

In the Supreme Court of the State of Grace

KIT POLITTE AND CORY TOWLES,
Petitioners,

v.

HORTON HOPKINS SCHOOL DISTRICT AND KEENA SMALLS,
Respondents

*On Writ of Certiorari
To the State of Appeals
Of the State of Grace*

BRIEF FOR RESPONDENT

TEAM NUMBER 32
ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

- I. Does a public school restriction of students' websites violate the students' First Amendment rights when the websites encourage students to protest the school's method of preventing and disciplining student drug use or anonymously accuse other students of using and distributing drugs?

- II. Is the law regarding the applicability of certain legal guidelines clear when courts have differed in their interpretation and even express that the law is ambiguous; and, if the law is clear, is it reasonable to believe that a search of a student who attended parties with drugs and who was closely associated with other students who had been caught with drugs would produce drugs and, if so, does having that student take off his outer garments constitute an excessively intrusive manner of discovering such drugs?

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CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I

United States Constitution, Amendment 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. IV

United States Constitution, Amendment XIV, Section 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, §1

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Keena Smalls has been the principal of Horton Hopkins High School, a public school in Hopkinsville, Grace, for twenty years. (R. at 1.) In the past five years, she has witnessed increasing drug use in Hopkinsville and on the high school's campus. (Id.) Fifteen students have been caught smoking marijuana on school grounds by Keena Smalls and other members of the school staff in the first two months of the fall semester alone. (Id.) Last year, Smalls suspended twenty-five students for using illegal drugs on campus. (Id.) In December 2007 a seventeen-year-old Horton Hopkins student died as the result of a cocaine overdose. (Id.) In January of 2007, Keena Smalls requested that the school district enact a strict, zero-tolerance drug policy that allows school officials to test students for drugs and conduct searches of lockers, desks, and students' personal property, including bookbags and clothing. (Id.)

In September 2008, Kit Politte, a senior at Horton Hopkins, started Drug Use Damages Schools (DUDS), a school sponsored club aimed at stopping student drug use. (R. at 2.) Politte later created a network webpage on Friendkepeida, a social networking website that allows users to create personal networks of acquaintances and webpages called "groups" which other users may join. (Id.) Her webpage, titled Fighting All Dealers (FAD), called for community members to submit information about potential drug dealers. (Id.) It allowed tipsters to e-mail anonymous information that Politte then posts on the webpage. (Id.) Politte promoted her webpage at the September 15 DUDS meeting, which took place on campus after school hours. (Id.) The group webpage has

235 members, 198 of which are Horton Hopkins students, including all 130 DUDS members. (Id.)

Corey Towles, a sophomore at Horton Hopkins, attended a party at the home of Jeff Tweegs on October 3, 2008. (Id.) During the week prior to the party, rumor circulated at the school that students would bring marijuana to the party. (Id.) Tweegs was suspended in September when Smalls caught him smoking marijuana during lunch. (Id.) Towles was at the party from 9 p.m. to 11 p.m. and saw students drinking beer and smoking cigarettes. (R. at 3.) At around 11:30 pm police responding to a noise complaint cited five students at the party for underage drinking and sophomore Frank Conrad for possessing marijuana. (Id.)

The next day, October 4, 2008, Politte received an e-mail with an attachment containing a photograph of Towles sitting with Conrad and another sophomore, John Thomson, sitting together at the party. (Id.) Conrad was smoking in the photograph. (Id.) Politte posted the photograph, attributed to “an anonymous Horton Hopkins student” with the caption “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (Id.)

The next morning, Principal Smalls received phone calls from several parents who had viewed the photograph on Politte’s website and were concerned about the use of drugs at the school. (Id.) The Hopkinsville police also contacted Smalls to alert her about the citations they issued to students at Tweeg’s party. (Id.) After speaking to police and viewing Politte’s webpage and photograph, Smalls called Towles, Conrad, Thomson, and Tweegs into her office. (Id.) All four students denied possessing drugs. (Id.) Smalls then conducted a search of their lockers and bookbags, per the school’s drug policy. (Id.)

Smalls then asked each student to submit to a search of their person individually and in private. (Id.)

Each student refused to be searched. (Id.) The gym teacher, Jim Waters, then conducted a search of each student in a private room. (Id.) Each student removed their clothing except undergarments and Waters searched the pockets of their clothing. (Id.) At no time did Waters touch any of the students. (Id.) Waters discovered marijuana in Thomson's possession. (Id.)

In response to the school's search and Politte's webpage, Towles created his own network group entitled, "Students Against Defamatory Statements" (SADS), on his personal computer. (Id.) The webpage contained the statement:

By taking unauthorized photographs of me during a Friday night out with my friends, and then posting inaccurate captions, DUDS, a school organization under the guise of its website FAD, committed a gross invasion of my privacy and defamed me in front of my friends and peers... 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. (R. at 3-4.)

After Horton Hopkins students heard about Towles' webpage, they began accessing both Politte's and Towles' pages from the school computer labs and library throughout the school day and after school hours. (Id.) Realizing the situation had gotten out of control, Principal Smalls demanded that both Politte and Towles shut down their Friendkepedia network webpages. (Id.) When both students refused, Smalls suspended Politte and Towles until they agreed to take down the webpages. (Id.) Though Principal Smalls admitted she was angry about Towles' criticism of the school administration's attempt to mitigate the drug problem on school grounds, Smalls said her main concern

was keeping discipline and order at school, and preventing what she saw as a potential for student protest. (Id.) She worried that Towles and Politte’s websites were causing too much of a disturbance and interrupting other high schools students’ education. (Id.)

II. SUMMARY OF THE PROCEEDINGS

Appellants Kit Politte and Cory Towles filed a complaint in the Badger County District Court (“the District Court”) under 42 U.S.C. § 1983 on October 15, 2008. The complaint alleges that Horton Hopkins High School violated their right to free speech under the First and Fourteenth Amendment of the U.S. Constitution by making them delete their respective websites. (R. at 4) Appellant Towles also alleges a search conducted by a Horton Hopkins High School official violated his Fourth Amendment protection against unreasonable searches as applied to the states under the Fourteenth Amendment. (R. at 4) Respondents Horton Hopkins High School and Principal Keena Smalls disputed violating the constitutional rights of their students.

The District Court granted summary judgment to Respondents on both counts. (R. at 4) The District Court held that the regulation of student websites was permissible under the “substantial disruption” test set forth by the U.S. Supreme Court in Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). (R. at 6) The District Court also held that the search of Towles was justified at its inception and permissible in its scope as allowed under New Jersey v. T.L.O., 469 U.S. 325 (1985). (R. at 6-8) Appellants appealed these holdings to the State of Grace Court of Appeals (“the Court of Appeals”). (R. at 9)

The Court of Appeals upheld the summary judgment motion regarding the regulation of school speech. (R. at 9-10) The Court of Appeals found that the search of

Towles was neither reasonable at its inception nor permissible in its scope. (R. 10-11) However, the Court of Appeals found that the Respondents are entitled to qualified immunity since the constitutionality of such a search was not clearly established at the time. (R. at 11-12) The Court of Appeals therefore affirmed the District Court's order granting summary judgment. (R. at 12) The Appellants then appealed to this Court and were granted a writ of certiorari on January 26, 2009. (R. at 14).

SUMMARY OF THE ARGUMENT

The Court of Appeals of the State of Grace did not err in granting Summary Judgment to Respondents on the issue of whether or not Respondents violated Petitioners' First Amendment rights by restricting their personal webpages. The Court of Appeals correctly applied the standard adopted by the Supreme Court in Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). This standard has been applied by various courts to cases of both off-grounds student speech and student Internet-based speech, and therefore applies to Petitioners' speech.

The Court of Appeals correctly determined that Petitioners' rights were not violated under the Tinker standard because Respondents reasonably foresaw that their webpages would cause a substantial disruption to school discipline and activities and therefore could be restricted by school officials. The webpages could foreseeably cause a substantial disruption due to the fact that they encouraged student resistance to the school's search and discipline policies, harassed other Horton Hopkins students, and had the potential to disrupt the integral process of preventing and disciplining student drug use given the increasing and ongoing student drug use problem at Horton Hopkins High School. Due to the foreseeable disturbances that could have been caused by the

webpages, Petitioners' rights were not violated under the Supreme Court's Tinker standard.

The guidelines issued by the U.S. Supreme Court in New Jersey v. T.L.O., 469 U.S. 325 (1985), on how to determine if a search is reasonable have been applied differently by courts to strip searches than to searches of personal belongings. While there is some uniformity, there are also gray areas on when a strip search would be allowed. By there being differences in application, school officials are unable to predetermine if an action is permissible under the Fourth Amendment. Rather, the officials can only know for sure after their own jurisdiction has made a determination. Since the State of Grace has not already interpreted the T.L.O. standards in a strip search case, Horton Hopkins School District and Principal Keena Smalls should be granted qualified immunity.

If the Court decides that the law is clearly established, then this law must have been determined by the interpretations of other jurisdictions. Even under these standards, the search conducted by the Respondents was not unreasonable under the low threshold necessary for searches established by T.L.O. The search was justified since there was reasonable suspicion that searching Towles would uncover drugs. The search was also reasonable in scope since it was conducted in the most minimally intrusive manner possible considering the objective of the search. Therefore, even if the Respondents are not given qualified immunity, the lower courts' decisions to grant summary judgment should be affirmed.

ARGUMENT

I. THE STATE OF GRACE COURT OF APPEALS DID NOT ERR IN GRANTING RESPONDENTS' SUMMARY JUDGMENT ON THE ISSUE OF WHETHER RESPONDENTS VIOLATED PETITIONERS' FIRST AMENDMENT RIGHTS BY REGULATING PETITIONERS' WEBSITES.

On the issue of whether Horton Hopkins School District and Keena Smalls violated Petitioners' First Amendment right to free speech by regulating Petitioners' individual off campus websites, the State of Grace Court of Appeals properly granted summary judgment in favor of the Respondents. The Court properly chose to apply the standard for restriction of student speech in schools adopted by the Supreme Court in Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). The Court of Appeals then correctly applied this standard by ruling that Petitioners' First Amendment rights were not violated by Respondents' regulation of Petitioners' websites.

A. The right to freedom of speech granted to public school students by the First Amendment is not absolute.

The Supreme Court has held that under certain circumstances, the right to freedom of speech is limited for students in public schools. The Court ruled that public school officials can prohibit student speech that is vulgar, lewd or plainly offensive in Bethel v. Fraser. 478 U.S. 675 (1986). In addition, the Court held in Hazelwood Sch. Dist. v. Kuhlmeier that schools can exercise editorial control over the style and content of student speech when the speech is school-sponsored. 484 U.S. 260 (1986). Most recently, in Morse v. Frederick, the Supreme Court's ruled that school officials may restrict speech that they reasonably believe is promoting drug use. 127 S.Ct. 2618 (2007)

The limitations of free speech in public schools also apply to speech that is vulgar, lewd, plainly offensive, school sponsored or promoting drug use, however. The

Court ruled in Tinker that “conduct by the student, in class or out of it, which for any reason . . . materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” 393 U.S. at 513.

B. The Tinker standard applies to cases involving off grounds Internet speech created by public school students.

The Supreme Court’s language and rulings support the adoption of the Tinker standard to First Amendment cases involving public school students’ off campus Internet speech. The court specifically stated that the standard applies to student conduct whether it is “in class or out of it.” Id. Furthermore, the Supreme Court ruled in Reno v. ACLU, that Internet speech is subject to the same First Amendment protections as print media. 521 U.S. 844, 897 (1997). Because the Court specifically stated that speech outside of school is subject to the Tinker standard and that First Amendment rights are the same for Internet speech and print media, the Tinker standard should be applied to off campus Internet cases.

Courts in the Second Circuit as well as those in Michigan, Ohio, and Missouri, have applied the Tinker standard to off grounds Internet cases. (See, for example, Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), Mahaffey ex rel. Mahaffey v. Aldrich, 236 F.Supp.2d 779 (E.D.Mich. 2002), Coy ex rel. Coy v. Bd. of Educ., 205 F.Supp.2d 791 (N.D. Ohio 2002), Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist., 30 F.Supp.2d 1175 (E.D.Mo. 1998).) Each court analyzed whether the student’s Internet speech, though created or distributed off grounds, could “reasonably conclude that [the speech] will materially and substantially disrupt the work and discipline of the school.” Wisniewski ex rel. Wisniewski v. Bd. of Educ., 494 F.3d 34, 38 (2d Cir. 2007).

Because of the Supreme Court’s language and holdings regarding off campus and Internet speech, and the adoption of the Tinker standard by numerous courts assessing First Amendment cases regarding the off campus Internet speech of public school students, the State of Grace Court of Appeals did not err in applying the Tinker standard to the case at hand.

Therefore, according to the Tinker standard, student speech can be restricted, if facts are presented which “reasonably lead school authorities to forecast substantial disruption of or material interference with school activities.” 393 U.S. at 514. If the off campus speech has not come onto school grounds, school officials must reasonably foresee that it would make its way onto school grounds and that it would then cause a substantial disruption. 494 F.3d at 40.

C. Petitioners could have reasonably foreseen that their off grounds websites would make their way onto school grounds.

A number of courts have held that students must be able to foresee that their off campus speech will reach campus in order for schools to hold punish them for the effects of their speech. In Wisniewski, a student created a drawing depicting the shooting of his teacher and displayed it next to his name during online chats with his fellow students. 494 F.3d at 36. The drawing was visible to other students for three weeks before the teacher was alerted that the student had created it. Id. The court was divided as to whether evidence that the speech did reach campus was enough to show that it was foreseeable to the student that it would reach campus. Id. at 39. The court concluded that because the student knowingly allowed other students to view the drawing, it was reasonably foreseeable that it would come to the attention of the school authorities. Id.

Similarly, in Doninger v. Niehoff, the Second Circuit Court of Appeals ruled that a student who created a blog off school grounds and outside of school hours could be held responsible. 527 F.3d at 53. In Doninger, the student reported in a blog that a school activity was cancelled and encouraged her fellow students to contact the administration. Id. at 45. The court concluded that the student could have reasonably foreseen that her blog would reach campus due to the fact that she purposely forwarded it to other students and encouraged them to react to the blog by contacting school officials. Id. at 50.

Both Politte and Towles' websites did reach campus. This is evidenced by the fact that students accessed the webpages on school computers on Horton Hopkins property and during school hours. R. at 4. Even if the court agrees with the portion of the Wisniewski court that concluded that the fact that speech reaches campus is insufficient to prove foreseeability, evidence shows that Politte and Towles could have reasonably foreseen that their websites would reach campus.

Politte promoted her webpage at a school-sponsored DUDS meeting on school property. R. at 2. She managed the website and therefore should have been aware that all 130 DUDS members belonged to her website group as well as 68 other Horton Hopkins students. R. at 2. She also posted a photograph of other Horton Hopkins students, including Towles, with the caption "Are Horton Hopkins students becoming drug dealers?" R. at 3. Politte's website, like the student's blog in Doninger, mentioned the school she attended. Like both the Doninger blog and the Wisniewski drawing, Politte voluntarily sent her webpage to other students that she knew attended Horton Hopkins. Therefore, like the students in Doninger and Wisniewski, Politte could have reasonably foreseen that her webpage would reach campus.

Towles also could have reasonably foreseen that his webpage would reach campus. Like Politte, he specifically referenced Horton Hopkins and DUDS, a group sponsored by Horton Hopkins, on his webpage. R. at 3. Like the Doninger blog, Towles webpage encouraged Horton Hopkins students to contact the administration by writing “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.” R. at 3. Because of his intentional references to Horton Hopkins and proposal that the students react against the administration, Towles could have reasonably foreseen that his webpage would reach campus.

D. Horton Hopkins school officials could have reasonably foreseen that Petitioners’ websites would cause a substantial disturbance of school activities and discipline.

When evaluating the websites created by Petitioners, Respondents reasonably foresaw that the websites would cause a substantial disturbance in student activities and discipline. While applying the Tinker standard in Layshock v. Hermitage Sch. Dist., the court explained that “while there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required.” 496 F.Supp.2d 587, 602 (W.D.Penn. 2007). Furthermore, in Doninger, the court stated that “Tinker does not require school officials to wait until disruption actually occurs before they may act.” 527 F.3d at 51, quoting LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001). Therefore, school officials need not prove that the disruption they foresaw was inevitable or more than likely, but simply that it was reasonably foreseeable.

Courts have applied the Tinker substantial disruption test in a number of cases. In Wisniewski, after the court ruled that the student could foresee that his drawing of his

teacher's shooting would reach campus, they determined that the risk of substantial disruption posed by the drawing was not only reasonable, but clear. 494 F.3d at 40. The school was therefore authorized to punish him and order that he cease displaying the drawing even though he did not intend for it to cause a disruption. Id.

The court in Doninger ruled that the student's call for other students to respond aggressively toward the administration in her blog would be disruptive to the efforts of the school to resolve the ongoing conflict. 527 F.3d at 51. Many students responded to the blog by calling or emailing the administration, which caused school officials to miss or be late to other school activities. Id. The court ruled that the student's blog substantially disrupted the school's activities by causing the aggressive and frequent phone calls protesting the potential cancellation of a school event. Id.

In Harper v. Poway Unified Sch. Dist., the Court held that speech that could potentially harass other students could be restricted because school officials could reasonably foresee it causing a substantial disturbance. 545 F.Supp.2d 1072 (S.D.Cal. 2007). The student was forbidden from wearing a T-Shirt that read "Homosexuality is shameful. Romans 1:27." Id. at 1075. School officials claimed that because the shirt could potentially harass homosexual students. Id. at 1087. Though there was no evidence that any students felt harassed by the shirt or that the shirt in any way affected the learning environment at school, the court held that the student's First Amendment rights were not violated. Id. Because the shirt could cause other students to feel attacked or discriminated against, the determined that the school officials could have reasonably foreseen this substantially disrupting the learning environment. Id. at 1088.

Similarly, in Guzick v. Drebus, the Sixth Circuit Court of Appeals held that a school's prohibition of students wearing buttons was constitutional though it restricted their freedom of speech. 431 F.2d 594 (6th Cir. 1970). The school officials claimed that students wore buttons that tended to polarize the students and label them as members of "separate, distinct and unfriendly groups." Id. at 596. The court concluded that school officials could reasonably foresee that the presence of the buttons would result in "collisions and disruptions that would seriously subvert [the school] as a place of education for its students." Id. at 596-97. Even though no substantial disruption had resulted from the student's button, the court stated that the school officials "should not have to fashion their disciplinary rules only after good order has been at least once demolished." Id. The court also found it relevant to examine the specific climate and circumstances at the school in question, recognizing that what may cause division between students at one school may not at another. Id. at 596.

Based on the standards set forth by previous courts for determining whether a school official could have reasonably foreseen that student speech would cause a substantial disturbance, there are numerous facts which support the fact that Respondents reasonably foresaw that Petitioners' websites would cause a substantial disturbance at Horton Hopkins.

1. *Petitioners' websites disrupted or encouraged the disruption of the school's disciplinary procedures.*

Respondents did not violate the First Amendment rights of Towles and Politte because school officials reasonably foresaw that the websites would cause a substantial disturbance of school disciplinary procedures. Politte's Friendkipedia page had already caused parents who viewed it to be concerned about drug use and to call the school

administrators expressing their concerns. R. at 3. Similarly to the blog in Doninger, these actions by parents were a direct reaction to Politte's website and consumed the valuable time of the school administration which could have been spent conducting school discipline or activities. R. at 3. The court in Doninger determined that phone calls from parents and students regarding the student's blog were a burden on the administration and a disturbance to school activities. Furthermore, this disruption did not have to be foreseen by the administration because it had already occurred before school officials chose to regulate Politte's website. The fact that this disruption had already occurred caused school officials to reasonably foresee similar future disruptions.

Furthermore, the calls from parents regarding suggestions that students were becoming drug dealers on Politte's website could affect the way administrators deal with allegations of drug use in the future. Parents could potentially put pressure on the school to investigate claims on Politte's website without additional evidence of drug use. Potential accusations that school officials are not sufficiently investigating all of the wholly anonymous tips provided on Politte's website would expose the administration to increased pressure to investigate these uncorroborated claims. Furthermore, if the school officials set a standard of investigating students based on phone calls from parents regarding the website, students could begin using the website to submit false anonymous tips in order to cause other students at school to be searched. The website therefore, forces school officials to choose between two types of disturbance of discipline: fielding the calls of frustrated parents or risking that the website become a method playing out high school pranks and rivalry.

School officials could have reasonably foreseen Towles' website disrupting the disciplinary policy at Horton Hopkins. By encouraging students to speak out against the current method of searching and disciplining students, the website could cause formerly cooperative students to resist questioning, searches and disciplinary actions by the administration. Towles' website encouraged students to protest the search of students' lockers, which is a legal search of school property. R. at 4. Such resistance by students could result in a chilling effect on teachers who reasonably suspect the presence of drugs on campus but fear students' increased resistance and protest. This could result in legitimate suspicions of drug use remaining uninvestigated by teachers. Not only could Towles' website cause teachers to be reluctant to report suspicions of drug use, but students may feel that reporting drug use that they have witnessed would cause their friends who support Towles' website to turn against them. For all these reasons, it was reasonable for Horton Hopkins officials to foresee that Towles' website would cause a substantial disruption in school discipline due to its effects on students and teachers.

2. *Petitioners' websites harassed other students and had the potential to polarize the student population.*

The content in Petitioners' websites harassed other students and could have served as a catalyst for student polarization. Politte's website, though designed to combat drug use on campus, accepted anonymous tips and photographs of other students at the school and accused them of using or distributing drugs. R. at 2. Because the tips are anonymous, misunderstandings and false information can be communicated about other students without allowing them to confront their accusers. Such statements have the potential to damage students' reputation with teachers, parents and other students and photographs of the other students may violate their privacy. These actions, though they

may not be intended to harass other students, can cause students to feel harassed by Politte and the anonymous tipsters who frequent her website.

Towles' website, on the other hand, is direct evidence that certain students did feel harassed by the postings on Politte's site. Towles website specifically states that he felt Politte and DUDS of committed "a gross invasion of [his] privacy and defamed [him] in front of [his] friends and peers." R. at 3-4. Because Towles felt harassed by Politte's webpage content, he created his own webpage, which retaliates against Politte by accusing her of these violations and referring to her and DUDS as "Hopkins idiots." R. at 4. Based on this evidence, it was reasonable for school officials to foresee that Politte, DUDS students, and students mentioned on Politte's website would feel harassed by the current content of Petitioners' websites and that the content of the sites would become even more combative, harassing and accusatory.

Not only do Petitioners' websites pose a risk of harassing Horton Hopkins students, but the sites could also foreseeably cause a substantial polarization of the student body. Though the issue is not a traditionally political one, such as the Vietnam War, school desegregation, or gay rights, it is foreseeable that it could divide students into factions. Though rival views will always exist in high schools, the web pages created by Politte and Towles allow students to join these groups and thus label themselves according to which side they support. The web pages also allow students to view the members of each group, making it clear who belongs to each side. Such a rivalry could foreseeably cause disruption in classes and school activities and an increase in peer pressure on students to resist administrative efforts against drug use. For all of the above reasons, school officials could have reasonably foreseen Petitioners' web pages causing a

substantial disturbance in school activities due to their tendency to harass and polarize Horton Hopkins students.

3. *Respondents should be given deference due to the school's increased student drug use.*

Prior cases regarding the restriction of student speech in public schools have determined that school officials should be given deference when deciding the which events may cause significant disruptions in their schools. Layshock, 496 F.Supp.2d at 602. Each school is different, based on, for example, its location, the makeup of its student body and faculty, its history, and its unique struggles and advantages. Because the administration of each school possesses an in depth knowledge of the specific characteristics of each school based on their experience from working there each week and continuously interacting with students and staff, “great deference should be given by the courts to the school official’s determination.” Id.

The immense difference between schools illustrated by the cases Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) and Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966). These two cases, decided on the same day and by the same circuit, yielded different results. In both cases, students wore “freedom buttons”, small buttons whose insignia supported racial equality, to school. Id. at 750. In Blackwell, the buttons caused an extreme disturbance at the school, where students came into classrooms without permission, threw buttons through school windows, and pinned buttons on students who tried to resist wearing them. 363 F.2d at 752. In Burnside, the same buttons only caused a “mild curiosity” among the students at a different school. 363 F.2d at 748. Even though the speech was the same, it affected the two schools in an entirely different way. Furthermore, the court in Guzick evaluated the school’s climate

and history in deciding whether the school officials could reasonably foresee a disruption. 431 F.2d at 596.

Because the specific characteristics of a school are relevant in determining whether a certain sort of speech will cause a substantial disruption in a particular school and school officials are knowledgeable and aware of their school's climate and history, the court should defer to their choice to restrict Petitioners' speech in this case. As the undisputed facts of the case show, Horton Hopkins High School was actively working to combat a growing student drug use problem. R. at 1. The administration has caught fifteen students smoking marijuana on school grounds in the first two months of fall semester alone. R. at 1. In December of 2007, a seventeen-year-old student died as a result of a cocaine overdose. R. at 1. The special circumstances at Horton Hopkins High School caused by the increased use of drugs by students require the administration to combat student drug use with a zero tolerance policy. R. at 1.

Even if Politte and Towles' websites would not be considered disruptive at other schools, the prevalent drug use at Horton Hopkins High School makes it reasonably foreseeable to school officials that the content of these websites will disrupt their discipline policy. Both websites seek to disrupt a system of investigation and discipline for student drug use that may be trivial and infrequently used at other schools. But at Horton Hopkins, the discipline process for student drug use is essential to school functioning, student safety and the prevention of drug use.

In Morse v. Frederick, the Supreme Court addressed the "serious problem" of "drug use in our Nation's youth." 127 S.Ct. at 2621. The court ruled that a student who held up a banner off school grounds at a school-approved event could be disciplined by

the school administration because “the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse.” Id.

Though Petitioners’ student speech, unlike the restricted speech in Morse, was not explicitly encouraging drug use, its restriction would still support the governmental interest in stopping student drug abuse which the Morse court used to justify the restriction of student speech. School officials could have reasonably foreseen that Towles’ encouragement of student protest against searches for drugs and the distraction of administrators by calls from parents regarding Politte’s unconfirmed, anonymous allegations of student drug use, could have significantly harmed their ability to prevent and discipline student drug use, and thus indirectly enabled an increase in student drug use.

The court should give deference to the school official’s decision to disallow Petitioners’ sites due to the ability of Horton Hopkins officials to gauge the potential effects of the websites on their school, the dangerous and increasing level of student drug use at Horton Hopkins, the governmental interest in preventing student drug use and the websites potential to disrupt Horton Hopkins High School’s efforts to prevent and discipline student drug use.

II. THE RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY SINCE THE LEGALITY REGARDING STRIP SEARCHES IN SCHOOLS IS NOT CLEARLY ESTABLISHED LAW.

The U.S. Supreme Court recently amended the two-step sequence required by Saucier v. Katz in a 42 U.S.C. § 1983 action. 533 U.S. 194 (2001). Saucier required the courts to first decide if there was a violation of constitutional rights and only afterwards to decide the issue of qualified immunity. In the recent case of Pearson v. Callahan, the

U.S. Supreme Court decided that the courts “may exercise their sound discretion in deciding which of the two prongs should be addressed first.” 129 S.Ct. 808, 819.

The constitutionality of Respondents’ actions is moot if the Court decides to first determine the applicability of qualified immunity. In a 42 U.S.C. § 1983 action, the court may determine the issue of qualified immunity on summary judgment since it is a matter of law reviewed *de novo*. *See., Elder v. Holloway*, 510 U.S. 510, 511 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Appeals Court’s decision granting qualified immunity should be upheld. Qualified immunity is appropriate since “the contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates that right” in order for an official to be held liable. *Anderson v. Creighton*, 483 U.S. 635 (1987). The action does not have to be previously determined unlawful, only “that in the light of pre-existing law the unlawfulness must be apparent.” *Id.* at 640. The unlawfulness of the search conducted by Respondents, if it was indeed unlawful, was not apparent. The “pre-existing law” is the standard set forth in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). However, this case involved the search of a student’s purse. The lower courts have shown confusion on how to apply the guidelines therein to school strip searches.

A. The lower courts have split on whether or not strip searches can be reasonable and in what contexts under the Fourth Amendment, showing that the law is vague as applied to schools under the T.L.O. guidelines.

Despite that “*T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in” that case, the courts have tried to define those rights. *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir. 1997). In doing so, they

have shown some consistency in how to apply those guidelines to strip searches conducted to find missing money or objects. Such searches are unreasonable and violate the Fourth Amendment. *See, e.g., Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005) (“a few hundred dollars”); *Bellnier v. Lund*, 438 F.Supp 47 (N.D. N.Y. 1977) (three dollars); *Kennedy v. Dexter Consol. Sch.*, 129 N.M. 436 (2000) (diamond ring); *Konop v. Northwestern School District*, 26 F.Supp.2d 1189 (D.S.D. 1998) (\$200); *Oliver v. McClung*, 919 F.Supp 1206 (N.D. Ind. 1995) (\$4.50); *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 951-52 (11th Cir. 2003) (\$26). The courts have even granted qualified immunity to school officials in some of these cases, *See, e.g., Beard*, 402 F.3d at 602-603; *Bellnier*, 438 F.Supp at 55; *Thomas*, 323 F.3d at 951-56. The *Kennedy* court did not grant qualified immunity only because there was a lack of individualized suspicion. 129 N.M. at 441-42.

However, the reasonableness of strip searches to find drugs has been decided in a less uniform manner. Many courts have upheld such searches as permitted under the Fourth Amendment. The Seventh Circuit found it reasonable to search a student who was acting up, had bloodshot eyes, and dilated pupils in *Bridgman v. New Trier Sch. Dist. No. 203*, 128 F.3d 1146 (7th Cir. 1997). A tip that was corroborated when the student was wearing the described coat was sufficient for the Eleventh Circuit. *C. B. v. Driscoll*, 82 F.3d 383 (11th Cir. 1996). The Seventh Circuit found school officials’ suspicion of a too “well-endowed” student, along with that student’s history and allegations against him, was enough to make a strip search reasonable. *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1319 (7th Cir. 1993). The Pennsylvania court upheld a search of a student after a tip led to a student who “looked

stoned, smelled of marijuana, and was somewhat incoherent.” Rinker v. Sipler, 264 F.Supp.2d 181, 188 (M.D. Pa. 2003). Ohio found it reasonable to search a student who smelled of marijuana and was acting lethargically. Widener v. Frye, 809 F.Supp 35 (S.D. Ohio 1992). Finally, when a vial with drugs was recovered which did not match the one described by the informant, the Sixth Circuit found it reasonable for the student to be strip searched in order to find the one described as well. Williams by Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).

In contrast, a Michigan court found it unreasonable to intimately search one student when another alleged he hid drugs in his “butt crack.” Flewless ex rel. Fewless v. Bd. of Educ. Of Wayland Union Sch., 208 F.Supp.2d 806, 810 (W.D. Mich. 2002). Similarly, the Second Circuit found that a search was not justified when there was only a student tip, past disciplinary problems, and a suspicious denial of wrong doing. Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006). Finally, the Ninth Circuit found it unreasonable to intimately strip search a student when another tried to pass the blame for pills found on her own person. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071 (9th Cir. 2008), cert. granted, 77 U.S.L.W. 3243 (U.S. Jan. 16, 2009) (No. 08-479). These varying opinions show that the law is not clearly established.

B. The Respondents are entitled to the same qualified immunity that other courts have granted to school officials in recognition that the T.L.O. guidelines do not establish clear guidelines for them to follow regarding school strip searches.

The courts of other jurisdictions have recognized that the guidelines in New Jersey v. T.L.O., do not give adequate guidance to school officials since the Court did not specifically address strip searches. 469 U.S. 325. By not addressing strip searches and under what conditions they specifically could be found “reasonable,” public schools have

been left to decipher the law for themselves. As such, the courts have recognized the need to grant qualified immunity to school officials and to establish better guidelines for future searches. Qualified immunity is important since no school officials in any jurisdiction are sure what stance the court will make until after a strip search has been challenged by a student.

The Kentucky court in Lamb v. Holmes, 162 S.W.3d 902 (Ky. 2005), decided that the constitutionality of the strip search of a group of girls over a pair of shorts depended upon a matter of fact not yet established. If the girls were just required to turn over the waistband of their shorts to prove that they were not wearing the missing shorts, as alleged by the school officials, the search would have been reasonable. However, the search would not have been reasonable if the girls were compelled to lift their shirts and lower their pants as they alleged. The court decided this question in order to make a clear standard, but also decided that the lower court did not need to decide this issue of material fact in this specific case since the school officials were entitled to qualified immunity.

Similarly, the Williams court came to “a troubling conclusion: the reasonable standard articulated in New Jersey v. T.L.O., has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 cause of action.” 936 F.2d at 886. The court decided this even though carefully going through the school officials’ actions and deciding that the steps were all reasonable given the “totality-of-the-circumstances.” Id. at 888 (internal quotation marks omitted).

Perhaps most significant is the U.S. Supreme Court granting certiorari in Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071 (9th Cir. 2008), cert. granted, 77 U.S.L.W. 3243 (U.S. Jan. 16, 2009) (No. 08-479). Redding has parallels to Towles' claim since both rely *partly* on "guilt by association." By granting certiorari, the Supreme Court substantiates the ambiguity of the legality of strip searches in the school context. If the diversity of opinions by these courts is not sufficient, then the Supreme Court finding it necessary to issue another opinion regarding school searches, and this one specifically regarding strip searches, certainly asserts that the law was not clearly established. As such, Respondents are entitled to qualified immunity.

III. EVEN IF THE LAW WAS CLEARLY ESTABLISHED, HORTON HOPKINS SCHOOL DISTRICT AND PRINCIPAL SMALLS DID NOT VIOLATE TOWLES' FOURTH AMENDMENT RIGHTS BY CONDUCTING A SEARCH OF HIS PERSON FOR DRUGS.

The Court of Appeals erred in finding that the examination conducted on Towles violated his right to be protected from unreasonable searches under the Fourth Amendment. Whether or not a search is "reasonable" depends upon "the context within which a search takes place." New Jersey v. T.L.O., 469 U.S. 325, 337 (1985). The U.S. Supreme Court designed a two prong test to "balance[e] the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests." Vernonia v. Acton, 515 U.S. 646 (1995). First, a search must be justified at its commencement. Second, the search must be "reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S. at 342 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)). The school's search of Towles fulfills each of these requirements. Therefore, Towles' Fourth Amendment protections were not violated.

A. The search of Towles' was justified at its inception because his relationship with drug users and the drugs found in Conrad's locker created a reasonable suspicion that he was in possession of an illegal substance.

For a school search to be justified at its inception, it must have "reasonable grounds" for speculating that it will produce evidence that the student violated a law or school ordinance. T.L.O., 469 U.S. at 325. The Appeals Court erred in determining that the photograph was merely a "tip," that students being cited for drugs at the party was not corroboration of this tip, that the drugs found in a Conrad's locker should not have been considered in the school's decision to conduct a more thorough search, and that association with drug users does not make Towles more likely to possess a prohibited substance.

The photograph was not a "tip" that Towles was in possession of drugs. Rather, the picture proves that Towles was, not only at a party where drugs were used, but also friends with three drug users. This tip was not the sole basis used for the search as it was in Flewless ex rel. Flewless v. Bd of Educ. Of Wayland Union Schools, 208 F.Supp.2d 806 (W.D. Mich. 2002) and Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071 (9th Cir. 2008). In fact, in each of those cases there was inherent unreliability in the tipsters. In Flewless, the boys who accused Flewless of possessing drugs were to serve a detention the next day for destroying his class project. Id. at 809. Furthermore, there was a history of students picking on Flewless. Id. In Redding, one girl had been specifically named as possessing and distributing drugs. After being "[c]aught red-handed" with the drugs, she immediately accused Redding, the only plausible scapegoat. 531 F.3d at 1077. There was little, if anything, else to substantiate either of these claims. The reliability of whoever supplied the photograph is irrelevant since the picture of Towles is merely used

as evidence to two things: that Towles was at the party and that he is friends with, or at least hangs out with, Tweegs, Conrad, and Thomson. These alone obviously do not give grounds for the strip search of Towles, and they were not used as such by Principal Smalls. As such, this case is distinguished from both Flewless and Redding.

Soon after finding out about the picture, which stated that “Police find drug use at local high school party,” Smalls was informed by the police that students at Tweegs’ party were indeed cited for marijuana possession. This evidence was sufficient to motivate Smalls to search the boys’ lockers, which has not been challenged. This search led to marijuana being found in Conrad’s locker. Only after this finding this evidence did Principal Smalls decide to continue her search. The marijuana in Conrad’s locker is analogous to the cigarette rolling paper found in T.L.O. 469 U.S. at 328. The school official had reasonable grounds to search the student’s purse for cigarettes after a teacher witnessed the student smoking. After opening the purse, the school official noticed cigarette rolling paper as well as the cigarettes. The Court held that this gave her the necessary justification to “conduct a thorough search” of the purse. Id. at 329-30. Similarly, in Williams “new evidence . . . justif[ied] the extended level of intrusion.” Id. at 887. As mentioned, the school official was told the student possessed a vial of drugs. After the student was confronted, she handed over a vial of drugs. This vial did not match the one described by the other student. If the student had not handed over the one vial, the official would not have been justified in extending the search. Once Principal Smalls found the marijuana in Conrad’s locker, she was likewise given justification to continue her search. Cf. Phaneuf (holding that finding cigarettes in a purse did not justify a strip search for drugs); Sostarecz v. Misko, No. 97-CV-2112, 97-CV-2112 (E.D. Pa.

Mar. 26, 1999) (holding that the school official could not extend the search after initial medical evaluation came back negative).

This is where the importance of Towles' friendships becomes central. While this association does not amount to "probable cause" of any wrong-doing on Towles' part, Smalls only needs a reasonable basis that a search of his person would find drugs. The drugs found during the search are not considered in this assessment since they were not known at the inception of the search. Rather, Smalls' basis is that Towles is closely associated with at least two boys who have been found to have marijuana on school premises (Tweegs previously and Conrad during this search). Not only is he associated with Tweegs, he also is hoping to make a good impression on Tweegs in order to get on the baseball team. Furthermore, the fact that Towles had no disciplinary history at his old school only brings attention to the fact that he is at a new school and is trying to make new friends and fit into the new environment. This is what makes it so important that "[t]he most powerful predictors of teen drug use and delinquent behaviors [are] similar behaviors by peers." Helen E. Garnier & Judith A. Stein, An 18-Year Model of Family and Peer Effects on Adolescent Drug Use and Delinquency, 31 J. of Youth & Adolescence, Nov. 1, 2004, at 45-56. There is a strong correlation between peer attitudes and behaviors, and substance use. Smalls, in her capacity as principal and considering the history of the school, was likely very aware of this. Towles was not only friends with these users, he also desired to be accepted by them in order to get on the baseball team. These circumstances combined clearly established the low threshold necessary to establish a reasonable suspicion that a search would produce more drugs.

B. The search of Towles was permissible in its scope since searching him for drugs is reasonably related to the objective of preventing student drug use and the search was not excessively intrusive.

A search which is “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” is permissible in its scope. T.L.O. at 342. The District Court’s recognition of the “strong government interest in preventing student drug use” (R. at 7) as the objective of the search and that the search was not overly intrusive should be upheld.

Towles is a sixteen-year-old male suspected of being in possession of illegal drugs. He was taken into a private room by a male teacher and asked to remove his outer garments. At no time was he touched or any of his private body parts exposed. Each of these elements shows that the search was not excessively intrusive. Rather, it was as minimally intrusive as necessary considering the search was justified.

Other jurisdictions have taken particular interest in the amount of people present during the search, to what extent the student was required to strip, if the school officials in anyway touched the student, and if the search was for drugs or something else. Strip searches for missing items or money have consistently been found to be unreasonable. As explained in Konop v. Northwestern School District, 26 F.Supp.2d 1189, 1196 (D.S.D. 1998), “To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm” (citing T.L.O., 496 U.S. 325, 382). In Konop, \$200 was thought to be stolen from a girl’s locker (the money was later determined to be much less). The girls were taken into the locker room by twos and asked to completely strip. They refused to remove their underwear or bras but the teacher pulled the underwear to each side, touching the girls, to

make sure nothing was hidden there anyway. Their bras were only not searched since it would have been too obvious if that amount of cash in small bills was hidden in their sports bras. Konop, 26 F.Supp at 1201-03.

Considering the significant impact that drugs have on schools, and how they change the school environment and therefore encourage even more usage, courts have recognized the need to conduct reasonable strip searches in the cases where possession is suspected. For example, in Cornfield v. Consolidated High Sch. Dist. No. 230, the minor was taken to a private room, asked to undress to his undergarments in front of two male guards, and even asked to lift his crotch in order to make sure no drugs were hidden there. 991 F.2d 1316, 1319 (7th Cir. 1993). The court found that this search was not excessively intrusive. In Williams v. Ellington, although the court did not officially decide on the issue on the constitutionality of the search, they did mention that the “[d]efendants were not unreasonable, in light of the item sought (a small vial containing suspected narcotics), in conducting a search so personally intrusive in nature.” 936 F.2d 881, 887 (6th Cir. 1991). Here, the Assistant Principal took the Williams into a room in the presence of a female secretary. She was told to remove her shirt, to lower her jeans to her knees, and then to remove her shoes and socks.

These circumstances contrast to where the searches were unnecessarily intrusive. For example, in Flewless ex rel. Fewless v. Bd. of Educ. Of Wayland Union Sch., 208 F.Supp.2d 806 (W.D. Mich. 2002), the fourteen-year-old boy, who also had a learning disability, was also taken a private room and asked to take his bottoms completely off, exposing his rear end. The court found that this was excessively intrusive considering that there were other ways to make sure he had not hidden drugs in his rear end and, even

more importantly, it was “pointless” since it could not even determine conclusively if drugs were hidden inside his butt. Id. at 820. In Redding, the court found that requiring a thirteen-year-old girl to expose her breasts and pelvic region to find “pills with the potency of two over-the-counter Advil capsules” was excessive. 531 F.3d at 1074. The court further pointed out that the most logical places the girl would have hidden the pills had already been searched and that it was unlikely that other students would consume pills she stored in her underwear. Towles’ search was not excessive by these standards.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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