NO. 05-1338

IN THE

SUPREME COURT OF THE STATE OF GRACE

KIT POLITTE and CORY TOWLES,

Petitioners,

v.

HORTON HOPKINS SCHOOL DISTRICT
and KEENA SMALLS,

Respondents.

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

BRIEF FOR PETITIONERS

TEAM 33

Attorneys for Petitioners

QUESTIONS PRESENTED

I. Whether the First Amendment protects a student's Internet speech created off-campus from regulation by public school officials.

II. Whether the Fourth Amendment precludes public school officials from strip searching a student without consent, probable cause, or reasonable suspicion that the student is violating either the law or the rules of the school.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT AND AUTHORITIES 8

I. THE FIRST AMENDMENT PROHIBITS THE SCHOOL DISTRICT FROM FORCING POLITTE AND TOWLES TO REMOVE THEIR PERSONAL WEBPAGES 8

A. Schools Are Generally Prohibited from Regulating Student Off-Campus Speech 9

B. The School District May Not Regulate the Webpages as Disruptions Under the *Tinker* Test 12

1. The school could not reasonably forecast that Politte's and Towles' speech would cause a substantial disruption 12

2. The only disruption that occurred at the high school was based on Principal Smalls' unreasonable overreaction 17

C. The School District May Not Regulate the Webpages as School-Sanctioned Speech Under *Kuhlmeier* 18

II. THE SCHOOL OFFICIALS VIOLATED TOWLES' FOURTH AND FOURTEENTH AMENDMENT RIGHTS WHEN THEY PERFORMED AN UNREASONABLE STRIP SEARCH OF HIS PERSON 18

A. The Strip Search of Towles Was Not Reasonable Under the *T.L.O.* Test 19

1. The search was not justified at its inception 19

2. The search was not reasonable in its scope 22

B. Respondents Are Not Entitled to Qualified Immunity 24

1. The strip search violated Towles' Fourth Amendment rights 24

2. Towles' Fourth Amendment right was clearly established................................25

CONCLUSION...26

APPENDICES:

APPENDIX "A": CONSTITUTIONAL PROVISIONS.. A-1

TABLE OF AUTHORITIES

Page(s)

UNITED STATES CONSTITUTION:

U.S. Const. amend. I 8

U.S. Const. amend. IV 18

U.S. Const. amend. XIV 18

FEDERAL STATUTES & RULES:

Fed. R. Civ. P. 56(c) 8

42 U.S.C. 1983 8

CASES:

Beard v. Whitmore Lake Sch. Dist.,
402 F.3d 598 (6th Cir. 2005) 23, 24

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 9, 12

Beussink v. Woodland R-IV Sch. Dist.,
30 F. Supp. 2d 1175 (E.D. Mo. 1998) 9, 10, 11

Cornfield v. Consol. High Sch. Dist. No. 230,
991 F.2d 1316 (7th Cir. 1993) 8, 22, 23

Doninger v. Niehoff,
527 F.3d 41 (2d Cir. 2008) 14, 15, 16

Emmett v. Kent Sch. Dist. No. 415,
92 F. Supp. 2d 1088 (W.D. Wash. 2000) 9, 10, 11

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988) 12, 18

Morse v. Frederick,
127 S. Ct. 2618 (2007) 9, 12, 13, 14, 15

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 18, 19, 22, 25

Phaneuf v. Fraikin,
448 F.3d 591 (2d Cir. 2006) 19, 20, 21

Pluet v. Frazier,
355 F.3d 381 (5th Cir. 2004) 8

Redding v. Safford Unified Sch. Dist. #1,
531 F.3d 1071 (9th Cir. 2008),
cert. granted, 129 S. Ct. 987 (U.S. Jan. 16, 2009) 19, 20, 21, 22, 25

Saucier v. Katz,
533 U.S. 194 (2001) 24, 25

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969) 8, 12, 13, 16, 18, 24

West v. Atkins,
487 U.S. 42 (1988) 8

OPINIONS BELOW

The opinion and order of the Badger County District Court is unreported but appears in the record at pages 1–8. The opinion and order of the State of Grace Court of Appeals is also unreported and appears in the record at pages 9–13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fourth, and Fourteenth Amendments to the United States Constitution, which are reproduced in Appendix "A."

STATEMENT OF THE CASE

This case results from school officials' conduct infringing on students' constitutional rights. After a student was impermissibly strip-searched, two students were suspended from school for exercising their right to free speech. Keena Smalls ("Smalls") is the principal of Horton Hopkins High School ("Horton Hopkins"). (R. at 1.) During the last few years, drug use and possession among students at Horton Hopkins has increased both on campus and throughout the Hopkinsville community. (R. at 1.) In 2007, the Horton Hopkins School District enacted a strict drug policy at Smalls' request. (R. at 1.) This policy permits the invasion of students' privacy in a multitude of ways, including drug tests and invasive searches of students' lockers, desks, clothing, and persons. (R. at 1, 14.)

Petitioner Kit Politte. Petitioner Kit Politte ("Politte") is an eighteen-year-old senior at Horton Hopkins who is concerned about the school's drug problems and actively works to raise awareness and decrease drug use. (R. at 2.) In September of 2008, Politte founded the school club Drug Use Damages Schools ("DUDS"), which she "hoped would help curb drug use within the student body." (R. at 2.) DUDS members post flyers around school and host assemblies geared to encourage students to lead a healthy, drug-free lifestyle. (R. at 2.)

On September 10, 2008 Politte reached out to the Hopkinsville community by creating a network webpage on Friendkepideia, a social networking website. (R. at 2 & n.1.) The webpage, Fighting All Dealers ("FAD"), is intended to give Hopkinsville residents a safe and anonymous place to post tips about potential drug dealers. (R. at 2.) Politte "hoped tips submitted to her webpage would help police and lead to the arrest of local dealers." (R. at 2.) Politte only works on the FAD webpage on her personal computer when she is at home. (R. at 2.) As administrator of the webpage, Politte monitors the e-mailed tips and anonymously posts the tips she believes are the strongest. (R. at 2.) FAD is open to all members of Hopkinsville, and the network now has 235 members throughout the community including many Horton Hopkins students. (R. at 2.)

Petitioner Corey Towles. Petitioner Corey Towles ("Towles") is a sixteen-year-old sophomore who transferred to Horton Hopkins in the Fall of 2008. (R. at 2.) Although new to Horton Hopkins, Towles' record from his former school is exemplary. (R. at 2.) He was an honor student, played junior varsity baseball, and the only disciplinary action he ever received was two detentions for tardiness. (R. at 2.) Towles hopes to continue playing baseball at Horton Hopkins, and he has tried to get to know some of the baseball players in an effort to pursue that endeavor. (R. at 2.)

The Picture. On October 2, 2008, Jeff Tweegs ("Tweegs"), a junior at Horton Hopkins and captain of the baseball team, hosted a house party. (R. at 2.) Towles decided to attend the party and "hoped that meeting some of the baseball players would improve his chances of making the team." (R. at 2.) Unfortunately, Tweegs had been suspended for smoking marijuana on a prior occasion, and there were rumors that there might be marijuana at the party. (R. at 2.) Towles stayed at the party for approximately two hours, spending the majority of that time

outside with some other sophomores. (R. at 3.) Towles observed a few students smoking cigarettes and drinking beer, but he did not see anyone using drugs. (R. at 3.) After Towles left the party, the police responded to a noise complaint and broke up the party. (R. at 3.) The police cited five students for underage drinking, and one student, Frank Conrad ("Conrad"), for possession of marijuana. (R. at 3.)

On October 4, 2008, someone e-mailed Politte a picture from the party that showed Towles and two other sophomores, including Conrad, sitting outside. (R. at 3.) In the picture, Conrad was smoking. (R. at 3.) Politte posted the picture on FAD with the caption, "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" (R. at 3.) Several Horton Hopkins parents saw the picture on FAD and called Smalls to express their concern about student drug use. (R. at 3.) The police also notified Smalls of the citations issued at the party. (R. at 3.)

The Strip Search. After receiving this information, Smalls decided to question Tweegs and all three boys in the posted photograph, including Petitioner Towles. (R. at 3.) Each boy was questioned individually and each denied having drugs. (R. at 3.) Smalls then acted on the authority of the recently enacted drug policy and searched each of the boys' backpacks and lockers. (R. at 3.) During this search, Smalls found marijuana in Conrad's locker, but found nothing in Towles' or any of the other boys' lockers or backpacks. (R. at 3.)

After finding nothing in Petitioner Towles' locker or backpack, Smalls "asked" him and the other boys to search their persons. (R. at 3.) The boys refused to consent to such an invasive procedure. (R. at 3.) Despite their refusal, Towles and the others were forced to submit to a strip search by the school's gym teacher, Mr. Waters. (R. at 3.) Although Waters did not touch the

boys, he made them strip to their undergarments and stand there while he searched their clothing. (R. at 3.) Again, no drugs were found on Towles. (R. at 3.)

The Demand. After the strip search, Towles created his own webpage, Students Against Defamatory Statements ("SADS"), on which he spoke about the injustice he suffered at the hands of the school officials. (R. at 3–4.) Towles' message on SADS petitioned students to speak out against the injustice that was going on at Horton Hopkins. (R. at 4.) He stated a need for people to "speak out against Smalls and the rest of these Hopkins idiots." (R. at 4.) Like Politte, Towles also created his webpage at home, from his own computer. (R. at 3.)

After the strip searches, students began accessing both Towles' and Politte's webpages. (R. at 4.) Some students began accessing the webpages from school computers, but only during free time and after school. (R. at 4.) Smalls "was angry about Towles' criticism of the school administration's actions." (R. at 4.) She claimed that Politte's and Towles' webpages were creating a disturbance, and interfering with students' education. (R. at 4.) Smalls demanded that Towles and Politte take down their webpages. (R. at 4.) When both students refused to surrender their constitutional rights to free speech, Smalls suspended Politte and Towles indefinitely. (R. at 4.) She would not let them return to school until they complied with her demand to take down their private webpages. (R. at 4.)

The District Court. Towles, along with his parents, and Politte sued Horton Hopkins and Keena Smalls, in her official capacity as principal of Horton Hopkins, for violating their constitutional right to free speech. (R. at 4.) Towles also sued Respondents for the unreasonable search of his person. (R. at 4.) The Badger County District Court granted Respondents' Motion for Summary Judgment on all claims. (R. at 5.) The court found that Smalls' demand that Politte and Towles remove their webpages was reasonable. (R. at 6.) Specifically, the court held

that her concern for a protest was reasonable, and therefore her actions were not a violation of Politte's and Towles' First Amendment rights. (R. at 6.)

The court also found that the strip search conducted on Towles was reasonable and not a violation of his Fourth Amendment rights. (R. at 8.) First, the court reasoned that the strip search of Towles was "justified" because Towles had friends "who had been involved with drug use in the past," was in a picture with someone smoking, and marijuana was found in another student's locker. (R. at 7.) Second, the court stated that the strip search was "not intrusive" and reasonable in light of the school's "interest in preventing drug use." (R. at 7–8.) Because the court held that the strip search did not violate Towles' constitutional rights, it did not address the Respondents' affirmative defense of qualified immunity. (R. at 8.)

The Court of Appeals. The State of Grace Court of Appeals applied a de novo standard of review and affirmed the district court's rulings. (R. at 9.) The appellate court held that because students had accessed Politte's and Towles' webpages on campus, their speech had "clearly reached campus" and therefore could be regulated by the school. (R. at 10.) The appellate court found that the search of Towles was unjustified, highly intrusive, and a violation of his constitutional rights. (R. at 10.) However, the court also held that the Respondents were protected by qualified immunity because the law regarding strip searches is not "clearly established." (R. at 11.)

Justice Evans dissented from the majority's opinion regarding Politte's and Towles' First Amendment rights. (R. at 12.) Recognizing that neither student "[designed] or even [looked] at the webpages on school property or during school hours," Justice Evans recognized that "[t]his is not a matter that falls under school officials' authority." (R. at 12.) Justice Evans stated that

"[b]ecause the Internet speech was conducted entirely off-campus, this is a situation appropriate for disciplinary action by the parents, should they choose to become involved." (R. at 12.)

SUMMARY OF THE ARGUMENT

This case involves the First and Fourth Amendment rights of students in a school. Horton Hopkins High School has attempted to erode students' constitutional rights by regulating off-campus speech, and subjecting students to unreasonable seizures and searches. In upholding Horton Hopkins' Motion for Summary Judgment, the lower court denied students their constitutional rights. This Court should reverse.

I.

Schools do not have the power to regulate student off-campus speech. Politte and Towles have each created personal webpages that are not affiliated with Horton Hopkins. These webpages constitute off-campus speech; thus, Horton Hopkins' demand that Politte and Towles remove their webpages is a direct violation of their First Amendment rights.

The Supreme Court has repeatedly held that schools should encourage students to exercise their First Amendment rights to help students understand their rights as citizens. However, the Supreme Court has allowed schools to regulate student speech that is likely to cause a substantial disruption to the school's work or discipline. Politte's and Towles' webpages have not caused a disruption at Horton Hopkins and therefore cannot be regulated by the school. No classes have been disrupted by the webpages, and the webpages have not compromised the work of the faculty or administration.

Schools are also permitted to regulate speech that bears the school's imprimatur or can be reasonably assumed to be endorsed by the school. However, neither Politte's nor Towles' webpages are in any way controlled, supervised, sanctioned or endorsed by Horton Hopkins.

This Court should reverse the court of appeals holding on the First Amendment issue.

II.

Towles' rights were violated when he was forced to submit to a strip search by school officials. The Supreme Court has established a two-part test to determine the reasonableness of a student search. First, the search must be justified at its inception. Towles' search was not justified at its inception because the school did not have any evidence that he was committing an illegal act or violating a school rule. The school acted impermissibly in conducting a highly intrusive strip search of Towles based solely on the fact that he was seen in a photograph with a couple of other students, one of whom was smoking.

Second, a student search must be reasonable in its scope in light of the circumstances that gave rise to the incident. The reasonableness requirement is heightened as the intrusiveness of the search heightens. A strip search is an incredibly intrusive procedure, and therefore requires a high level of reasonableness. The scope of Towles' search was completely unreasonable because it was a severe invasion of his right to privacy, and it was done without any justification. When asked if he had any drugs, Towles honestly replied that he did not. The school searched his book bag and locker, and did not find any drugs or contraband. Undeterred, the school principal ordered that Towles be strip searched. The school had no reason to believe that Towles might have drugs or any other contraband hidden on his person.

Horton Hopkins has claimed qualified immunity, but that argument is without merit. The two determinative factors for qualified immunity are whether a constitutional right has been violated, and whether that right has been clearly established. The unreasonable search conducted on Towles was clearly a violation of his constitutional rights. Further, Towles' right to be free from unreasonable searches has been clearly established by the Supreme Court for decades.

This Court should reverse the court of appeals holding on the issue of qualified immunity.

ARGUMENT AND AUTHORITIES

This claim was brought under §42 U.S.C. 1983. In order for a plaintiff to prevail under this statute, he must prove: (1) that there was a violation of a Constitutional right, and (2) that the person who violated the right was acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Pursuant to Fed. R. Civ. P. 56(c), orders granting summary judgment are reviewed *de novo*. *Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004). In reviewing the record, all reasonable inferences must be made "in the light most favorable to the non-moving party." *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1992). The non-moving party "must identify specific facts to establish that there is a genuine triable issue." *Id.*

I. THE FIRST AMENDMENT PROHIBITS THE SCHOOL DISTRICT FROM FORCING POLITTE AND TOWLES TO REMOVE THEIR PERSONAL WEBPAGES.

The First Amendment specifically allows all people the right to free speech and the ability to petition "the government for a redress of grievances." U.S. Const. amend. I; *see* App. "A." Public school officials act in a governmental capacity, but they "do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). Respondents violated Politte's and Towles' First Amendment rights when they forced them to remove their personal webpages as a condition to returning to school.

A. Schools Are Generally Prohibited from Regulating Student Off-Campus Speech.

Politte's and Towles' webpages are an expression of free speech and therefore constitutionally protected. Being a student does not negate a person's First Amendment rights. The United States Supreme Court has long held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Rather, "any limitation on student speech is permissible only in narrowly defined circumstances." *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (citing *Tinker*, 393 U.S. at 509). Politte's and Towel's webpages do not fit within the confines of student speech that can be regulated by school officials.

In *Bethel School District No. 403 v. Fraser*, a high school student ("Fraser") was disciplined for delivering a speech that contained "elaborate, graphic, and explicit sexual metaphor[s]." 478 U.S. 675, 677–78 (1986). The speech was delivered during school hours at a school assembly which students were strongly encouraged to attend. *Id.* at 677. The United States Supreme Court held that Fraser's punishment was not a violation of his constitutional rights, stating "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission." *Id.* at 685. However, the Court later noted that if "Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007).

The United States Supreme Court has not yet directly addressed students' First Amendment rights pertaining to Internet speech. However, several courts have held that student Internet speech made outside the school cannot be regulated by school officials. For example, in *Emmett v. Kent School District No. 415*, the court enjoined school officials from suspending a student

("Emmett") who created a website for which the "intended audience was undoubtedly connected to Kentlake High School." 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000). The title of the website was the "Unofficial Kentlake High Home Page," and contained information about the school's faculty, administration, and students. *Id.* at 1089. A particularly notorious aspect of Emmett's website was an interactive page that contained "mock obituaries" which were discussed throughout the school by students, faculty, and administrators. *Id.* Emmett created the website at home; no school resources or time were used in the construction or maintenance of the website. *Id.* The court held that despite the website's direct connections to the school, "the speech was entirely outside of the school's supervision or control." *Id.* at 1090.

Likewise in the *Beussink* case, a high school student ("Beussink") was suspended for creating a personal webpage from his home that "used vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage." 30 F. Supp. 2d at 1177. The webpage encouraged others to contact the principal and even had a link "that allowed a reader to access the school's homepage from Beussink's homepage." *Id.* Several students and teachers viewed the webpage at school, and the principal reported that "he heard students discussing the incident in the halls." *Id.* at 1181. However, the court held that it was unconstitutional to discipline Beussink for exercising his First Amendment rights. *Id.* The court emphasized that "it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the First Amendment." *Id.* at 1182. The court further stated that "[t]he public interest is not only served by allowing Beussink's message to be free from censure, but also by giving the students at Woodland High School this opportunity to see the protections of the United States Constitution and the Bill of Rights at work." *Id.*

Politte's and Towles' speech was entirely off-campus. As in *Emmett* and *Beussink*, both Politte and Towles created their webpages at their own homes, on their own computers, without utilizing any school property, resources or time. (R. at 12.) Unlike the student in *Fraser*, there was nothing lewd or obscene about Politte's or Towles' speech. Just as the United States Supreme Court stated that Fraser's speech would have been protected if it had been made off-campus, Politte's and Towles' off-campus speech are also protected. If Fraser had delivered his speech off-campus apart from a school event, having another student hear his speech would not negate his First Amendment rights. Similarly, Politte's and Towles' First Amendment rights are not negated by the fact that other Horton Hopkins students decided to access their webpages. More simply stated, schools do not have the power to regulate an independent webpage merely because students access it.

Unlike the websites at issue in *Emmitt* and *Beussink*, Politte's webpage, FAD, is not focused on the high school, but rather reaches out to the entire Hopkinsville community. (R. at 2.) FAD's sole purpose is to help decrease drug use in the Hopkinsville community. (R. at 2.) Because Horton Hopkins is part of the Hopkinsville community and experiencing drug problems, it is natural that postings on FAD would sometimes mention Horton Hopkins. As in *Emmitt*, Politte's speech in FAD is not within the school's supervision or control.

Towles' webpage, SADS, is more directly connected to Horton Hopkins than FAD, but SADS is also distinguishable from the website in *Beussink*. Unlike the website in *Beussink*, SADS is not hostile and vulgar toward school officials. Towles' post on SADS is nothing more than an invitation for students to exercise their right to free speech by speaking out against the injustice he suffered at the hands of the school administrators. (R. at 4.) SADS' message is concededly less explicative than the website in *Beussink*. However, SADS' encouragement to

exercise constitutional rights is consistent with the public policy expressed in *Beussink* and our First Amendment rights.

B. The School District May Not Regulate the Webpages as Disruptions Under the *Tinker* Test.

The webpages created by Politte and Towles do not fall within the narrow types of speech that the United States Supreme Court allows schools to regulate. A school may only prohibit a student's First Amendment right to free speech when it will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509. Unless a school can show specific "constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511. A school official's "fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.[1] The school district did not make the required showing to regulate the webpages under the *Tinker* test.

1. The school could not reasonably forecast that Politte's and Towles' speech would cause a substantial disruption.

In *Tinker*, several students were suspended for wearing black armbands to school as a sign of protest in the midst of the Vietnam War. 393 U.S. at 504. There was no evidence that any classes or schoolwork was disturbed by the protest; however, some students did make hostile remarks to the students wearing armbands while outside the classrooms. *Id.* at 508. School officials expressed fear that if students were permitted to wear the armbands, more students

[1] The Court has since carved a few narrow exceptions to *Tinker*. First, schools may regulate lewd and vulgar speech in classrooms and school assemblies. *Fraser*, 478 U.S. at 686. Second, it is not a violation of the First Amendment for schools to regulate student speech in school-sponsored activities, such as school newspapers or plays. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Finally, the Court has recently determined that schools may regulate student speech that promotes illegal drug use. *Morse*, 127 S. Ct. at 2628, 2629. None of those exceptions are applicable here.

might react in kind and the situation could result in disorder that "would be difficult to control." *Id.* at 509. However, the Court held that disallowing the students from wearing the armbands was unconstitutional because there was insufficient evidence to show that "the school authorities had reason to anticipate that the wearing of armbands would substantially interfere with the work of the school or impinge upon the rights of other students." *Id.*

The *Tinker* Court emphasized that school officials cannot prohibit student speech simply to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* Any expressed disagreement among students could potentially create an argument or disturbance. *Id.* at 508. The Court held that the students' objective in wearing the armbands, "to make their views known, and by their example, to influence others to adopt them," was permissible in a school context. *Id.* at 514. The Court stated that because schools are "educating the young for citizenship," there is a need "for scrupulous protection of Constitutional freedoms of the individual, if we are not to . . . discount [the] important principles of our government as mere platitudes." *Id.* at 507.

In *Morse*, a high school student ("Frederick") displayed a fourteen-foot banner that read "BONG HiTS 4 JESUS," during school hours at a school-sanctioned event. 127 S. Ct. at 2622. The banner was clearly visible to the other students at the event and violated an existing school policy that prohibited advocating illegal drug use. *Id.* at 2622–33. The school principal ("Morse") immediately ordered Frederick to take down the banner. *Id.* at 2622. After he refused to do so, Morse confiscated the banner and Frederick was suspended. *Id.* The Court found that Morse acted reasonably. *Id.* at 2629. "When Frederick suddenly and unexpectedly unfurled his banner," Morse had to take immediate action. *Id.* The Court held that Frederick's First Amendment rights had not been violated because "schools may take steps to safeguard those

entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Id.* at 2262.

The importance of deterring student drug use was the controlling factor in *Morse*. The Court addressed the growing drug problems among school children and indicated that curbing this problem is a compelling state interest. *Id.* at 2628. Applying *Tinker*, the Court held that the inherent danger in promoting drug use "is far more serious and palpable," than the type of disturbance addressed in *Tinker*. *Id.* at 2629. The Court further noted that "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use . . . [and has] provided billions of dollars to support . . . drug-prevention programs." *Id.* at 2628.

In *Doninger v. Niehoff*, a high school junior ("Avery") "was disqualified from running for Senior Class Secretary after she posted a vulgar and misleading message" on a website that was not affiliated with the school. 527 F.3d 41, 43 (2d Cir. 2008). Avery and other Student Council members were upset with the school's principal and superintendent regarding the scheduling of a school event. *Id.* at 44. The message Avery posted referred to the principal and superintendant as "douchebags" and requested that other students contact the principal in order "to piss her off more." *Id.* at 45. Several student comments were posted to Avery's message, and one student called the superintendent a "dirty whore." *Id.* Although Avery's speech was off-campus, the court applied the *Tinker* standard, reasoning that this type of off-campus conduct could still create a substantial disruption in the school. *Id.* at 50.

The court held that Avery's speech did not warrant protection under *Tinker* because her vulgar language and false information was intentionally inflammatory and likely to create a substantial disruption. *Id.* at 50–51. Avery's conduct was found to be actually disruptive to the school's operations. *Id.* Specifically, several students were called away from class, and both the

principal and superintendent were forced to miss their scheduled activities in order to deal with the aftermath of Avery's message. *Id.* at 51.

Unlike the *Doninger* case, Politte's and Towel's webpages did not create any disruption at Horton Hopkins. No evidence suggests that any classes were cancelled, postponed or disrupted as a result of the webpages. The phone calls principal Smalls received from a few parents do not amount to a substantial disruption. (R. at 3.) Taking phone calls from parents is a normal part of a principal's responsibilities.

Additionally, Politte's and Towles' webpages are nothing like the banner that was prohibited in *Morse*. No student, teacher, or any other person has been forced to view the webpages in our case. The fourteen-foot banner in *Morse* was flagrantly displayed in front of countless students and teachers at a school-sanctioned event, and was likely difficult not to see. In order to view Politte's or Towles' webpage, people must make the voluntary actions to get on a computer, log on to the Internet, and look up the appropriate webpage. More importantly, as opposed to the *Morse* banner, Politte's and Towles' webpages do not promote any illegal activity. Contrarily, Politte's webpage actually seeks to eliminate illegal drug use, a goal which the *Morse* Court found to be of the utmost importance for society, especially in schools.

Although actual disruption is not required by *Tinker*, Respondents failed to show that it was reasonable to believe that some sort of substantial disruption would occur. Smalls was not reacting to a situation that required immediate action like the principal in *Morse* was required to do. Politte's webpage had been up for about a month before Smalls demanded that it be removed. (R. at 4.)

Neither Politte's nor Towles' webpages can be construed as potentially disruptive. Politte's webpage is simply a conduit for the Hopkinsville community to safely give and receive

information that will help stop drug dealers. (R. at 2.) Towles' webpage merely encourages students to exercise their right to free speech. (R. at 4.) Unlike the website in *Doninger*, Towles' webpage is not vulgar or misleading. Towles' use of the word "idiots" on his webpage is clearly distinguishable from Avery's use of the word "douchebags" in *Doninger*. "Idiot" is a far less offensive term than the word "douchebag." The purpose of Towles' webpage can also be distinguished from the website in *Doninger*. Towles' request for students to "speak out" against unfair treatment does not compare to Avery's request for students to piss off the principal in *Doninger*. (R. at 4.)

Smalls' justification for violating Politte's and Towles' free speech is based on the principles that *Tinker* expressly disallowed. Just as the school officials in *Tinker* could not prohibit student speech based on a fear that students might become difficult to control, Smalls cannot prohibit Politte's and Towles' speech because she fears students might protest. (R. at 4.) The student actions in our case are analogous to the student actions in *Tinker* because they were both expressing their views with the hope to influence others. Allowing Politte and Towles to peacefully exercise their free speech rights on their webpages is consistent with the public policy expressed in *Tinker*.

However, the factors that could potentially lead to a substantial disruption were far greater in *Tinker* than in the case at bar. In *Tinker*, the student speech at issue dealt with the Vietnam War crisis, and students wearing armbands were being subject to hostile comments at school after just one day. In contrast, the students in our case were merely accessing the webpages at issue from Politte's and Towles' school computers. (R. at 4.) The Vietnam War caused protest and rioting across the country, and yet the *Tinker* Court did not find that there was a reasonable

potential for substantial disruption. It is unreasonable to find that the situation in our case was more volatile and more prone to causing a substantial disruption than the situation in *Tinker*.

2. The only disruption that occurred at the high school was based on Principal Smalls' unreasonable overreaction.

The only significant disruptions that occurred at Horton Hopkins were the unreasonable strip searches that were performed on several students, particularly Corey Towles. Smalls subjected Towles to a strip search based solely on the fact that he was in a picture with a student who was smoking. (R. at 3.) Towles was justifiably upset after being subjected to this humiliating invasion of his privacy, and subsequently posted his own webpage. (R. at 3.) If Smalls had not authorized Towles' strip search, he would not have posted his webpage. Therefore, even if Smalls mistakenly perceives Towles' webpage as any kind of disruption, it is a direct result of her own unreasonable actions.

Smalls chose to take the extreme measure of restricting Politte's and Towles' freedom of speech when there were far less restrictive alternatives available. Smalls' chief concern was that there was a potential for protest because students were accessing Politte's and Towles' webpages while on campus. (R. at 4.) One simple solution to this alleged problem would be to restrict students from accessing Politte's and Towles' webpages from school. Due to the wide variety of inappropriate material available on the Internet, most schools have restrictions on what students can access. As principal of the school, Smalls had the authority to place a restriction that barred students from accessing Politte's and Towles' webpages, but Smalls chose not to take that action. Instead, Smalls attempted to extend her authority into students' personal homes and computers. Such an invasion of a person's constitutional rights cannot be permitted.

C. The School District May Not Regulate the Webpages as School-Sanctioned Speech Under *Kuhlmeier*.

Regulation of student speech that is promoted by a school is not subject to the *Tinker* test. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). Schools are permitted greater regulation over speech that will be reasonably perceived as bearing the school's imprimatur. *Id.* at 271. In *Kuhlmeier*, the United States Supreme Court held that a school that retained editorial control over a school newspaper written as part of a journalism class was not a violation of the First Amendment. *Id.* at 268. "Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities," when such action is reasonably related to educational concerns. *Id.* at 273.

Politte's and Towles' webpages cannot be interpreted as bearing Horton Hopkins' imprimatur. The webpages were created off-campus, outside of school hours, and do not purport to be supported by the school. (R. at 12.) The only connection between Politte's and Towles' webpages and Horton Hopkins is that the webpage creators are students at Horton Hopkins. Such a tenuous connection between Horton Hopkins and the webpages cannot be perceived as bearing the school's imprimatur.

II. THE SCHOOL OFFICIALS VIOLATED TOWLES' FOURTH AND FOURTEENTH AMENDMENT RIGHTS WHEN THEY PERFORMED AN UNREASONABLE STRIP SEARCH OF HIS PERSON.

The Fourth Amendment protects people from unreasonable searches and seizures by the government. U.S. Const. amend. IV; see App. The Fourth Amendment's "prohibition on unreasonable searches and seizures applies to searches conducted by public school officials." *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). Additionally, "The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *Id.* at 334. The Supreme Court has vigorously defended Fourth Amendment rights

and has held that "even a limited search of the person is a substantial invasion of privacy." *Id.* at 337. Searching the personal belongings and especially the person of a child is "undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337–38.

A. The Strip Search of Towles Was Not Reasonable Under the *T.L.O.* Test.

Searches conducted by School officials are held to a reasonableness standard. *Id.* at 337. A court must look at "all the circumstances" to determine if a student search is reasonable. *Id.* at 341. In *T.L.O.*, the Supreme Court established a two-part test to determine the reasonableness of a search of a student, conducted by school officials. *Id.* A student search conducted by school officials is only reasonable if it is "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*

1. The search was not justified at its inception.

To satisfy the first prong of the *T.L.O.* test, the search of a student conducted by a school official must be "justified at its inception." *Id.* In order to be justified at its inception, there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 342. A court must determine whether a search is justified at its inception based "on only those facts known to the school officials prior to the search." *Phaneuf v. Fraikin*, 448 F.3d 591, 597 (2d Cir. 2006). In other words, evidence obtained as a result of the search cannot justify the search.

In *Redding v. Safford*, school officials conducted a strip search of a student ("Savana"), looking for prescription ibuprofen. *Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1074 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 987 (U.S. Jan. 16, 2009). The school officials were given an uncorroborated tip from another student ("Marissa") who was caught with prescription ibuprofen, and tried to blame Savana. *Id.* at 1083. The assistant principal of the

school interrogated Savana about the pills, but she repeatedly told him that she didn't have any pills, nor had she ever brought any pills on campus. *Id.* at 1075. The assistant principal then asked to search her belongings, and Savana agreed. *Id.* When he found nothing in Savana's belongings, he ordered the school nurse to strip search her. *Id.*

Savana was an honor student and had no prior disciplinary record. *Id.* at 1074. Marissa and Savana knew each other from school, they had been to some mutual events, and Savana lent Marissa her planner at one point. *Id.* at 1083–84. The court noted that finding Savana likely to possess ibuprofen pills on that kind of evidence would be "nothing more than guilt by association, certainly too thin of a reed for such a substantial intrusion into Savana's expectations of privacy." *Id.* at 1084. The court further noted that the principal should have at least made further investigation before conducting a strip search, particularly because "the initial tip provided no information as to whether Savana currently possessed ibuprofen pills or was hiding them in a place where a strip search would reveal them." *Id.* at 1083.

In *Phaneuf*, a student ("Kelly") was strip searched after another student gave a "tip" to a school teacher that Kelly was carrying marijuana on her body. *Phaneuf*, 448 F.3d at 593. The school officials argued that the strip search was justified because the tip came from a reliable source, Kelly had former disciplinary problems, cigarettes were found in her purse, and she denied having marijuana in a suspicious manner. *Id.* at 600. The Second Circuit held that the search was not justified at its inception, noting that there was no evidence that indicated that Kelly had brought marijuana to school or was smuggling it in her clothing. *Id.* The court stated that "[w]hile the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search." *Id.* at 598–99.

In our case, Towles' strip search was not justified at its inception. As in *Redding*, Towles is an honor student with no prior disciplinary action that creates any kind of suspicion that he was in possession of drugs. (R. at 2.) The only disciplinary action on Towles' record was for tardiness. (R. at 2.) Tardiness does not suggest the possibility of drug use, and certainly do not suggest that a student would be smuggling drugs into the school.

The only possible links that could have lead Smalls to believe Towles might have drugs were tenuous at best. The only things Smalls knew about Towles when she ordered his strip search were that he had been to a party where students were smoking and drinking, and he was in a photograph with a student who was smoking. (R. at 3.) Smalls subjected Towles to precisely the kind of unfair "guilt by association" prejudice that the *Redding* court condemned. Towles was a transfer student at Horton Hopkins; there is no evidence that he even knew of the other boys' reputations for drug use. (R. at 2.) It would be reasonable for any new student at a school to want to attend social functions in order to make new friends. However, Towles had an even greater desire to attend Tweegs' party, given that Tweegs was the captain of the baseball team and Towles was interested in playing baseball at Horton Hopkins. (R. at 2.)

The only alleged "tip" that Smalls received was the picture of Towles that was posted on FAD. However, the picture could hardly be considered a tip because it did not implicate or accuse Towles of drug use. The caption to the picture stated a known fact, that the police had found drugs at a recent party. (R. at 3.) The rest of the caption merely posed a question, "Are Horton Hopkins students becoming drug dealers?" (R. at 3.) Towles' name was not mentioned. (R. at 3.) Even if such casual remarks could be construed as a "tip," it was completely uncorroborated. Unlike the uncorroborated tips in *Redding* and *Phaneuf*, the "tip" in our case does not even make a specific allegation against Towles. The tips given in *Redding* and *Phaneuf*

were more specific than the picture of Towles on FAD, and yet both those courts held that further investigation should have been done before subjecting a student to the highly invasive procedure of a strip search.

As in *Redding*, Towles' denied having any drugs, and school officials did not find any drugs when they searched his personal belongings. (R. at 3.) Also like *Redding*, the tip did not give Smalls any reason to believe that Towles had drugs at school, or that he was hiding drugs in a place that a strip search would reveal. Applying the *T.L.O.* test, Towles' search was not justified at its inception because Smalls had no reason to believe that Towles' was breaking the law or violating a school policy at the time of the search.

2. The search was not reasonable in its scope.

A student search is reasonable in 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. A reasonable search "should ensure that the interest of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* at 343. The standard of reasonableness increases "as the intrusiveness of the search of a student intensifies." *Cornfield,* 991 F.2d at 1321.

The Seventh Circuit held that the strip search of a sixteen-year-old student ("Cornfield") in a behavioral disorder program was reasonable in scope. *Id.* at 1323. The court noted that "a highly intrusive search in response to a minor infraction would similarly not comport with the sliding scale advocated by the Supreme Court in *T.L.O.*" *Id.* at 1320. However, the court noted several factors that made a strip search reasonable under the particular facts of the case. *Id.* at 1323. The student had been involved and implicated in several drug related matters, and several

faculty members noticed that he had an unusual bulge in his pants, and were suspicious that he was "crotching" drugs. *Id.* at 1322. The court was aware that "sixteen-year-old Cornfield was of an age at which children are extremely self-conscious about their bodies; thus the potential impact of a strip search." *Id.* at 1323. However, because the school officials had reasonable suspicion to believe that Cornfield was carrying drugs in his crotch area, the court found it reasonable that a strip search was the least intrusive means of verifying the suspicion. *Id.* By conducting a strip search, the school officials were able to observe from a distance while Cornfield changed clothes as opposed to having to physically touch him in his most private areas for a sufficient pat-down. *Id.* The school also tried to minimize the humiliating impact of the search by giving Cornfield a gym uniform to wear while his clothes were being searched. *Id.*

In another case, several students were strip searched in a gym locker room after a student alleged that her money had been stolen. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 601 (6th Cir. 2005). The Sixth Circuit found that the search was unreasonable in scope. *Id.* at 604. The court found that here was a strong privacy interest involved in these strip searches, the strip searches were highly intrusive, the students did not consent, and the scope of the searches exceeded "what would normally be expected by a high school student in a locker room." *Id.* at 605. Further, the court emphasized that the scope of the searches was unreasonable because there was no individualized suspicion. *Id.*

Towles is the same age as the student in *Cornfield*, where the court noted the increased vulnerability of a child that age. (R. at 2.) However, unlike *Cornfield*, there was nothing odd or suspicious about Towles' appearance or behavior to warrant a strip search. In *Cornfield*, the school officials chose to conduct a strip search because they had a specific idea of where Cornfield might be concealing drugs, and a strip search was less invasive than patting down his

genital area. Contrarily, conducting a strip search on Towles was highly invasive, and there was no justifiable reason to conduct such a search.

As in *Beard*, Towles did not consent to the highly intrusive strip search, and his privacy interests were severely compromised. Our case is also similar to *Beard* in that there was no individualized suspicion to search Towles. Towles was one of many students at a party where drugs were found. (R. at 3.) The fact that he was in a picture that was posted on FAD does not create individualized suspicion. Towles was not smoking or doing anything illegal in the picture. (R. at 3.) Taking pictures at parties is a common activity. People at parties often take candid shots just to show the general picture of the event. It is unknown if Towles posed for the picture at issue, or if he was merely sitting near Conrad when someone took a candid photograph.

The scope of a strip search was highly intrusive, and therefore under the *T.L.O.* test requires a higher than average degree of reasonableness. Towles' strip search was unreasonable in its scope because there was no visual or behavioral indication that a strip search of Towles was necessary, and there was no individualized suspicion that he had drugs on his person.

B. Respondents Are Not Entitled to Qualified Immunity.

In determining whether a defendant is entitled to qualified immunity, the Supreme Court has established a two-part test. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, the court must establish whether the facts alleged, "[t]aken in the light most favorable to the party asserting the injury," show conduct that violated a constitutional right. *Id.* Second, the court must determine whether that right is clearly established. *Id.*

1. The strip search violated Towles' Fourth Amendment rights.

Towles' did not shed his constitutional rights at the schoolhouse gate. *Tinker*, 393 U.S. at 506. The Fourth Amendment protection against unreasonable searches and seizures applies to

the conduct of school officials. T.L.O., 469 at 344. Towles' strip search violated his Fourth Amendment rights because the search was neither justified at its inception nor reasonable in its scope as required by the Supreme Court. *Id.* at 341.

2. Towles' Fourth Amendment right was clearly established.

Towles' Fourth Amendment right to be free from an unreasonable strip search was clearly established. In determining whether a right is clearly established, the court must determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. The Supreme Court established the framework for student searches more than twenty years ago in *T.L.O*. *T.L.O.*, 469 U.S. at 341. The *T.L.O.* case involved the search of a student's purse. *Id.* at 328. That decision put school officials on notice that a careful inquiry "must be made before they engage even in a minimally intrusive search." *Redding*, 531 F.3d at 1088.

The strip search that Towles was subjected to is far more intrusive than the search of a purse, locker, backpack, or any other container. Since the Supreme Court's decision in *T.L.O.*, numerous cases have been adjudicated, applying the *T.L.O.* test for a myriad of searches. The school officials in our case should have known that their conduct in strip searching Towles was illegal. There was no evidence that Towles committed any illegal act, had any contraband on his person, or even violated a school policy. Lacking any reasonable suspicion, the strip search that Towles was forced to submit to, was random and capricious. Even if there was some basis for the search of Towles' locker and book bag, the fact that the school found nothing during their first search made the subsequent strip search even more unreasonable. The Fourth Amendment and *T.L.O.* clearly establish Towles' right to attend school without fear of random strip searches.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for a trial on the merits.

Respectfully submitted,

____

ATTORNEYS FOR PETITIONERS

APPENDIX TABLE OF CONTENTS

Page

APPENDIX “A”: CONSTITUTIONAL PROVISIONS A-1

APPENDIX "A"

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 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. 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 (relevant portions)

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.