. Neither is it the case that their rights are coextensive at all times with those of adults. A search of a student by school officials is limited by the Fourth Amendment, but is not measured against the same standards. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

Neither a warrant nor probable cause is an irreducible requirement of the Fourth Amendment. *T.L.O.*, 469 U.S. at 340. Where a search is prompted by special administrative or safety needs and the standard probable cause and warrant requirements are impracticable, a search may still be reasonable in light of the balance between the governmental need to search and the privacy interest invaded. *Bd. of Educ. Of Ind. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829 (2002); *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987). The United States Supreme Court has held that such “special needs” are inherent in the school context. *Earls*, 536 U.S. at 829.

The touchstone of the Fourth Amendment is reasonableness. *Earls*, 536 U.S. at 828. Reasonableness is measured by balancing the need of the state to perform the search against the privacy interest invaded. *Griffin*, 483 U.S. at 875. In the context of the search of a minor student by a school official, reasonableness demands not probable cause, but the lesser standard of reasonable suspicion. *T.L.O.*, 469 U.S. at 341.

In the school environment, reasonableness is established by satisfying a two part test. *T.L.O.*, 469 U.S. at 341. First, the search must be justified at its inception. *Id.* A search is justified at its inception where there are reasonable grounds to suspect that the search will uncover evidence of either a violation of the law or of a school rule. *Id.* at 342. Second, the search must be reasonably related in scope to the circumstances that justified it. *Id.* The search of Towles' person satisfies both prongs of the test.

A. Reasonable suspicion existed at the inception of the search of Towles' person and book bag.

In *T.L.O.*, the Court said that a school official's search of a student is justified at its inception where there are reasonable grounds to suspect that the search will uncover evidence of either a violation of the law or of a school rule. *T.L.O.*, 469 U.S. at 341. "Reasonable suspicion" is not a set of easily codified legal rules, but rather determined by an examination of the totality of the circumstances surrounding a search. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Reasonableness does not deal with certainties, but probabilities. *Id.* at 8.

Federal courts have analogized from the reasoning of *Terry v. Ohio* to supply the contours of the reasonable suspicion standard in school searches. *T.L.O.*, 469 U.S. at 341-342. As in *Terry* and its progeny, reasonable suspicion in a school setting is not satisfied by "inchoate and unparticularized suspicion or 'hunch,'" but this does not mean that

school officials may not rely on circumstantial evidence. *Cf., Sokolow*, 490 U.S. at 8. As the Court pointed out in *Sokolow*, “[l]ong before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same-and so are law enforcement officers.” *Sokolow*, 490 U.S. at 8, quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Public employment and common-sense are not mutually exclusive; the *T.L.O.* Court held that school officials are similarly free to rely on common-sense inferences. *T.L.O.*, 469 U.S. at 343.

1. The Court of Appeals failed to give proper weight to the government interest at stake in the search of Towles

In previous school search cases, the Court has balanced three main factors in determining the reasonableness of a search: the government interest at stake, the legitimate expectation of privacy, and the nature of the intrusion. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Earls*, 536 U.S. at 829. The Court of Appeals considered the nature of the intrusion in its analysis, but failed to give any weight to the important government interest at stake in the search. The HHHS zero-tolerance policy and its underlying rationale must be taken into account in evaluating the government interest at stake.

The search of Towles’ person and book bag did not take place in a vacuum. HHHS officials have observed a marked increase in drug use among students over the past five years, culminating in the fatal December 2007 overdose of the 17-year-old captain of the volleyball team. During the 2006-2007 school year, Smalls suspended 25 students for on-campus drug use. In September and October of 2008, an additional 15 students were

caught using illicit drugs on campus, among them Jeff Tweegs, the host of the party at which Towles was photographed.

Under ordinary circumstances, schools have a substantial need to maintain order and protect the safety of the children committed to their care. *T.L.O.*, 469 U.S. at 350. This substantial need is the basis for the application of the lower standard of reasonable suspicion, rather than probable cause. *Id.* The Supreme Court has twice held that pervasive drug use is an additional important factor to be balanced against the privacy interests of students in determining the reasonableness of a search. *Acton*, 515 U.S. at 660; *Earls*, 536 U.S. at 834. In *Acton*, the Court upheld a mandatory random drug-testing regime for student-athletes in a community where “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture.” *Acton*, 515 U.S. at 662-663. Against the intrusiveness of the search and the lack of individualized suspicion, the *Acton* Court weighed the reduced expectation of privacy enjoyed by minor students, the governmental interest in protecting students from the dangers of drug abuse, and the duty to create a safe school environment.

The Court held that, contra the Ninth Circuit, suspicionless searches require not a “compelling” government interest, but a government interest “*important enough* to justify the particular search at hand.” *Id.* at 661. According to the Court, “[d]eterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs ... or deterring drug use by engineers and trainmen,” interests previously found to be compelling in drug testing cases. *Id.* The Court also noted that the drug use implicates the special “custodial and tutelary

responsibility” schools have towards their students. *Id.* at 662. (“[T]he 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.”)

The Court again emphasized the weight to be given to drug abuse prevention as a governmental interest in *Earls*. *Earls*, 536 U.S. at 832. The *Earls* Court noted that the district court had found that the school district was facing a drug problem when it enacted its blanket suspicionless testing policy for student-athletes. *Id.* at 835. Teachers testified that they had observed students under the influence at school, and illicit drugs were recovered on school grounds. *Id.* However, the Court goes on to say that a “particularized or pervasive drug problem” is not a necessary precondition for conducting suspicionless drug testing. *Id.* It is the nature of drug use itself that creates the important government interest. *Id.* at 836. (“[T]he need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy.”)

As in *Earls* and *Acton*, HHHS administrators determined that they were facing a growing drug abuse problem and, accordingly, enacted a zero-tolerance drug policy. As in *Earls* and *Acton*, school officials testified to pervasive drug use on school grounds. The reasonableness of a search is not established by a fixed quantum of evidence, but by comparison with a sliding scale, with more pressing and important government interests being more likely to establish reasonableness. *Cornfield v. Cons. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993). The evidence presented of pervasive drug abuse at HHHS supports a finding of a heightened government interest. This heightened interest

renders reasonable searches that might in other circumstances not pass Constitutional muster.

2. The totality of the circumstances surrounding the party justified the search of Towles' person and book bag.

Principal Smalls had reasonable suspicion relating to Towles before the search.

Reasonable suspicion is a common-sense standard, permitting school officials to draw “common-sense conclusions about human behavior.” *Sokolow*, 490 U.S. at 8, quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981). Reasonable suspicion requires only that school officials have reasonable grounds to suspect that the search will uncover evidence of either a violation of the law or of a school rule. *T.L.O.*, 469 U.S. at 341. The Court of Appeals dismissed Principal Smalls’ rationale for the search as “guilt by association,” without considering whether common-sense conclusions to be drawn from the totality of the circumstances surrounding the party provided those grounds. The Court of Appeals also erred in analyzing the search rationale in light of Towles association with Conrad and Thomson, rather than in light of his physical proximity to a crime.

Towles was photographed socializing with Conrad in Tweegs’ backyard on the night of the party; Conrad was pictured smoking what might have been either a marijuana cigarette or a cigarette. Towles left the party at 11:00 p.m.; shortly thereafter, Hopkinsville police officers raided the party and found Conrad in the backyard, in possession of a marijuana cigarette. While it is axiomatic that “a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person”, *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), proximity to a criminal suspect is a factor that may establish reasonable suspicion. *United States v McCray*, 148 F.Supp.2d 379, 387 (D. Del. 2001). The

approach of a known drug dealer to an automobile has been held sufficient to provide reasonable suspicion for an investigative stop. *United States v. McGlory*, 968 F.2d 309, 343 (3d Cir.1992). Similarly, walking down the street with a drug dealer who was about to make a transaction has been held to provide reasonable suspicion for an investigative stop. *United States v. Cruz*, 909 F.2d 422, 424 (11th Cir.1989). The Court's decision in *Ybarra* is distinguishable where proximity to a criminal suspect is not the result of being "innocuously present in a crowd at a public place." *United States v. Barlin*, 686 F.2d 81, 87 (2d Cir. 1982). Reasonable suspicion exists where the circumstances surrounding a person's presence at the scene of a crime are consistent with the crime suspected. *Id.* Towles was in a private residence, not a public place; and rather than being "innocuously present", he was an invitee, socializing with others who were apparently committing a drug offense.

In the school context, the Eighth Circuit and numerous state courts have upheld searches on reasonable cause based on proximity to a crime scene. In *Cason v. Cook*, the Eighth Circuit held that a second-hand report that a student had been seen in a locker room around the time of a theft created reasonable suspicion to search the student's purse, to pat her down, and to search her locker. *Cason v. Cook*, 810 F.2d 188, (8th Cir. 1987). The Alabama Supreme Court reached a similar conclusion in *Wynn v. Board of Education*, upholding the search of an elementary school student who had been left unsupervised in a room where \$6 was stolen. *Wynn v. Bd. Of Educ.*, 508 So.2d 1170 (Ala. 1987). The West Virginia Supreme Court upheld a strip search in *State ex rel. Galford v Mark Anthony B.*, where reasonable suspicion was based not on a certainty that the student in question had been in alone in a classroom where a theft occurred, but where it

was merely *likely* that he had been alone in that classroom. *State ex rel. Galford v Mark Anthony B.*, 433 S.E.2d 41 (W. Va. 1993).

In *Martinez v Sch. Dist. No. 60*, the Colorado Court of Appeals upheld a search under circumstances similar to those in the instant case. *Martinez v Sch. Dist. No. 60*, 852 P.2d 1275 (Colo. Ct. App. 1992). A chaperone at a school dance questioned a student who appeared to be under the influence of alcohol; the student admitted to drinking at a pre-dance party, and stated that the plaintiffs had been in his company at the party. *Id.* There was no specific information that either plaintiff had used alcohol; nevertheless, the court upheld the search, ruling that the knowledge that one student had used alcohol at a party, and that two other students had socialized with him at that party constituted reasonable suspicion to search. *Id.* The court held that the defendant was “not required to wait until plaintiffs ... had exhibited physical symptoms of alcohol consumption before undertaking an investigation to determine whether they had been drinking.” *Id.* at 1278.

Reasonable suspicion depends on the totality of the circumstances known to the school official at the time of the search. *Cf. Cruz*, 909 F.2d at 424. Principal Smalls was presented with a picture of Conrad smoking some sort of cigarette shortly before being cited for possession of a marijuana cigarette. A reasonable, common-sense inference to be drawn from the photo was that Conrad was smoking the marijuana cigarette he would later be cited for possessing, or another like it. Furthermore, Principal Smalls is not required to ignore the collective wisdom and experience of school administrators regarding teen drug use. Drug use is frequently a communal activity for teens. *See, e.g., Martinez*, 852 P.2d at 1275. It was a further, but still reasonable, inference that Towles was sharing marijuana with Conrad and Thomson. This conclusion is only strengthened

by the fact that the party was held at the home of Tweegs, who had been caught smoking marijuana on school grounds one month earlier. The evidence of Towles' marijuana use was no more attenuated than the evidence of Martinez's alcohol use at the inception of that search.

A "drug culture" exists at HHHS; a drug culture that provided the rationale for the enactment of a zero-tolerance drug policy. (Dist. Ct. Op. at 1). Towles' presence at a party thrown by an active participant in that drug culture and his proximity to apparent marijuana use provided Smalls with reasonable grounds to suspect that the search would uncover evidence of Towles' participation in that drug culture, either in the form of drugs or drug paraphernalia.

B. The scope of the search was reasonably related to the circumstances that justified the initial interference

The search of Towles' book bag and person were reasonable because they were sufficiently related to the circumstances that justified the search. Reasonableness is established by a balancing test. *Cornfield*, 991 F.2d at 1321. Where the government interest is greater and the expectation of privacy is lower, more intrusive searches are reasonable. *Id.* Schools exercise a "custodial and tutelary" power over their charges, "permitting a degree of supervision and control that could not be exercised over free adults." *Acton*, 515 U.S. at 655. "The reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Id.* Schools are responsible for maintaining safety on-campus for both students and faculty; student drug use affects the safety of students that use, as well as the safety of those with whom they interact. A search that might be unreasonably intrusive with respect to an adult in a law enforcement context may be reasonable when performed on a minor in a school.

“A search will be permissible in its scope when the 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.*, 469 U.S. at 342. Towles claims that the search of his bag and the strip search were intrusive and unreasonable. Federal and state courts have held that similar searches were reasonable in scope under similar circumstances. The Hawaiian Supreme Court held in *In Interest of Doe*, 77 Hawai'i 435, 887 P.2d 645, that the search of a student's purse was reasonable in scope where the purse was the most likely place for the student to have hidden marijuana. Likewise, the book bag was the most likely place for Towles to conceal marijuana. Towles' legitimate expectation of privacy in his book bag must be weighed against the school's responsibility to maintain safety and order. The concealable nature of the searched-for item and the heightened governmental interest in protecting student safety combine to render the search of Towles' bag reasonable in scope.

Strip searches, while more intrusive, are not per se unreasonable. The Sixth Circuit upheld a strip search on suspicion of possession of an inhalant in *Williams by Williams v. Ellington*, 936 F.2d 881, C.A.6 (Ky.), 1991. School officials, acting on a tip from another student, initially focused on Williams' purse and locker. When the purse and locker failed to yield results, a female assistant principal brought Williams into her office, where she conducted a strip search of Williams in the presence of a second female staff member. The court held that the search was reasonable in scope because the vial being searched for was small and easily concealed, and because the manner in which the search was conducted was appropriate in light of Williams age and sex. The traumatic aspects of the search, (and therefore, the intrusiveness,) are minimized when the search is conducted by

same-sex staff members in a private location. It is less clear what relationship age should have to the conduct of a search. *Cornfield*, 991 F.2d at 1321. The Seventh Circuit has held that puberty provides a crucial turning point in analyzing the conduct of a search. *Id.* While post-pubescent children may be more self-conscious about nudity, (and the search may therefore be more intrusive,) they are also more capable of understanding the rationale for a strip search. *Id.* It is also relevant that post-pubescent children are more likely to commit criminal acts and to be able to understand the consequences of criminality. *Id.*

The strip search of Towles was conducted by a male staff member in private. Towles was not asked to remove his underwear, and he was not touched at any time by the male staff member. There is no direct evidence on the record as to Towles' physical development, but at 16, he is well past the age of 14 suggested as a turning point by the *Cornfield* court. *See Cornfield*, 991 F.2d at 1321. In *Rinker v. Sipler*, a federal district court upheld a search where there was no nudity, no physical contact and no members of the opposite sex were present. *Rinker v. Sipler*, 264 F.Supp.2d 181 (M.D.Pa. 2003). It was natural, the court reasoned, for the search to make the plaintiff feel uncomfortable. However, "his understandable discomfort [did] not make defendants' actions unreasonable under the Fourth Amendment." *Id.* at 189. The search of Towles, while to some degree intrusive, was conducted as respectfully as possible under the circumstances.

It is important to note that the failure of the locker and bag searches to yield drugs does not inherently render the strip search impermissible. While *T.L.O.* held that escalating searches were permissible, it did not hold that *only* escalating searches are

reasonable. *E.g. Rinker*, 264 F.Supp.2d at 188. Each step in the search is evaluated in light of the totality of the circumstances. *Id.* The inquiry is not whether the school has attempted all less-intrusive search methods and found increasing quanta of evidence, but whether the scope of the search is reasonably related to the circumstances justifying the search. As a pragmatic matter, a requirement that evidence be found via less intrusive search methods before schools may conduct searches by more intrusive methods would render school searches useless. Students in possession of drugs could simply hide them such that they could only be found by intrusive search methods that school officials would never be able to use.

As with the search of Towles' bag, the fact that a dangerous amount of drugs can be easily concealed and the heightened interest associated with drug searches combine to bring the strip search within the scope of permissible activity.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Supreme Court uphold the Court of Appeals ruling with respect to Petitioners' First Amendment claims and overturn the Court of Appeals ruling that the search was unreasonable.

Respectfully submitted,

Signed this ____ day of March, 200__.

TEAM #30
Attorneys for Respondents